

**BETWEEN SCYLLA AND CHARYBDIS:
THE ETHICAL PERILS OF THE CRIMINAL
DEFENSE LAWYER**

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The relationship between defense counsel and the client accused of a criminal offense is an extraordinarily delicate one. Attorneys for the accused must sometimes walk a razor's edge in fulfilling their duty to represent the client with zeal and, at the same time, abide by the numerous statutory, ethical and professional restrictions governing attorney conduct.

This paper is intended to provide guidance to the criminal defense practitioner in those thorny areas of defense work that most often are the source of ethical questions. The suggested answers to the posed hypothetical questions are by no means definitive and, because the issues raised do not always lend themselves to crystal clear solutions, doubts are resolved to the extent possible, as I think they should be, in favor of the client.

This paper evolved out of training sessions at Federal Defenders of San Diego in the early 1970's.² Much has changed over the quarter century. Today, there is far more material for the defense attorney to consult in making ethical decisions than existed then. Primary sources are, of course, the California Rules of Professional Conduct and the Business & Professions Code, particularly section 6068. These would be the first material to be consulted. Additionally, there are the State Bar Formal Ethics Opinions, local bar association publications of ethics advisories, an ethics "Hot Line" provided by the State Bar, regular features on

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² Thus, co-workers Frank M. Mangan, Warren R. Williamson, Frank T. Vecchione, Glorene Franco, Lewis A. Wenzell, Michael J. McCabe, Thomas D. Schaefer, Glen S. Warren, Robert L. Boles, and then Executive Director, John J. Cleary, all contributed in the original article.

ethics in most professional magazines, and many more attorneys who have expertise to consult.³

Although the source material has become more abundant and the answers have changed slightly, the ethics questions have remained the same. They still keep cropping up. When primary sources don't answer the question, then secondary resources are also abundant and include the American Bar Association Model Rules of Professional Conduct (hereafter Model Rules which replaced the ABA Code of Professional Responsibility (hereinafter cited as ABA Code), the ABA Standards on the Administration of Criminal Justice (hereinafter cited as ABA Standards), the ABA Canons of Ethics, American Bar Association ethics advisory opinions, and the relevant case law.

The suggested answers rely on California law for guidance. There will also be a component referring to national standards. In any case, the nature of the problems and the tentativeness of the solutions are such that it is the approach to an answer and the citation to relevant resources which is most important. Once those are referenced, each attorney must then make the ethical choice.

The following questions are but a few of the myriad which come up in a busy criminal defense practitioner's career. As a rule of thumb, the best way to discover if one has an ethical dilemma is by the "feel" method. If what you are about to do doesn't feel quite right, you probably have an ethical question to resolve. The time to do it is before the fact rather than after, and the best way to begin is to talk to others whom one respects for guidance, and then go to the written sources. Because we are human and may not always make the right choice, it is strongly recommended that all efforts to research the issue be documented and preserved in the client's file. Then, if questioned months or years later about the issue, one's good faith attempt to resolve the issue is preserved. As the poet Thomas Grey said, "half a mark fixed at or near the spot is worth a cartload of recollection."

³ California Rule of Professional Responsibility, 1-100(A) states: "Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

PROBLEM ONE

Five defendants are indicted in a narcotics conspiracy case. All of the attorneys for the five defendants agree to meet together to discuss defense strategies with their clients present in defense counsel's office. They agree this is to be a "joint defense" meeting and thus confidential. During the meeting, the defendants discuss in detail their involvement in the case, each making serious admissions of culpability. After the meeting, the client tells defense counsel in private that he wishes to cooperate with the government and testify against all of the other defendants in the case based on their admissions made during the meeting. Until the meeting, the client had not heard any of the other defendants make any admissions and was unaware of any other incriminating evidence against them. Later the prosecutor subpoenas defense counsel for trial based upon the statements the now cooperating defendant has told him in pre-trial discussions. The prosecutor informs defense counsel that he will ask him questions about the conference in his office and that he expects him also to testify to the admissions made by the co-defendants.

The practical and prophylactic response to this question is to first think very carefully about *ever* having joint defense sessions with clients present. If it is deemed necessary, then all present should sign an agreement stating the time and date of the meeting, its defense purposes, and that everyone agrees to be bound by the attorney-client privilege. A short version might read:

We, the undersigned, have all agreed that we shall conduct, as a group or in sub-groups, regular meetings and have frequent communication under the umbrella of the joint attorney-client privilege, the work-product privilege, and the Sixth Amendment right to effective assistance of counsel. We understand that the obligations of both the undersigned defense counsel and the defendants will be to adhere to these privileges and not inform others outside the joint defense group of defense strategies, investigations, work product or communications mentioned at these meetings. In addition, all counsel understand their obligations to be candid with other counsel under the applicable State Bar Rules. We all agree that all joint defense meetings will be deemed to have commenced with a

reiteration of the above understanding. This agreement continues indefinitely and does not end with the conclusion of the criminal case in court.

Because it is the duty of defense counsel to discover what the co-defendants and their counsel have to say about the case,⁴ such meetings are not infrequent and should be protected by something akin to the above confidentiality agreement.

Here, the problem has arisen and the question places several of the defense attorney's ethical obligations in conflict. Obviously, if one's client has cooperated and is able to bring about the convictions of the other four defendants, he/she will be in an advantageous position at sentencing. In fact, a dismissal may be in order. However, other participants in the multi-party conference will certainly argue that they come within the protection of the attorney-client privilege and that no one may repeat what was said without the permission of the party making the statement. It is certainly immoral for a defendant to use such a conference as a means of gaining incriminating information on co-defendants in order to bargain for a lighter sentence from the government. Defense counsel must look further, however, because morality does not always answer sticky ethical questions.

Let us start then with one of the fundamentals guiding the ethical practice of law in California, Business & Professions Code 6068, which states in its first seven subsections:

⁴ In Professor Anthony Amsterdam's, Trial Manual 4 For The Defense Of Criminal Cases (1984 ALI-ABA), defense counsel are advised: "An interview with a codefendant should explore thoroughly what information s/he has given to the authorities. If a codefendant admits guilt, counsel should determine whether the codefendant intends to testify for the prosecution and implicate the defendant. Whether or not the codefendant admits an intention to testify, counsel should take the codefendant's story in detail. A codefendant may turn state's evidence at any time; and his or her testimony is likely to be decisive at trial. If s/he denies guilt, counsel should ascertain what s/he knows about the crime and what his or her defense is. Counsel should ask the codefendant's lawyer the same questions. Trial tactics relating to severance and jury trial or waiver may hinge on answers to these inquiries." (Id. at section 117, p. 1-123-124).

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) To employ, for the purpose of maintaining the causes confided to him or her such 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.
- (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

The client should be advised (at the meeting and thereafter) that everything said in the joint-defense conference is privileged and may not be communicated to the government or anyone else. If the client persists in his will to go to the government and give up information from the meeting, the defense attorney should inform the client that he/she cannot take part in this violation of the joint defense privilege. To do so would violate the contractual defense agreement, the attorney-client privilege under Evid. Code section 954, and at least six of the above sub-sections of section 6068. Further, Rule of Professional Conduct, Rule 3-210, states in part: "A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid." Counsel must advise against this illegal course of action.

Of course, counsel must not appear at the prosecutor's office for the same reasons and the latter should be told there will be no testimony voluntarily given. The prosecutor should be then informed of the above statutes and the attorney's

ethical duty not to inflict needless harm on his co-defendants⁵ in violation of a joint defense privilege.

There is no privilege if counsel's services were sought or obtained to aid anyone to commit or plan to commit a crime or fraud. Evidence Code section 956. But does counsel have an obligation to prevent a client from illegal acts such as divulging privileged information? If the entire conversation between defendants and their attorneys is privileged, then the government should be unable to make use of that information in its investigation or at trial.

One measure to head off this fiasco would be to seek an *ex parte* private conference with the judge and client to inform the judge that the attorney is going to be called to testify at the trial. Counsel should explain to the court the generic problem and suggest that the attorneys for the co-defendants should be informed of what is afoot so that they might bring a motion to suppress for a violation of the joint defense agreement and a violation of Evidence Code section 954. The court would understand that this would best be done pre-trial rather than in the middle of the trial when co-counsel would surely discover the source of the incriminating material and then seek a mistrial.

A leading case providing guidance on this issue is **Hunydee v. United States** (9th Cir. 1965) 355 F.2d 183. There, two persons charged with income tax evasion held a conference with their attorneys. Hunydee made admissions to the effect that he would take the blame and plead guilty to the charges in order to exonerate his co-defendant. At trial both the co-defendant and his attorney testified as to Hunydee's admissions. The defendants objected, contending that such testimony revealed a confidential communication between a client and his lawyer. The Ninth Circuit upheld the defendant's argument under the authority of **Continental Oil Company v. United States** (9th Cir. 1960) 330 F.2d 347:

The rule announced in [**Continental Oil**] is that where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues

⁵ ABA Code, EC 7-10.

and are intended to facilitate representation in possible subsequent proceedings.

Applying this principle to the facts of our case, we hold that Hunydee's admissions to his attorney were within the attorney-client communication privilege. These statements apprised the respective attorneys of Hunydee's position at that time and influenced the course of their representation.⁶

The work product privilege provides an alternative argument that the client's statements about the conference is inadmissible. In **Hickman v. Taylor** (1947) 329 U.S. 495, the United States Supreme Court held that materials prepared by attorneys in anticipation of litigation are not subject to discovery without a showing of necessity or justification.⁷ See California Penal Code section 1054.6, stating that work product is non-discoverable. See **Izazaga v. Superior Court** (1991) 54 Cal.3d 356, 380-382 [285 Cal. Rptr. 231] (work product doctrine is not constitutionally based but is protected by statute).

United States v. Nobles (1975) 422 U.S. 225, 236, states that counsel for an adversary cannot gain materials which reveal, "the mental processes of the attorney" (422 U.S. at 238). The function of the work product doctrine is to provide "a privileged area within which [the attorney]. . . can analyze and prepare

⁶ **Hunydee v. United States** (9th Cir. 1965) 355 F.2d 183, 185. Dicta in other Ninth Circuit cases affirm this rule, e.g., **Himmelfarb v. United States** (9th Cir. 1949) 175 F.2d 924, 939: "[w]here the presence of a third person is indispensable in order for the communication to be made to the attorney, the policy of the privilege will protect the client, that is, his presence is required in order to 'secure the client's subjective freedom of consultation.'"

⁷ See **In re Terkeltoub** (S.D.N.Y. 1966) 256 F.Supp. 683, 685, in which a district court judge quashed a subpoena of an attorney called before the grand jury to testify concerning his interview with a witness. The court held that "no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings.... The defendant has a right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation."

his client's case" (**id.**, at 238), in order to "assure the thorough preparation and presentation . . . of the case" (**Ibid**). Inquiry into defense counsel's "litigating strategies [is not] . . . the subject of permissible inquiry by his opponent. . ." (**United States v. Valenzuela-Bernal** (1982) 458 U.S. 858, 862 n.3.)

As noted in **Briggs v. Goodwin** (D.C. Cir. 1981) 698 F.2d 486, 494-495, *vacated o.g.*, (1983) 712 F.2d 1444, the possession by the prosecutor of such privileged material undermines the fairness of the adversary system:

Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy is sufficient in itself to establish detriment to the criminal defendant. Such information is "inherently detrimental . . . unfairly advantages the prosecution, and threatens to subvert the adversary system of criminal justice." Further, once the investigatory arm of the Government has obtained information, that information may reasonably be assumed to have been passed on to the other governmental organs responsible for prosecution."

Conclusion. Under the **Hunydee** rationale, the all joint defense conversations come within the attorney-client privilege. Thus, if the client improperly reveals the admissions of his four co-defendants to the prosecution, he is violating their attorney-client privilege as well as the contract he made. See **United States v. Henke**, 222 F.3d 633, 643 (9th Cir. 2000) (reversing defendants' convictions where trial court improperly denied defense counsel's motion to withdraw on the eve of trial; there was a JDA and when one defendant cooperated and testified during trial, one of the other attorneys said he had to conflict off because the JDA made this witness his client.)⁸

Because the co-defendants, and not the client, are the holders of the privilege and have not consented to the breach or waived the privilege, neither the

⁸ This case could cause trial judges to demand inspection rights of JDAs in advance of trial. See **United States v. Stepney**, 246 F. Supp. 2d 1069 (The court ordered that the joint defense agreements not include the duty of loyalty provision, that it include a model waiver of confidentiality provision, and that any member be permitted to withdraw from the agreements by giving notice to all other members.)

attorney nor the client may reveal this information to anyone. Further, defense counsel has a duty to strongly advise the client against such a course of action. As stated in Canon Fifteen of the ABA Canons of Ethics:

it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

This may mean the defense counsel will have to move to withdraw from the case.

PROBLEM TWO

May defense attorneys or investigators, while working on behalf of the defendant, tape record a telephone conversation with a prospective witness without notifying the latter?

This is an area controlled by privacy statutes. The issue here is not the admission of the resulting recording into evidence; it is whether the tape recording is legal and thus ethically permitted.

In California, the answer is no. Both parties must know the conversation is being taped. In federal court, only one person need know the conversation is being taped without running afoul of federal wiretap statutes. (**United States v. White** (1971) 401 U.S. 745, 749-751.)

It is thus generally illegal for private attorneys to make secret recordings of telephone conversations with witnesses in California. (There is an exception for law enforcement under section 633).

Penal Code⁹ section 631 prohibits wiretapping. By this is meant (1) tapping a telephone line, (2) making an unauthorized connection with the line, and (3)

⁹ Federal law, as noted, allows recorded conversations without the consent of all parties, see 18 U.S.C. §§2510-2520. Also, there is in California a law enforcement exception which has been deemed to permit secret recordings

reading or learning the contents of a message while it is in transit. Most cases say that unconsented to taping or even "listening" by a third party is a violation of Penal Code section 631. **Ribas v. Clark** (1985) 38 Cal. 3d 355, 359-362 [12 Cal. Rptr. 143] (even a person who listens to a telephone conversation on an extension at the request of one of the parties to the conversation violates Penal Code § 631). Indeed, the California prohibitions extend to secret videotaping of activity which is unrelated to the telephone. **People v. Gibbons** (1989) 215 Cal. App. 3d 1204, 1208 [263 Cal. Rptr. 905] (includes surreptitious videotaping of sexual activity between consenting adults).

Penal Code Section 632 prohibits any person from eavesdropping upon confidential communications by means of electronic amplifying or recording devices without the consent of all parties. The term "confidential communication" is defined as meaning any communication carried on in such a manner as reasonably indicates that a party to it expects it to be confidential, but it excludes communications made at public gatherings or any legislative, judicial, executive, or administrative proceeding open to the public.

Under this section, the legality of secretly tape recording conversations with prospective witnesses depends on whether the conversation qualifies as a "confidential communication" under the statute. This in turn depends on what the witness reasonably thinks about the circumstances of the call. If told by the attorney\investigator that "this is recorded" clearly there is no problem with recording. If told "this is no a confidential conversation because you will be called to testify and I have to turn over my notes of this conversation," that too would seem to undermine any expectation of privacy, but my advice is that if one is prepared to say the latter, it is preferable to say "to make sure I get what you say correct, I'd like to record this, okay?"

Note that Penal Code section 637 prohibits non-parties to a telegraphic or telephonic message from willfully disclosing the contents of a message addressed to another person without the permission of such person. Since any information in a phone call would be directed to the lawyer from an investigator who records the call, permission would be needed for disclosure of the communication.

One California court, in interpreting the privacy statutes, has held that, given the legislative intent to prevent eavesdropping and other like invasions of

privacy, participant recording was not meant to be prohibited by the statute. **Rogers v. Ulrich** (1975) 52 Cal.App.3d 894, 898 -99 [125 Cal.Rptr. 306]. In this case, the court held that the alleged violation of section 631 was not covered by one party recording, and that there was no violation of 632 because there was nothing "confidential" about the conversation.

See also **Olsen v. Superior Court** (1976) 63 Cal.App.3d 188, 191 [133 Cal.Rptr. 573] ("We thus conclude that a participant to a telephonic communication is exempted from the prohibition against recording such communication only if the other participant to the communication knows that it is being recorded.)

Thus, in California, the consent of all parties is necessary to record. The major exceptions are when the caller is likely to be discussing an extortion, kidnaping, bribery, a felony involving violence against the person, or making an obscene or annoying call. Penal Code § 633.5; *see* **People v. Parra** (1985) 165 Cal.App. 3d 874, 879 [212 Cal.Rptr. 53]; **Lubetsky v. State Bar of California** (1991) 54 Cal.3d 308, 321 [285 Cal.Rptr. 268].

Next, there is the issue of "beep" tones. One would think that in California if given permission to record a call, that is all that would be required. Maybe not. The Committee on Professional Ethics of the State Bar of California's Opinion No. 1966-5 discusses in detail the recording of telephone conversations by attorneys.¹⁰ The Committee's opinion is that recording such conversations without a "beep" tone is both contrary to law and deceptive. The Opinion specifically rejected the notion that obtaining consent of the parties obviates the need for the beep tone. As with all such opinions, it is advisory only and does not bind the State Bar of California or any of its disciplinary committees. This implies that not only must one get consent, one must also have a beep tone on the call. The vitality of this opinion is subject to serious question given what follows.

¹⁰ ABA Formal Opinion 337 states that a lawyer should not record a conversation without the consent or prior knowledge of all the parties and cites the generic DR 1-102(A)(4) which proscribes conduct involving dishonesty, fraud, deceit, or misrepresentation. This Code section is echoed in Model Rule 8.4(c). *See also* Pitulla, **The Ethics of Secretly Taping Phone Conversations**, 80 Feb. ABA J. 102.

The FCC authorizes the use of recording devices in connection with interstate telephone service subject to the conditions that (1) the use be accompanied by adequate notice to all parties to the telephone conversation that it was being recorded, (2) that such notice be given by use of an automatic tone warning device, and (3) that the automatic tone warning device be furnished, installed and maintained by the telephone company.¹¹ The FCC order requires telephone companies to file tariffs with the FCC which authorizes the use of the recording devices under the stated conditions. In the past, California telephone companies filed such tariffs with the FCC as well as with the California Public Utilities Commission (PUC).

However, a general order released in 1983 by the PUC suggests that consent obviates the need for further actions like beep tones to alert the other party that the conversation is being taped. In PUC General Order 107B, adopted in 1983, Appendix A,II 4 (a), states that consent of all parties to the monitoring or recording of a phone call makes permissible the recording. It also states that recording may also take place when notice is given by other techniques such as an automatic tone warning device (the beep tone) or other.

The ethical and legal course for a California lawyer or investigator confronted by Problem Two then is not to record the conversations without consent and, as a practical matter, to make sure the consent is recorded at the outset of the conversation.

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¹¹ **Use of Recording Devices in Connection with Telephone Service**, 12 FCC Reports 1005 (1947-48).

PROBLEM THREE

Counsel is appointed to represent Mr. James Jones, who is charged with a misdemeanor offense. During an interview at the jail where Jones is being held, he informs the lawyer that his actual name is Roger Klaggett and that he is wanted in another state for a multiple murder. He tells counsel that the other state has a very powerful case against him, and he has no intention of ever revealing his true identity to anyone. Counsel informs him that at the arraignment on the indictment he may be asked his true name. He tells counsel that he is sticking to his current identity and wants his real name to be kept secret.

What are the practical, legal, and ethical problems posed? If Jones actually does respond that Jones is his true name at the arraignment, does counsel have any responsibility to say anything?

The short answer is that a defendant who insists on lying about his name at the arraignment because he is wanted in another jurisdiction and is presently a fugitive presents problems similar to those in which the client insists on perjuring himself at trial. Clearly, an attorney has an ethical duty not to present false or perjured testimony to the court.¹² Furthermore, an attorney should attempt to dissuade the client not to misrepresent his true name in court. If the client persists, counsel should try to withdraw after explaining the reasons to the client. If denied permission to withdraw, the attorney cannot do anything do further the client's fraud on the court as by seeking bail release.

This is an especially serious and difficult problem given the competing obligations of counsel. But because it appears that arguing on behalf of the client under the false name for any legal relief would be tantamount to abetting his false identity crime (which he is going to use to get a low bail and then jump it), counsel has to proceed with care as the line between unethical and ethical conduct is thin

¹² California 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 such means only as are consistent with the truth, and never seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." *See also* ABA Code, DR 7-102(A)(4); Model Rule §3.3.

indeed.

As a practical matter, if the client has already given a false name to the authorities at the time of arrest, he/she has probably committed a crime. It is a crime to give a false name to an officer at the investigative detention. (Penal Code § 148.9.) If counsel knows this prior to arraignment, there will indeed be major problems if counsel goes along with the charade.

In **In re Young** (1989) 49 Cal.3d 257, a defense attorney was given a four year suspension for arranging bail for a defendant who had given a false name to the police at the time of his arrest. (He gave a false name because he was wanted on a robbery case where the victim had died.) The attorney had been arrested and convicted for violating Penal Code section 32, an accessory to a felony in helping the defendant avoid felony arrest. In rejecting the attorney's arguments against discipline, the court stated:

... petitioner violated his oath and duties as an attorney under sections 6068 and 6103 when he arranged bail for his client under a false name. An attorney's duty to maintain his client's confidences does not extend to affirmative acts which further a client's unlawful conduct. While petitioner admittedly had no duty to disclose that his client gave the arresting officer a false name, he had a duty not to further his client's unlawful conduct by arranging bail for him under a false name. Petitioner's actions misled the bail bondsman and the officers of the court responsible for bail and allowed a fugitive wanted for a violent felony to evade prosecution. We conclude that there is sufficient evidence that petitioner acted dishonestly, and that his misconduct constituted a fraud on the court. (**Id.** at 265.)

Counsel is thus in a dilemma: an attorney cannot reveal the identity of the client because that information came to counsel by means of a privileged communication. On the other hand, counsel cannot take any affirmative step in using the false name on behalf of the client. This would include not aiding in getting bail and, by the same logic, not getting the defendant a plea bargain by which he could, as in many misdemeanors, receive immediate probation and liberty -- and thus continue as a fugitive on the outstanding murder warrants.

A further complication is Penal Code § 989, which states:

When the defendant is arraigned, he must be informed that if the name by which he is prosecuted is not his true name, he must then declare his true name, **or** be proceeded against by the name in the accusatory pleading. If he gives no other name, the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the accusatory pleading may be had against him by that name, referring also to the name by which he was first charged therein.

Also, Penal Code § 953 states that if the true name is discovered later, all that need be done is to change it: “When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the accusatory pleading.”

These sections do not confer on the defendant a right to deceive the court with a false name (or permit the attorney to act on that false name). Rather, they simply provide the State remedies if that happens -- the defendant may be prosecuted under the name given the court.

In federal court, a federal prosecutor might use 18 U.S.C. section 1001, which makes it a crime to give false statements in a matter concerning a United States agency, to prosecute a defendant who gives a phony name to the arraigning magistrate. **United States v. Plascencia-Orozco** (9th Cir. 1985) 768 F.2d 1074 (permitting such a prosecution for giving a false name to the magistrate as well as for an obstruction of justice under 18 U.S.C. section 1503.) As with the state example, the concession of the true name at arraignment might bring on this additional charge to say nothing of what happens on the outstanding warrant.

So what action, if any, must counsel take once the client has indicated that he/she is, in fact, going to continue lie to the court about his/her name despite the attorney's advice to the contrary. Must the lie be revealed to the court? There is little doubt that the U.S. Supreme Court would endorse the attorney acting to inform the court of the client's true name. *See Nix v. Whiteside* (1986) 475 U.S.

157, 171, 89 L.Ed.2d 123, 106 S.Ct. 988 (attorney threatens to tell court of client's intent to commit perjury is not ineffective assistance of counsel).

In **People v. Cox** (1991) 53 Cal.3d 618, 650-652 [280 Cal.Rptr.692], the question arose as to the propriety of the defense attorney's revealing to the court information (a rumor) of his client's potential for an escape which resulted in the unnecessary shackling of his client was a permitted and perhaps required communication by counsel. On appeal, the defendant argued that the attorney acted against the client's interests, to which the court responded there was no conflict of interest.

Parenthetically, we also observe that the American Bar Association Code of Professional Responsibility permits an attorney to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." (DR 4-101(C)(3); see also ABA Model Rules Prof. Conduct, rule 1.6(b)(1) [attorney may reveal confidential information "to prevent the client from committing a criminal act ... likely to result in imminent death or substantial bodily harm"]; cf. Evid. Code, § 956 [no attorney-client privilege "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime"]; see generally **Matter of Shay** (1911) 160 Cal. 399, 406 [117 P. 442]; **Falloon v. Superior Court** (1926) 79 Cal.App. 149, 157-158 [248 P. 1057].) The Model Rules of Professional Conduct also admonish against knowingly "fail[ing] to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client" (ABA Model Code Prof. Conduct, rule 3.3(a)(2).) Under most circumstances, this obligation would include alerting the court to matters that might threaten the security of the proceedings.

People v. Cox, supra at 654-655. See also **United States v. Friedman** (9th Cir. 1971) 445 F.2d 1076 (confidential attorney-client communications lose their privileged character when they concern contemplated unlawful acts by the client.)

What not to do about this situation is simpler than what to do about it. Bus. & Prof. Code § 6068(e)'s duty to preserve secrets and confidences. California Evidence Code § 956, states no attorney-client privilege exists, "if the services of

the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." The relevant ABA rules, which do not control in California but are used for their persuasive value, are: DR 7-102 (B)(1), as amended, which requires that a lawyer reveal to the court any fraud committed by his client, except when the information is protected as a privileged communication. DR 4-101 (C)(3) states that a lawyer may reveal the intention of his client to commit a crime.

It is a crime to have given the false name to the officer at the investigative detention (Penal Code § 148.9), but neither the ABA Code, the California Business and Professions Code, nor the California Rules of Professional Conduct *require* the revelation of a client's intent to commit non-violent criminal acts. Further, the California Supreme Court, while noting that counsel may not knowingly "allow" a witness to testify falsely, has stated: "It is to be remembered that a person cannot accurately be said to allow that which he cannot prevent." (**People v. Pike** (1962) 58 Cal.2d 70 [372 P.2d 656].)

In **People v. Riel** (CA 2000) 22 C4th 1153, 1217-18, the court said: "Although attorney 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. ... 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. It is the role of the judge or jury to determine the facts, not that of the attorney."

Thus, the defense attorney should do nothing and say nothing to assist the defendant in his hoax if he is intent to pursuing it. Counsel should advise the client to speak truthfully to the court or not at all. Clearly, counsel cannot seek bail for the defendant under the false name without risking very serious trouble as did Mr. Young. Since bail is commonly addressed at arraignment, this will be an immediate and almost inevitable issue to face.

If the client insists on lying about his true name in order to bail out, one course of action is to seek to withdraw from the case without, of course, revealing

the basis for the conflict of interest. (**Uhl v. Municipal Court** (1974) 37 Cal.App.3d 526, 530-535 [112 Cal.Rptr. 478]; but *see also* **Aceves v. Superior Court** (1996) 51 Cal.App.4th 584 (requiring divulging all non-privileged material to declare such a conflict). If denied, this would be an issue worth pursuing in the Court of Appeal.

If this is denied, and counsel is required to go forward in the case, he/she must be exceedingly careful in announcing an appearance (as unlikely as future court proceedings may be); it is suggested that counsel say, "Attorney for the defendant," and avoid the use of defendant's false name. It is, of course, essential that the attorney maintain in the file detailed memos about the advice given the client and the ethical authorities consulted in dealing with the issue.

PROBLEM FOUR

The client is indicted locally after having been brought in from Los Angeles where he was convicted on an unrelated narcotics case. The key witness against him in that Los Angeles case was a co-defendant, Sam Shark, who turned state's evidence and testified against the client. Counsel is confident that Shark was represented by a lawyer in Los Angeles. The client informs counsel that Shark is actually the guilty party in the new, local case and that he is completely innocent. By a quirk of fate, Shark is currently locked up at the local jail. Counsel wants to interview him, hoping to be able to take an incriminating statement against him and use it at trial on his client's behalf.

What are the practical, legal, and ethical considerations under these circumstances?

There is no doubt that defense counsel has an absolute duty to attempt to secure exculpatory information by investigating the client's case. **People v. Pope** (1979) 23 Cal. 3d 412, 425 [152 Cal.Rptr. 732]; **In re Cordero** (1988) 46 Cal. 3d 161, 181-187 [249 Cal.Rptr. 342]; *see also* **McQueen v. Swenson** (8th Cir. 1974) 498 F.2d 207 (failure of defense counsel to conduct a proper investigation by interviewing witnesses denied the client effective assistance of counsel); **Sanders v. Ratelle** (9th Cir. 1994) 21 F.3d 1446 (defendant's attorney rendered ineffective

assistance of counsel for failure to conduct any investigation of the existence of a third-party confession, even though he knew that the third party was willing to confess).

The ABA Standards, The Defense Function, § 4.1 state:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

The relevant inquiry, then, is to determine what steps may be taken, consistent with applicable ethical standards, to interview Sam Shark. The first consideration are the California Rules of Professional Conduct. Rule 2-100 states:¹³

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party¹⁴ the member knows to be represented by another lawyer in the matter,¹⁵

¹³ *See also* DR 7-104(A)(1): "During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

¹⁴ Model Rule 4.2 in 1995 substituted the word "person" for "party" and clarified the change in the comment by noting "[t]his rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communications relate" thereby expanding the prohibition on direct contact with someone represented by counsel.

¹⁵ *See Grievance Committee v. Simels* (2nd Cir. 1995) 48 F.3d 640 (reversing a censure order by narrowly construing "represented party in the matter").

unless the member has the consent of the other lawyer.¹⁶

Although Mr. Shark was a co-defendant on a different case in Los Angeles and was (or is) represented there by a lawyer, Shark is not a defendant in the client's current case. He may be interviewed without the consent of his counsel on the Los Angeles case. In fact, counsel has a duty to interview him.

If Shark were a co-defendant in the current case, defense counsel would be precluded from attempting to communicate with him absent the express consent of his attorney. However, because Shark is not a "party" to the instant case counsel is free to interview him even though he may be represented by a lawyer in other cases. As a practical matter, it is obvious that if Shark has a lawyer and permission to interview Shark is requested, such permission will be denied. Defense counsel should try to interview Shark without seeking prior authorization from Shark's attorney in Los Angeles.¹⁷

It must now be decided what can be said to Shark, if he is willing to talk. Of course, no misrepresentation can be made to Shark, and ABA Informal Opinion 581 indicates that defense counsel, or his investigator, has no duty to inform Shark about whom he represents. If Shark inquires, however, about the identity of the client, there is a duty to inform him.

Because Shark is potentially digging his own grave by talking to someone else's lawyer, a relevant consideration is whether the attorney *should* advise him of the fact that his statements may ultimately be used against him in a criminal prosecution. Under California law there is no duty to inform Shark that his statements may incriminate him. In **DeLuca v. Whatley** (1972) 42 Cal.App.3d

¹⁶ See **Abeles v. State Bar** (1973) 9 Cal.3d 603 [108 Cal.Rptr. 359, 510 P.2d 719]; **Mitton v. State Bar** (1969) 71 Cal.2d 545 [78 Cal.Rptr. 649, 455 P.2d 753]; Model Rule 4.2.

¹⁷ Under ABA Formal Opinion 396 (1995), defense counsel may interview a person without counsel's consent when defense counsel either lacks "actual knowledge" that the person is represented or could not reasonably infer representation from the circumstances. There is no duty under Model Rule 4.2 to inquire as to whether the person is represented by counsel in the current matter.

574, the court held there was no duty owed to the witness when defense counsel failed to advise him of possible criminal prosecution and the witness's testimony resulted in his arrest. "When an attorney defends a person accused of crime he has but one intended beneficiary — his client." *Id.* at 576.

ABA Standards, The Defense Function § 4.3 (c) advises:

It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

As a practical matter, if so advised, Shark would probably refuse to talk until he had an opportunity to speak with a lawyer. Defense counsel has an obligation not to destroy exculpatory evidence for his client and such advice to Shark would, in effect, destroy the evidence. Further, given what the client stated to his counsel, it is highly likely that Shark has an adverse position to that of the client. For counsel to give him any advice puts counsel in a conflict of interest position with his own client. This is forbidden under California Rule of Professional Conduct, 3-300. Therefore, if Shark asks for any advice, counsel should say he cannot give it.

The New York County Lawyer's Association considered a similar problem in 1933 in its Opinion 307. It concluded that it is the duty of defense counsel to interview a witness in an attempt to use his testimony if it will benefit the client -- even though the use of such testimony may subject the interviewee to criminal prosecution. The opinion indicated that the interviewing defense counsel could not mislead or deceive the interviewee while questioning him, but also concluded that there was no duty to warn the witness of possible consequences of statements he might make.¹⁸

¹⁸ See ABA Standards, The Defense Function 4.3 Commentary, which states: "Occasionally, a prospective witness gives a statement that is helpful to the client ... but at the cost of possibly incriminating the prospective witness. The lawyer's paramount loyalty to his or her own client must govern in this situation"; see also *St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 951-952 ("Attorneys have not been held to a duty of professional care ... in any situation in

This issue is fundamental to the core responsibilities of defense counsel. If an effective and zealous defense of the client means anything, it at least includes investigating the case and finding the actual culprit when the client not only tells the attorney that he is innocent, but gives counsel the identity of the true perpetrator. Although one cannot ethically mislead or deceive Shark in an interview, a defense lawyer is not appointed the constitutional watch-dog of the public at large.

Defense counsel should be reminded that interviewing witnesses alone is an unwise action. *See Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 850, n. 9 ("that a defense attorney in a capital case would confide her client's life to her own imperfect and mortal memory is truly astonishing....she is in the intolerable position of being unable to impeach the witness without facing potential recusal."). ABA Standards, The Defense Function 4.3(e) warns: "Unless defense counsel is prepared to forego impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person."

The latter problem is exactly the one defense counsel faced in **People v. Farmer** (1989) 47 Cal.3d 888 [254 Cal.Rptr. 508] faced when he twice interviewed the actual murderer whose statement cleared Farmer of the capital homicide. The problem was that counsel did not have an investigator with him and could not tape the conversation in prison where the interviews took place. At the guilt trial, he did not seek to be relieved so that he could be a witness to tell the jury about the real murderer's confession to him. The jury never heard from him about the confession he took and Farmer was convicted and sentenced to death. It took over fifteen years to overturn the conviction based on ineffective assistance of counsel. **Farmer v. Ratelle** (9th Cir. Nov. 21, 1997) unpublished opinion, Slip No. 96-56489; 1997 U.S. App. LEXIS 33623. Lesson: an attorney should never interview a key witness alone or without a tape recorder running.

which the imposition of such duty would intrude upon the basic attorney-client relationship.")

PROBLEM FIVE

The client is charged with a misdemeanor. At the arraignment he unexpectedly informs the court that he will represent himself under the guidelines of **Faretta v. California** (1975) 422 U.S. 806. The magistrate appoints counsel as advisor (stand-by counsel) to the defendant and states that the defendant shall be able to represent himself fully at trial. During pre-trial conferences with the defendant, it becomes clear that the defendant is incompetent to stand trial and was probably legally insane at the time of the offense. When informed that he probably has a complete defense to the charge and may not be competent to stand trial, the defendant fires his advisory counsel and insists that no mention be made of counsel's opinion.

What are defense counsel's ethical responsibilities to the defendant and the court?

It is assumed in this answer that the duty of counsel is the same whether acting as stand-by or if representing the client. While it is clear that the impressions made by a lawyer about a client's mental or physical condition are not communications and, hence, not within the attorney-client privilege, it is not so readily determined that the same are not within the ethical obligation of a lawyer to guard the confidences and secrets of his client. The ethical obligation, after all, is broader in scope than the attorney-client privilege; it also reaches any other information gained in the professional relationship that the client has requested to be held inviolate or against whom disclosure would be embarrassing or detrimental.¹⁹ Thus, unlike the evidentiary privilege, the ethical obligation exists "without regard to the nature or source" of the information and without reference to the termination date of employment.²⁰

Nevertheless, counsel, faced with the possible mental incompetency of a **Faretta** client, is certainly not ethically precluded from revealing his or her suspicions to the court. The fact that the defendant deems this information "secret" does not alter this course. See **Shephard v. Superior Court** (1986) 180

¹⁹ EC 4-4; DR 4-101(A).

²⁰ EC 4-4, 4-6.

Cal.App.3d 23 (defense attorney must argue best interests of client — his incompetence — even if latter disagrees); **People v. Bolden** (1979) 99 Cal.App.3d 375, 378 (revelation of client incompetence is not a breach of attorney-client privilege); **People v. Stanley** (1995) 10 Cal.4th 764, 804-805 (attorney can try competence issue in opposition to the client's wishes.).

The bigger issue is whether counsel has a duty to the court to reveal doubts about the client's competency. In **People v. Masterson** (1994) 8 Cal.4th 965, 971, the court stated:

There is authority that if " 'the attorney doubts the present sanity of his client, he may assume his client cannot act in his own best interests and may act even contrary to the express desires of his client' " [Citations]; see also 2 **ABA Standards for Criminal Justice**, std. 7-4.2(c), supra, p. 7.176 ["If the client objects to such a motion [to evaluate the defendant's competence to stand trial] being made, counsel may move for evaluation over the client's objection."].)

The ABA Standards, cited above, state in the Commentary to std. 7-4.2(c), "Defense counsel, who has an independent professional responsibility toward the court and the fair administration of justice, as well as an allegiance to the client, also should move for an evaluation whenever a good faith doubt arises about a defendant's competence to stand trial, notwithstanding defense counsel's doubt as to what is in the defendant's legal best interests."

One case would go so far as to hold counsel ineffective for not revealing to the court his/her doubts as to the client's incompetence. In **Evans v. Kropp** (E.D.Mich. 1966) 254 F.Supp. 218, a petitioner for habeas corpus relief was held to have received ineffective assistance of counsel because his lawyer failed to disclose information necessary for a determination of competency. After petitioner's arrest and attempted suicide, he was examined by a jail psychiatrist who advised retained counsel that the petitioner was not competent to stand trial and that a sanity hearing was in order. No mention was ever made in court of the competency issue and, after one attempt to enter a plea of guilty failed, the plea was finally accepted. At a post-conviction hearing on the petition, petitioner's trial counsel testified that he was aware of the attempted suicide, that he could not recall actual notice of the psychiatrist's opinion, and that had he known of his

client's mental incapacity he might *not* have informed the court or requested a sanity hearing because in his judgment the petitioner would be better off in state prison than in a state hospital for the criminally insane. In granting the habeas petition, the court held, without citation to authority, that "no lawyer, as an officer of the court, has the right to make such a judgment. Regardless of his personal views, he may not withhold from the court such critical information as the diagnosed mental incompetency of his client and of his consequent possible inability to stand trial." **Id.** at 222.

Counsel in **Evans** was retained. Thus, unlike the defendant in the problem (whom the court has already determined competent to represent himself), the **Evans** defendant was represented by counsel at the time of his guilty plea — which was his first opportunity to make a knowing and intelligent waiver before the court of any constitutional rights. Whether this distinction totally absolves advisory counsel from any duty of disclosure to the court is open to question. **Evans**, however, should not be viewed as shifting any responsibility from the court's shoulders²¹ in regard to the previously discussed dual, but similar competency determinations of competency to stand trial and competency to represent one's self²² of the **Faretta** defendant. **Godinez v. Moran** (1993) 113 S.Ct. 2680, holds that the degree of competency required to waive the

²¹ In **Westbrook v. Arizona** (1966) 384 U.S. 150, the Supreme Court held that even when the petitioner had received a hearing on the issue of his competence to stand trial, the fact that no hearing or inquiry was made to determine his competence to waive his constitutional right to counsel was sufficient cause for remanding the case, inasmuch as the petitioner had conducted his own defense. The Court states that the defendant's sixth amendment right to counsel "invoked, of itself, the protection of the trial court." **Id.** at 150. This "protecting duty" was assigned specifically to the trial judge in determining whether there is an intelligent and *competent* waiver by the accused. **Johnson v. Zerbst** (1937) 304 U.S. 450.

²² Compare ABA Standards, The Function of the Trial Judge § 6.6 (1974) (outlining the inquiry to be made by the trial judge of the defendant who elects to represent himself at trial), with **Dusky v. United States** (1960) 362 U.S. 402 (outlining the standard used by the trial judge in determining mental competency to stand trial).

constitutional right to counsel is the same as that required concerning mental competency to stand trial. Thus, a determination by the trial court that a defendant is indeed competent to waive counsel and thereby to conduct his own defense, is one that necessarily includes an implied or express finding that the defendant is competent to stand trial.

On the other hand, when appointed or retained counsel is discharged by a defendant who wishes to seek **Faretta** self-representation, then the **Evans** rationale requires counsel to reveal his suspicions or other critical information about the defendant's present mental incompetency to the court at that hearing.

California cases hold that if the attorney believes the client is incompetent and the client does not wish to pursue that issue, the attorney may still raise the issue. (**People v. Bolden** (1979) 99 Cal.App.3d 375, 378.) Indeed, the cases suggest counsel should do so because of the primary societal interest in having the client mentally present for all critical stages of the proceedings. Thus, the attorney, even in opposition to the client's wishes, may try the competence issue to the trier of fact. (**People v. Stanley** (1995) 10 Cal.4th 764, 804-805.)

PROBLEM SIX

The defendant, Mr. Rabbit, is scheduled to appear on Monday for a motion hearing. Counsel has his current correct address which is different from the one he originally gave the court because Rabbit moved. When Rabbit does not show up for the motion hearing, counsel says nothing about his whereabouts. A bench warrant is issued for his arrest and bond is forfeited. The next day Rabbit calls counsel to say he has not moved, has no plans to move, and failed to appear in court because he has decided no longer to make court appearances. Protests that he come to court are of no avail. Several days later an FBI agent calls on counsel and asks for Rabbit's current address. Counsel declines to answer and is soon subpoenaed before the grand jury and asked about Rabbit's current location.

Rabbit is eventually arrested. Counsel is appointed to represent him again on the underlying case and also on the bail jump case. Rabbit insists on going to trial on both cases. Counsel is again subpoenaed before the grand jury and asked if he told Rabbit the

court date for the appearance on the motions. As counsel leaves the grand jury room, the prosecutor hands him a subpoena for the bail jump trial and tells him he will ask the same questions at trial.

What are counsel's responsibilities to his client?

Any initial comments to the court by the defense attorney when his client does not show up for the motion hearing can later cause problems for both attorney and client. The volunteering of information regarding the client's whereabouts or intentions at that time can provide the government with evidence for a future bail jump charge, create potential conflict problems, and divulge attorney-client communications without consent of the client.

A compelling response to the court is to say that the client has been in touch and indicated his intention to come to court on time. This may stay a bench warrant for a few hours, but, practically speaking, that accomplishes little. One could ask for and probably get that without revealing such information. Even if the court refuses, if the client is merely late and does come to court the same day, it is unlikely that a bench warrant would have issued prior to his arrival.

On the other hand, if he has no intention of coming to court and has, in fact, jumped bail, the brief stay of the warrant serves no purpose. Therefore, volunteering information to the court regarding a client's location or recent communications is legally unsound, ethically questionable, and pragmatically worthless. In situations in which a defendant's case is called and he is nowhere to be found, the best course is suggest the court trail the matter to the foot of the calendar. If the defendant has not arrived by then, ask for the bench warrant to be stayed until the end of the day while you try to find out what is going on.

A problem occurs when defense counsel has had recent communications with his client, has advised him of his court date, and the court inquires into those facts. If the lawyer chooses to respond to the court's inquiries, the response must be truthful. As ABA Standards, The Defense Function, 1.2(f) makes clear: "Defense counsel should not intentionally misrepresent matters of fact or law to the Court." However, the dilemma here is not whether to tell the court the truth but whether one should disclose any communications with the client in response to the court's inquiries. The answer is not if you can help it.

If one decides not to disclose any communications with the client and cannot otherwise finesse the court's question, what might be asserted? The attorney-client privilege comes first to mind. In addition, several ethical considerations would restrict such a disclosure:

(1) California Business and Professions Code Section 6068(e): "It is the duty of an attorney:...**(b)** to maintain inviolate the confidence, and **at every peril to himself** to preserve the secrets of his client." [emphasis added]

(2) EC 4-4: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege:... a lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client."

(3) DR 4-101(B): "Except as permitted..., a lawyer shall not knowingly: (1) reveal a confidence or secret of his client."

(4) ABA Canon 37: "Confidences of a Client: It is the duty of a lawyer to preserve his client's confidences."

(5) An attorney should elect to go to jail and take his chances on release by a higher court rather than divulge communications of his client.²³

If the court does not accept the above arguments and demands disclosure, the attorney either discloses or risks contempt of court and jail. The choice must be made keeping in mind EC 7-3 ("While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law"), and EC 7-6 ("In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client"). Thus it would be expected that the defense attorney go down fighting on behalf of his

²³ **People v. Kor** (1954) 129 Cal.App.2d 436, 277 P.2d 94 (on court order, an attorney for a defendant in a criminal case testified as to conversations with his client after the claim of privilege had been overruled; the defendant's conviction was reversed for the erroneous denial of the privilege claim, the appeals court stating that the attorney "should have chosen to have gone to jail and take his chances of release by a higher court....[I]t is...a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or similar problem.")

client if he has a reasonable doubt as to the client's actual intentions.

In the Matter of DeMassa (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, the Bar court held that the attorney, although affirmatively obligated by his duty to his client to conceal knowledge of the client's whereabouts, crossed the line from "zealous protector of client confidences" when he allowed the client, then a fugitive, to stay at his house.²⁴

In the hypothetical problem, the defense attorney should have advised his client to appear in court as soon as possible. To acquiesce in a client's desires to remain a fugitive would violate DR 1-102(A)(4)(5)²⁵ and could result in disciplinary action.

If contacted by the client and advised that he no longer intends to appear in court, it would be advisable to tell him that such a communication may not be deemed protected by the attorney-client privilege because it is a statement of intent to commit a future crime and that at some later date a court can force it to be revealed.

The client does not heed this advice but remains a fugitive. If an FBI agent contacts the defense attorney and inquires as to the client's whereabouts, what should the attorney do?

First, it should be remembered that failure to disclose information to the FBI, unless one is ordered to do so by a court, cannot give rise to criminal prosecution. Nor would failure to disclose the location of a fugitive give rise to prosecution for harboring and concealing a fugitive under 18 U.S.C. section 1071. *See United States v. Foy* (7th Cir. 1969) 416 F.2d 940; *United States v. Magness* (9th Cir.

²⁴ *See also In re Young* (1989) 49 Cal.3d 257, 265 ("attorney's ethical duty not to disclose his client's confidences does not extend to affirmative acts which further a client's unlawful conduct").

²⁵ "A lawyer shall not...
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice."

1972) 456 F.2d 976.

An attorney's response to the FBI presents simpler issues than the response to a grand jury subpoena. The FBI is not an impartial tribunal which can rule on the validity of the defense attorney's claims. If the attorney cannot argue his case persuasively, he can be compelled to testify. Faced with the facts of the hypothetical problem, the defense attorney could go before the grand jury and refuse to disclose communications with his client on the basis of the attorney-client privilege. The defense attorney will have to be able to prove that the communication was made for the purpose of providing legal services to the client and that such communication was made in confidence. The privilege belongs to the defendant but his attorney has the authority to claim the privilege in absence of evidence to the contrary.²⁶ However, the Ninth Circuit has held that merely informing a client of the next court date is only the relaying of a message and is not in the nature of a confidential communication; therefore, such communication would not be protected by the privilege.²⁷

Though the communication of the client's next court date may not be privileged, the conversation with him following the bail jump will be. Such communication is confidential because it is for the purpose of obtaining legal advice, and does not contemplate unlawful acts in that the unlawful act has already been committed.

While one could argue that forcing an attorney to testify about his communications with his client would have a "chilling effect" on the attorney-client relationship and might create a conflict of interest, these arguments were rejected by the Ninth Circuit in **United States v. Freeman** (9th Cir. 1975)

²⁶ Federal Rule of Evidence 501.

²⁷ See **United States v. Freeman** (9th Cir. 1975) 519 F.2d 67 and **United States v. Hall** (2d Cir. 1965) 346 F.2d 875. The Ninth Circuit has also held that the existence of a fee arrangement is not a confidential communication protected by the attorney-client privilege, **In re Michaelson** (9th Cir. 1975) 511 F.2d 882. It should also be noted that confidential attorney-client communications lose their privileged character when those communications contemplate unlawful acts by the client, **United States v. Friedman** (9th Cir. 1971) 445 F.2d 1076.

519 F.2d 67. This means counsel could be subpoenaed to testify at the trial of the defendant on the bail jump and will create a conflict of interest problem, a problem which will have to be resolved (probably by the defendant having other counsel for the bail jump case) prior to trial.²⁸

PROBLEM SEVEN

The defense case has all but concluded in a bank robbery trial. The client informs defense counsel that he wishes to take the stand even though he has previously admitted to counsel that he is guilty. Despite counsel's protestations, the client insists on taking the stand with the purpose to perjure himself. What are defense counsel's ethical, practical and legal responsibilities in this circumstance? Does it make any difference if the client informs counsel of his intentions prior to trial instead of just before he testifies?

Answer:

Fortunately, the defense lawyer is not often confronted by a truly perjurious client who insists on testifying. The problem arises only when the client has told the lawyer the inculpatory facts but nevertheless insists upon testifying without repudiation of his former statements, *i.e.*, states that he plans on lying on the witness stand. If the client repudiates prior inculpatory statements, the problem of the perjurious defendant would not arise.

Assuming that the client has told the lawyer he intends to take the witness

²⁸ Assume the defendant wishes to waive the conflict. Can the court reject the waiver and require new counsel to represent the defendant? Yes, say the U.S. Supreme Court. **U.S. v. Wheat** (1988) 486 U.S. 153. But maybe not in California, at least as to retained counsel. In **People v. Jones**, ___ Cal. 4th ___ n. 3 (2004), the court adopted the Wheat rationale as to appointed attorneys, but left open the issue of whether the issue would be the same as to retained counsel, citing **People v. Alcocer** (1988) 206 Cal.App.3d 951, which both permitted the defendant to waive the conflict of interest and rejected **Wheat**. *But see* **People v. Peoples** (1997) 51 Cal.App.4th 1592 (upholding the declaration of conflict and removal of the attorney where more than just the client's interest would be adversely affected by counsel's representation); cf. **People v. Burrows** (1990) 220 Cal.App.3d 116 (probably overruled by **Jones**.)

stand and lie, what options are open to the defense lawyer? The tension is between the client's constitutional right to testify on the one hand and the attorney's ethical obligation not to present perjured testimony. This issue has been debated endlessly in the journals, and will not be repeated here.²⁹ The California answer appears to be the following:

(1) Ethically and legally, an attorney cannot assist a client in any way to formulate perjurious testimony, and he must do all within his or her power to convince the client not to take the witness stand and commit perjury.

(2) If the client lies on the stand and counsel discovers this after the fact, there is no duty to reveal that a client has perjured himself.

(3) If prior to trial, the client insists that on perjuring himself and is resistant to importuning that he not do it, counsel should seek leave to withdraw in a manner which will protect the client's interests. If possible, this motion should be taken up with a judge who is not to be the trial judge.

(4) If the motion to be relieved fails, and in any instance during the trial when the client insists on taking the stand to commit perjury, counsel may only ask narrative questions ("tell us what happened in your own words"), but may not proceed with the normal question and answer routine which knowingly elicits perjured testimony. Perjured testimony cannot be argued to the jury.

(5) If the prosecutor objects to the narrative answers, cite the following:

²⁹ See Freedman, **Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions**, 64 Mich.L.Rev. 1469 (1966) (suggesting it is proper to put the client on the witness stand knowing he will commit perjury because failure to do so may deprive the client of his rights to counsel and due process). Cf. Burger, **Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint**, 5 Am.Crim.L.Q. 11 (1966) and Braun, **Ethics in Criminal Cases: A Response**, 55 Geo.L.J. 10 (1967) (both suggesting that the lawyer cannot put the perjurious client on the stand).

"The decision to elicit a narrative account from one's own witness is also a tactical one. In certain situations, a narrative account may be more beneficial to the party calling the witness. In the absence of strong showing that the client has been substantially prejudiced, trial counsel should not be second-guessed as to his decision to permit a client to testify in narrative fashion." **People v. Hayes** (1971) 19 Cal.App.3d 459, 471-472; **In re Rosoto** (1974) 10 Cal.3d 939.

The above are rules of application. The "real world" in which they would be applied is never so simple. Until the client actually lies under oath, one can never be sure perjury will be committed. An attorney can legitimately take comfort in the belief that a client, no matter how obstreperous, will ultimately decide either not take the stand or will follow advice and testify truthfully. As the California Supreme Court pointed out in **People v. Pike** (1962) 58 Cal.2d 70 [372 P.2d 656], while counsel may not "knowingly allow a witness to testify falsely, whether he be a criminal defendant or otherwise...[i]t is to be remembered that a person cannot accurately be said to 'allow' that which he cannot prevent." *See also People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 ("We recognize as a practical matter it is probably impossible to know in advance for certain whether a defendant will testify falsely.")

While some jurisdictions recommend remedies such as attorney withdrawal, court disclosure, or even refusing to permit the defendant to testify when a client announces his intention to perjure himself, California has settled on this "narrative approach" as the best means of dealing with the client perjury issue. The narrative approach was recently described in **People v. Johnson** (1998) 62 Cal.App.4th 608, 624 [72 Cal.Rptr.2d 805]:

Under the narrative approach, the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange. Instead, the attorney permits the defendant to testify in a free narrative manner. In closing arguments, the attorney does not rely on any of the defendant's false testimony.

In approving this method, the court concluded

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 p. 629.)

This is the California position approved of in the leading case of **People v. Guzman** (1988) 45 Cal.3d 915, 941-946; *see also* **People v. Gadson** (1993) 19 Cal.App.4th 1700, 1712-1714 (extending the rule to counsel's refusal to question defense witnesses whom he believed would perjure themselves).

Other jurisdictions favor other varied approaches.³⁰ The U.S. Supreme Court, although not condemning the narrative approach, does not look favorably on the procedure. **Nix v. Whiteside** (1986) 475 U.S. 157, 170-171 & note 6 [89 L.Ed.2d 123, 106 S.Ct. 988]. There, the court held that the defense attorney's threatening to reveal a client's perjury to the court if the client took the stand and testified falsely was not ineffective assistance of counsel.)

Underlying the case authority is the attorney's ethical responsibility not to knowingly present perjured testimony. These rules may be found in numerous sources, depending on the jurisdiction. In California, § 6068(d) of the Business and Professions Code³¹ says that it is the duty of an attorney "to employ, for the purpose of maintaining the causes confided to him such means only as are

³⁰ *See* Model Rule 3.3, Comment 9 (specifically rejecting the narrative approach). Some courts in other jurisdictions have deemed the narrative approach to constitute ineffective assistance of counsel. **State v. Lee** (1984) 142 Ariz. 210 [689 P.2d 153, 157-159]; **State v. Robinson** (1976) 290 N.C. 56 [224 S.E.2d 174, 180].

³¹ State Bar Rule 5-200(A) and (B) presents similar language:
"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;"

consistent with the truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." State Bar Rule 5-200(A) and (B) presents similar language.

And the ABA Code, in DR 7-102(A)(4), states that an attorney shall not "knowingly use perjured testimony or false evidence."

An attorney would be opening himself up to criminal charges if he or she knowingly presents false testimony. *E.g.*, In **In re Jones** (1971) 5 Cal.3d 390 [96 Cal.Rptr. 448], an attorney was disciplined based upon his conviction for subornation of perjury and submission of false evidence. (**People v. Jones** (1967) 254 Cal.App.2d 200 [62 Cal.Rptr. 304].) The Supreme Court stated this is an offense for which disbarment would be warranted. (5 Cal.3d at 400-401.)³²

The attorney-client privilege offers little or protection to the lawyer in this instance. California Evidence Code § 956 says that there is no attorney-client privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." The Ninth Circuit also has said that "[c]onfidential attorney-client communications lose their privileged character when they concern contemplated unlawful acts by the client." **United States v. Friedman** (9th Cir. 1971) 445 F.2d 1076, 1085. Similarly, DR 4-101(C)(3) indicates that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."

To sum up, it is unethical and can lead to disbarment to knowingly to present perjured testimony. It may also be criminal conduct to do so. The client's statement that he is about to commit perjury is not privileged and would have to be revealed if counsel is required to do so in a court proceeding. Therefore, let the narrative begin.

Next, must the attorney reveal the perjury if it is discovered following the client's testimony? Not in California. The California State Bar Committee on Professional Responsibility and Conduct stated in its Formal Opinion 1983-74 that

³² It may be that any assistance offered a defendant who is knowingly going to perjure himself would constitute aiding and abetting the commission of perjury in violation of California Penal Code §§ 31 and 118 and 18 U.S.C. §§ 2 and 1621.

an attorney who knew that his client committed perjury in the midst of a civil trial had no duty to reveal that knowledge and indeed was prohibited under California Business & Professions Code §6068(e) from divulging that information to the court absent the client's consent.³³

Thus, as to past perjured testimony, the attorney has no duty to, and indeed must not, reveal the fact of such perjury to the prosecutor or the court. "The attorney client privilege ... exists to permit a client to freely and frankly reveal confidential information, including past criminal conduct, to the attorney or others whose purpose is to assist the attorney, and to thereby enable the attorney to adequately represent the client." (**People v. Clark** (1990) 50 Cal.3d 583, 620 [268 Cal.Rptr. 399].)³⁴

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³³ The ABA rules are not so clear cut in this regard. *See* ABA Opinion 314 (1965) says that a lawyer must disclose even the confidences of his clients if "[t]he facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed." DR 7-102(B)(1) requires that a lawyer reveal any fraud committed by a client, but a 1974 amendment added the words "except when the information is protected as a privileged communication." The revealing of past perjury to an attorney would qualify as a privileged communication. The ABA Comm. on Professional Ethics, Opinions, No. 287 (1953), which held that a lawyer who discovered from his client that the client had given false material testimony in a prior proceeding had no obligation to and could not disclose these facts to the courts or other authorities. *But see* Model Rule 3.3 which requires an attorney to take "reasonable remedial measures" when evidence offered by an attorney is subsequently discovered to be false and the perjury is discovered before the end of the proceeding. ABA Comm. on Professional Ethics & Grievances, Formal Op. 353 (1987) ("[C]ontrary to Formal Opinions 287 and 341 and the exception provided in DR 7-102(B)(1) of the Model Code, the disclosure requirement of Model Rule 3.3(a)(2) and (4) is not excused because of client confidences.")

³⁴ *Compare* ABA Model Rule 3.3: although a lawyer is required to take "reasonable remedial measures" when he discovers he has presented false material evidence to the tribunal, this duty lasts only during the life of the proceeding.

PROBLEM EIGHT

During the investigation of a bank robbery case, defense counsel's investigator goes to defendant's home at defendant's request to bring some of his clothes to the jail for future court appearances. While rummaging through a closet, the investigator discovers a ski mask, sawed-off shotgun, and a large sack filled with money. He calls defense counsel and asks what to do with the items (which counsel, who has seen the bank surveillance photos, believes were part of the bank robbery).

Answer: Tell the investigator to leave the items alone!

An attorney has no right to hide or possess evidence of a crime once that evidence comes into his or her possession.³⁵ The leading California case, **People v. Meredith** (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612], hold that evidence over which the attorney takes possession is not protected by the attorney-client privilege and states that it must be turned over to the prosecution. However, if not possessed by counsel or the investigator, there is no duty to inform the authorities of its whereabouts.

People v. Lee (1970) 3 Cal.App.3d 514 [83 Cal.Rptr. 715], quotes approvingly the Washington Supreme Court's description of the defense attorney's obligation when the items have been put into the attorney's possession:

The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.) which in itself has little if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case,

³⁵ ABA Code Canon 7, DR 7-109(A) ("A lawyer shall not suppress any evidence that he or his client has a legal obligation to produce."); Model Rule 3.4, Comments 1 ("Fair competition in the adversary is secured by prohibition against destruction or concealment of evidence,"), 2 ("The exercise of [an important procedural right to obtain evidence through discovery or subpoena] can be frustrated if relevant material is altered, concealed or destroyed.").

whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution. (**State v. Olwell** (1964) 64 Wash.2d 828 [394 P.2d 681].

In this example, however, the items are not actually in the possession of the attorney or the investigator. There is thus no duty to reveal anything. "If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation." (**People v. Meredith** (1981) 29 Cal.3d 682, 695.)

The client...may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as a part of a communication to the attorney, and if further the communication is intended to be confidential, the privilege comes into play. Wigmore on Evidence § 2306 (McNaughton ed. 1961).

See California Rules of Professional Conduct, Rule 5-220 (no suppression of evidence when there is no legal obligation to reveal or produce); *see also* Cal. State Bar. Committee on Prof. Resp., Formal Opinion 1984-76 (1984) ("Thus, in the situation wherein the client informs the attorney of the location of the physical evidence of the crime, or the attorney merely observes it without taking possession, the attorney need not disclose to the prosecution either its location or his or his agent's physical observations of the same.")

The fact that the incriminating material was found as a result of a mission on behalf of the client, coupled with the duty of the attorney to resolve questions concerning disclosure in favor of his client, places the investigator's discovery clearly within the protection of the confidential communication doctrine. The investigator should be told to leave the material in the closet and not disturb it. The client should be told not to destroy the evidence.³⁶

³⁶ ABA Informal Opinion No. 1057 (1968) suggests that if the client indicates he/she will not follow that advice, counsel should of course not cooperate with the client in suppressing the evidence. Advise the client not to

If the investigator takes possession, the issue turns dramatically adverse for the client. "If counsel ... chooses to ... possess ... physical evidence pertaining to the crime, counsel must immediately inform the court of the action." (**People v. Superior Court (Fairbank)** (1987) 192 Cal.App.3d 32, 39-40.) The court also noted this "legal obligation[] should be self-executing and no motion by the prosecution or order by the court should be required to enforce them." (**Id.** at p. 39.) *See also* State Bar Formal Opinion 1986-89.

In **People v. Sanchez** (1994) 24 Cal. App.4th 1012, the trial court turned over to the prosecutor inculpatory writings by defendant that had been delivered to the trial court by defendant's lawyer, after the writings had been found by defendant's sisters and turned over to the lawyer. This was upheld as proper conduct on the part of the defense attorney.

Permutation on this general problem are great,³⁷ but the lesson from the cases is this: do not take possession of anything unless you have thought it through and are prepared to turn over to the court the material if it proves to evidence of a crime. Investigators should be told instructed before going to investigate not to seize anything without a specific authorization from counsel.

suppress it. If he or she refuses to follow that advice, withdraw from employment.

³⁷ Thus, if a client or witness, during an interview, places something on one's desk, it should not be touched until it is determined what it is. If problematic, the individual should be told of the problems of attorneys handling such material and decline to accept it. Obviously, the person should not be told to destroy the material. The purpose of not accepting possession is simply to avoid passing the problem from the defendant or witness to the attorney.

PROBLEM NINE

During the second day of a marijuana importation trial, John Smith is called to testify on the defendant's behalf. Smith testifies in accordance with what he told defense counsel's investigator pretrial: A stranger approached Smith and the defendant while they were drinking in a local bar and offered either of them fifty dollars to drive his truck from San Diego to Los Angeles. He explained that his regular driver was ill and this was an emergency run for which he needed a substitute driver. Smith initially accepted the offer but had to turn it down when he discovered he did not have a valid operator's permit. The defendant then accepted the job, drove the truck, and was soon arrested for transporting two tons of marijuana.

The evening after Smith testifies to these facts he calls defense counsel to state that everything he said was a lie. In fact, it was he who hired the defendant to drive the truck. He also told the defendant that it contained marijuana.

What are the ethical responsibilities of defense counsel in this situation?

There appear to be three distinct questions in this case: (1) Is defense counsel obligated to advise Smith to contact the court or prosecutor? Answer: no. (2) Should defense counsel himself advise the court or prosecutor of the contents of Smith's call? Answer: no. (3) Should defense counsel proceed with the trial as though he never received Smith's call? Answer: yes.

1. Advice to Smith: There is no obligation to give advice to Smith. In **DeLuca v. Whatley** (1972) 42 Cal.App.3d 574, the court held defense counsel owes no duty to the witness when defense counsel failed to advise him of possible criminal prosecution and the witness's testimony resulted in his arrest. That case involved a civil suit by the witness whom the criminal defense attorney called to testify at a preliminary hearing, and did so with the knowledge the witness would be incriminating himself. The court held defense counsel was under no obligation to the witness to advise him of his rights or the predicament he would be in if he testified.

Also, DR 7-104(A)(2) of the ABA Code³⁸ says in regard to communicating with a person with an adverse interest: "During the course of his representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

Defense counsel should therefore give no advice to Smith except perhaps, if Smith starts asking for legal advice, to advise him that counsel cannot give him advice and if Smith desires it, he should contact an attorney. Any other advice, such as a warning about a possible perjury charge, may well be interpreted as a subtle attempt to suppress evidence if Smith decided to call a prosecutor and distort the advice given. Of course, under no circumstances should Smith be discouraged from talking to the prosecutor, As 4.3(d) of the ABA Standards, The Defense Function states: "Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor...information which such person has a right to give."

2. No Obligation to Apprise the Court or Prosecutor. The California Rules of Professional Conduct 5-220 prohibits the suppression of evidence that the "member has a legal obligation to reveal or to produce."³⁹ But under these circumstances, the attorney had no duty to reveal this information.

DR 7-101(A)(3) provides that a lawyer may not prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B). Because disclosing to the court or prosecutor will undoubtedly prejudice the defendant, the attorney must decide if the California Rule 5-220 (or

³⁸ While there is no direct counterpart in the Model Rule, the commentary to Rule 4.3 states, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."

³⁹ EC 7-27 provides that a lawyer shall not suppress evidence that he or his client have a legal obligation to reveal or produce.

DR 7-102(B)(2)) requires such disclosure. The latter makes disclosure mandatory when a person other than the defendant has perpetrated a fraud on the court and is not unlike DR 7-102(A)(3) (prohibiting the lawyer from concealing or knowingly failing to disclose that which he is required by law to reveal) and DR 7-102(A)(6) (prohibiting the lawyer from participating in the creation or preservation of evidence when he knows it is obvious that the evidence is false).⁴⁰

ABA Opinion 287 (1953) held that a lawyer's duty to his client transcends even his duty to disclose perjury which resulted in a judgment otherwise unobtainable -- at least as long as the attorney was unaware that the testimony was false at the time it was given.⁴¹ Yet, under ABA Standards, The Defense Function, 7.5[a]): "Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity."

The problem here is that counsel would have to decide which version is true, the one given under oath, or the one in the phone call. Though Smith's recantation has the ring of truth, the defense attorney cannot know for sure that it **is** the truth and that his testimony at the trial was false. Who knows what pressures have been put upon Smith to make this call? The call may be motivated by reasons other than to reveal perjury. Since the obligation to his client is to resolve conflicts by giving the client the benefit of the doubt, defense counsel should not be required (or expected) to disclose the contents of Smith's call to the prosecutor or the court given the testimony under oath which Smith has given

⁴⁰ Under Model Rule 3.3, Candor Toward the Tribunal, a lawyer who has offered material evidence and comes to know of its falsity "shall take reasonable remedial measures." Model Rule 3.3(a)(4). This rule applies even if compliance requires disclosure of client confidences. Model Rule 3.3(b).

⁴¹ *But see* ABA Formal Opinion 87-353 which advises that, when an attorney becomes aware of the perjury after the fact but before the conclusion of the proceeding, the attorney must disclose client perjury to the tribunal under Model Rule 3.3(a) and (b). The opinion does not address perjury by a third party, but Model Rule 3.3(a)(4) addresses any material evidence offered by the lawyer that he or she subsequently learns is false and (b) states that such must also be disclosed if discovered before the conclusion of the proceeding.

which contradicts his phone call.

3. Defense Counsel's Conduct at Trial. EC 7-26 provides that:

The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

Disciplinary rules add little to this advice. DR 7-102(A)(4) merely states that a lawyer shall not use perjured testimony or false evidence. However, ABA Standards, The Defense Function, 7.5(a) does make it unprofessional conduct for a lawyer to fail to take reasonable remedial measures with evidence discovered to be false.

The fact that Smith now says in a phone call he lied when he testified under oath at the trial does not make it proper for the attorney to decide that Smith was not telling the truth at the trial. The attorney has fulfilled his obligation to all concerned parties by either saying nothing, or if appropriate, advising Smith to contact an attorney. Defense counsel's responsibility to everyone, save his client, ends at that point.

Just as EC 7-6 requires that when a lawyer is uncertain as to the state of mind of his client, he should resolve reasonable doubts in favor of that client, here too, if defense counsel has some doubt about whether the witness told the truth at trial, he must assume truthfulness. The attorney would violate DR 7-101(A)(3)⁴² if he did not argue Smith's trial testimony to the jury. Moreover, were the defendant expressly to urge the attorney to do so, he would violate EC 7-7 if he refused -- since the provision makes the decision that of the client and not of the attorney.

⁴² "A lawyer shall not intentionally...prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B)" [which requires a lawyer to reveal any fraud on the tribunal clearly established as perpetrated by his client or other person]. This rule complicates the above issue — does Smith's call "clearly establish" that he committed a fraud?

PROBLEM TEN

Defense counsel appears with the client for a sentencing hearing. The probation report reflects no previous record of arrests or convictions, but counsel has learned that the client has two recent arrests and convictions for possession heroin. The prosecutor has no record on the defendant and both he and the probation officers recommend probation based on the defendant's supposedly clean record. Prior to imposing sentence, the court says, "I've seen this man before. Defense counsel, does he have a record?"

What is the proper response?

Answer: If the information came from the client about the priors, as is almost always the case, counsel cannot give up that information to the judge. Try to finesse the inquiry back to the DA or the probation office.

Defense counsel in this situation faces competing pressures: the duty to the client to preserve confidences and to represent the client with undivided fidelity, and the duty to be scrupulously candid and truthful in representations before the court.⁴³

ABA Opinion 287 (1953)⁴⁴ states that when the court is about to impose a

⁴³ See ABA Standards, The Defense Function § 1.2(f) (3rd Ed. 1993): "Defense counsel should not intentionally misrepresent matters of fact or law to the court"; DR 1-102(A)(4): "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"; and DR 7-102(B)(1): A lawyer receiving information clearly establishing that his client has perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

⁴⁴ The California State Bar Commission on Professional Responsibility followed this opinion in its discussion of this issue in Formal Opinion 1986-87 (1987), and ABA Formal Opinion 87-353 (1987) advises that Formal Opinion 287 is still valid under these particular facts. *Cf.*, **Marin Municipal Court v. Marin**

sentence based on misinformation that the defendant has no previous record, defense counsel has no duty to correct this misinformation if he learned of the previous record from communications with his client. However, if the attorney learned of the record independently of his client, and he has reason to believe that the court is relying on his silence as corroboration, the attorney should tell the court not to rely on that silence.

In the problem at hand, of course, the court has asked defense counsel directly if his client has a record. According to Opinion 287 the solution is for the attorney to ask the court to excuse him from answering the question. Again, in the real world, this must be finessed rather than saying, "I am ethically precluded from answering," retort with, "The DA has the resources to check this, your honor, let's hear from him."

If this tact fails, the attorney should request a side-bar to state that he/she has considered the issue in depth and that research says that counsel cannot be looked to for an answer. If this request is denied, the attorney should attempt to withdraw from the case.⁴⁵

However, as noted in the next Q&A, should it come to light that the sentence was based upon a false assumption of no record created by the client, this could be grounds for revocation of probation later.

PROBLEM ELEVEN

While being escorted from court after having pled guilty to a misdemeanor for possession of three grams of heroin, the client says to defense counsel: "By the way, the three grams was just a sample I was carrying from a kilo of pure heroin I have back at the house. The sample was for a friend of mine to whom I was trying to sell the kilo. I have been making my living this way for three years. Do you think I should tell the probation officer all this?"

Superior Court (Sinclair) (1988) 199 Cal.App.3d 19, 27 (court cannot require defendants to reveal whether or not they suffered priors on a plea form.)

⁴⁵ The described approaches are also valid under the Model Rules. *See* ABA Formal Opinion 87-353.

What should defense counsel advise?

This situation requires a resolution of the same competing ethical precepts cited in Problem Ten. Here, however, there will be no perpetration of a direct fraud on the court since a probation officer is involved rather than the court itself. This would appear to be a distinction without a difference since deception of the probation officer will undoubtedly mean later deception of the court. Therefore the client should under no circumstances misrepresent facts to the probation officer. Rather, the client should be advised not to volunteer the information during the interview.

In anticipation of this problem, defense counsel should prepare a written version of the facts for submission to the probation officer and inform the client to say nothing else about the offense conduct on advice of counsel. Counsel has a right to be at the interview and can spare the client the need to say this directly.

Undoubtedly, a refusal to discuss the matter with the probation officer will generate an unfavorable impression in the mind of the officer which will result in an unfavorable dispositional recommendation in the probation report. But this will be better than the consequences of a full revelation. Under federal sentencing guidelines, an admission of more aggravated relevant offense conduct can result in a devastating augment of the sentence. As is often the case, a prudent silence is the sacred vessel of wisdom. Less elegantly put, loose lips sink ships.

If the client declines to follow the above advice, and it becomes apparent from a reading of the resulting presentence report that he has, in fact, actively misrepresented the circumstances surrounding the offense to the probation officer, the attorney must take pains to insure that his or her conduct at sentencing does not vouch for the accuracy of the misinformation contained in the presentence report. However, the attorney is under no duty to reveal the information to the court since it was gained during a privileged communication from his client.⁴⁶

It should be remembered that the law is clear that a probationary sentence

⁴⁶ EC 4-4; DR 4-101(B)(1) and (2); ABA Comm. on Professional Ethics, Opinions, No. 202 (1940), No. 287 (1953), No. 353 (1987); California Business and Professions Code §6068(e). *See also* Problem Ten, *supra*.

obtained through the concealment or misrepresentation of a material fact to the sentencing judge may be made the basis of a revocation of the probationary order, even though no post-sentencing violation has been committed. (**People v. Johnson** (1974) 10 Cal.3d. 868, 873 [112 Cal.Rptr. 556; **People v. Haskins** (1985) 171 Cal.App.3d 344; 214 Cal.Rptr. 685]; **United States v. Ecton** (9th Cir. 1972) 454 F.2d 464; **Trueblood Longknife v. United States** (9th Cir. 1967) 381 F.2d 17.)

When this circumstance is explained to the defendant, it may persuade him or her to follow defense counsel's advice in the first instance.

PROBLEM TWELVE

Defense counsel files eleven well-researched, innovative pretrial motions complete with thirty-five pages of points and authorities in behalf of a client. At the motion hearing, counsel asks for two days to hear the motions and that they be heard before in a session to avoid harmful publicity to the client.

The judge, irate, accuses counsel of filing frivolous motions as an unethical tactic to delay the defendant's trial. Counsel wishes to respond on the record to this tirade to acquaint the jurist with the job requirements of being a criminal defense attorney.

Answer:

The filing of pre-trial motions is an absolute necessity for obtaining needed relief on evidentiary issues and for preserving an adequate record on appeal. Defense counsel would be ineffective for failing to vigorously pursuing discovery, suppression motions, and the like. See **Kimmelman v. Morrison**, 477 U.S. 365 (1986) (failure to bring discovery motion to discover material for motion to suppress is IAC). Counsel also has an ethical duty to be competent. Rule 3-110, California Rules of Professional Conduct.

Filing numerous technical pre-trial motions occasionally draws bitter comment from trial and appellate courts. For example, a California court of appeals has categorized litigious motion-filing defense attorneys in the following manner:

The first category [of defense attorney] files every conceivable motion and presents issues ad nauseum. This attorney slows down the wheels of the administration of justice, exasperates trial judges, and bores and often succeeds in confusing juries. He does everything "by the book" and his win-lose ratio usually leaves much to be desired. On appeal, it must be conceded that he has made a good record. No stone has been left unturned. Of course, he lost his case but he has made a dandy record.

(**People v. Eckstrom** (1975) 43 Cal.App.3d 996 [118 Cal.Rptr. 391].)

Nonetheless, despite the protestations of trial and appellate courts, defense counsel has an ethical and professional responsibility to file each and every non-frivolous pre-trial motion to advance the interests of the client.⁴⁷ As noted, failure to do so may even result in the incompetent representation of the client and the need for new hearings or trials.⁴⁸

The ABA Standards, The Defense Function address themselves to this issue in several pertinent references. Standard 1.2(b) (The Function of Defense Counsel) provides, for instance, that:

The basic duty defense counsel for the accused owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

⁴⁷ ABA Code, Canon 7, EC 7-1: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law...."; Model Rule 1.3, Comment 1: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

⁴⁸ See **People v. Ibarra** (1963) 60 Cal.2d 460 [34 Cal.Rptr. 863, 386 P.2d 487] (defense attorney's failure to raise fourth amendment issue held incompetent representation).

The Commentary to this standard suggests that:

Defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters, and though such resistance should never lead to disrespectful behavior, defense counsel may appear unyielding and uncooperative at times. In so doing, defense counsel is not contradicting his or her duty to the administration of justice but is fulfilling a necessary and important function within the adversary system.⁴⁹ Defense counsel should not be viewed as impeding the administration of justice simply because he or she challenges the prosecution, but as an indispensable part of its fulfillment.

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment.⁵⁰

Standard 1.3(d) cautions against the use of procedural devices solely for the purpose of delay.⁵¹ To do so is professionally unethical. However, the conflicting consideration of zealously representing the client is recognized in the commentary to Standard 1.3(d) in which it is noted that:

⁴⁹ *See, e.g., McCoy v. Court of Appeals* (1988) 486 U.S. 429, 435; **United States v. Wade** (1967) 388 U.S. 218, 256-258 (White, J., concurring and dissenting).

⁵⁰ Commentary to §1.2, ABA Standards, The Defense Function, 122-123 (3rd Ed. 1993).

⁵¹ The California Rules of Professional Conduct, Rule 3-200(B) also cautions against "present[ing] a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law."

an overly aggressive concern for delay may impel a lawyer to eschew a remedy which in good faith the lawyer believes should be pursued in the client's interest. It may also tend to imply that the law is more concerned with expedition than with justice, an implication that inevitably will cause disrespect for its processes and thus undermine its efficacy. To the extent that the procedural rules permit dilatoriness by the taking of certain procedural steps, the fault is in the procedure and in lax judicial administration, not in the lawyer's conduct.⁵²

This language should be an effective answer to the attempts of a judge to thwart defense counsel's bringing of pre-trial motions.

Standard 3.6 ("Prompt Action to Protect the Accused") of the ABA Standards, The Defense Function, is also relevant and provides in part that

Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

Other ABA Standards also mandate defense counsel's bringing proper pretrial motions. With respect to attorneys employed in public defender offices, the standards relating to Providing Defense Services (3rd Ed. 1992) provide in Standard 1.1 that "[t]he objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective." A judge's attack on defense counsel's proper efforts on behalf of the client certainly does nothing to convince the public of the need for effective

⁵² Commentary to §1.3(d), ABA Standards, The Defense Function, 128-129 (3rd Edition, 1993).

representation of those accused of crime.

Counsel should also look to various ethical considerations as justification for bringing all appropriate motions. Canon Seven of the ABA Code requires that "a lawyer...[should] represent his client zealously within the bounds of the law." As pointed out in the Ethical Considerations promulgated within this Canon, what is within the bounds of the law depends upon the position of the attorney. EC 7-3 says, for example, that "[w]hile serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." EC 7-4 suggests that "[t]he advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." EC 7-4 further states that a lawyer is not justified in asserting a position in litigation that is frivolous. But the trial judge should give a great deal of leeway to the attorney's professional judgment as to what is and what is not permissible or required in this area. Cantankerous judges should be reminded of EC 7-19 which says that:

[T]he advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.

As ABA Opinion 280 (1949) points out:

[T]he lawyer...is not an umpire, but an advocate. He is under no duty to refrain from making any proper argument in support of any legal point because he is not convinced of its inherent soundness...His personal belief in the soundness of his cause or the authorities supporting it is irrelevant.

The comments in **Eckstrom**⁵³ notwithstanding, the case law on this point seems uniformly to support the requirement of zealously effective advocacy. In **Anders v. California** (1967) 386 U.S. 738, *rehearing denied*, 388 U.S. 924, the Supreme Court stated that "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in the behalf of his client..." **Id.** at 744.

⁵³ See text, *supra*.

This sentiment is echoed in **High v. Rhay** (9th Cir. 1975) 519 F.2d 109, in which the Ninth Circuit stated: "Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law." **Id.** at 113.⁵⁴

With the above legal and ethical mandates in mind, the jurist will hopefully be educated. If not, too bad, but no defense lawyer should fear filing non-frivolous pre-trial motions or taking other essential actions which draw the judicial wrath.

PROBLEM THIRTEEN

Smith is charged with embezzling a large sum of money from his own bank. He contacts a bank attorney who, not being a criminal law practitioner, refers Smith to defense counsel. The bank attorney later sends a bill requesting five percent of defense counsel's fee for the referral.

Smith wants his fee to be exclusive of any referral fee charge. He also offers defense counsel a fifty percent bonus if he gets out of his predicament unscathed. Defense counsel charges a fee of \$50,000. After a two-week trial Smith is convicted. He then refuses to pay the fee, claiming it to be unreasonable and unethical.

What are the ethical problems inherent in this situation?

A. The "reasonable" fee

EC 2-17 says that, with respect to clients who are capable of paying reasonable fees, a lawyer may not demand more than what is "reasonable." What is "reasonable" depends entirely on the circumstances of each case. For example, one federal district court found a fee of \$31,500 to a respected criminal attorney to

⁵⁴ See also **McCartney v. United States** (9th Cir. 1965) 343 F.2d 471: "[It is the duty of counsel] to honorably present his client's contentions in the light most favorable to his client"; **Willis v. United States** (9th Cir. 1973) 489 F.2d 707.

be reasonable considering the complexity of the case, the five and one-half days required for trial, and other factors. (**Miller, et al. v. Rosenthal** (E.D.N.Y., Nov. 12, 1974) 16 Cr.L.Rptr. 2161.)

The standards for the determination of an attorney's fee are set forth in the California Rules of Professional Conduct, Rule 4-200,⁵⁵ which provides an eleven factor test to determine whether a fee is conscionable. Included are:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee agreement.

The California Supreme Court has disciplined attorneys for charging exorbitant fees.⁵⁶ In **Bushman v. State Bar** (1974) 11 Cal.3d 558 [522 P.2d 312,

⁵⁵ See also ABA Standard, The Defense Function 3.3(b) (3rd Ed. 1993); DR 2-106(B).

⁵⁶ Other cases addressing attorney's fees include **Jeffrey v. Pounds** (1977) 67 Cal.App.3d 6, in which the same law firm represented a husband in personal injury action and then later the wife in a divorce action. The court held that the firm violated Former Rule 5-102 (B) by representing conflicting interests and remanded the matter to the trial court to determine the date of the violation. The lower court was instructed to determine the amount of fees following the ethical

113 Cal.Rptr. 904], a lawyer was suspended from practice for one year because he charged \$2,800.00 for services worth no more than \$300.00. The situation was worsened by the attorney's insistence that the clients, who were on welfare, execute a \$5,000 promissory note in his favor. In imposing discipline, the court recited the guiding law in the area:

It is settled that gross overcharge of a fee by an attorney may warrant discipline. The test is whether the fee is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." (**Herrscher v. State Bar** (1935) 4 Cal.2d 399, 401-402 [29 P.2d 832], quoting from **Goldstone v. State Bar** (1931) 214 Cal. 490, 498 [6 P.2d 513, 80 A.L.R. 701].) In **Herrscher** this court stated that most cases warranting discipline on this ground involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds. (4 Cal.2d at 403). (**Id.** at 563 [113 Cal.Rptr. at 906].)

In **Tarver v. State Bar** (1984) 37 Cal.3d 122 [207 Cal.Rptr. 302], the attorney was disbarred in part for charging his client more in fees that were recovered in the settlement of an age discrimination case. This was held to be an unconscionable fee.

In **Champion v. Superior Court (Boccardo)** (1988) 201 Cal.App.3d 777 [247 Cal.Rptr. 624], a junior partner left the firm. He had a contract with the partners which stated that if he left the firm and took his cases, he would only be entitled to remuneration from any awards in the case as determined by his partnership share. His share was 1.79%. He argued the contract produced an unconscionable fee, noting that if he won a case for \$160,000, he would received \$912 while his ex-partners would get \$50,088. The court agreed and struck the contract as shocking to the conscience.

violations: "The trial court should limit plaintiff's fee to the value of services rendered before the date of the violation," (**Id.** at 12). *See also* **Cal Pak Delivery v. UPS** (1997) 52 Cal.App.4th 1, 18 (no fee when there are ethical violations).

Under the facts of this question, it is highly unlikely that the fee charged Smith would not be considered as "unreasonable" under the rules barring some default by Smith in competently representing the client.

B. The "referral" fee

EC 2-22 suggests that, without the consent of the client, a lawyer should not associate in a particular matter with another lawyer outside the firm. If there is an association of attorneys on the case, fees may be divided, but only if the division is in proportion to the services performed and the responsibility assumed by each attorney.⁵⁷

California became the forty-ninth state to ban referral and forwarding fees when Rule 2-108 of the California Rules of Professional Conduct for members of the State Bar was approved in 1972. This was revised in 1988 with Rule 2-200 which is similar in intent and scope.⁵⁸ It reads:

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

⁵⁷ See DR 2-107(A); ABA Standards, The Defense Function, Standard 3.3(e); Model Rule 1.5(e)(1) allows for "division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation."; California Rules of Professional Conduct 2-200 is silent on the matter of attorney division of fees according to the proportion of services performed, but prohibits an increase in fees "solely by reason of the provision for division of fees...."

⁵⁸ Kohlman, **An Equitable Contingency Fee Contract**, 50 Calif. B.J. 268, 271 (1975). See also ABA Standards, The Defense Function, Standard 2.3 (3rd Ed. 1993).

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

The referral fee in the problem would not be allowed since it was not consented to by the client. Further, since the bank attorney did no work and assumed no responsibility, it would fall under the prohibition of part B of the rule as well. See **Campagna v. City of Sanger** (1996) 42 Cal.App.4th 533 (City Attorney prohibited from receiving a referral fee he negotiated for sending a lucrative civil case to a private law firm where the latter would sue on behalf of the City.)

C. The contingent fee in a criminal case

Simply stated, public policy condemns contingent fee arrangements in criminal cases largely because legal services in criminal matters do not produce a *res* from which to pay a fee.⁵⁹ Although the lawyer may not set a contingent fee for a criminal case, he can of course set one fee in the event the case is settled and another if the case is tried since such fees would be based on an estimate of the time necessary to present the case. See **People v. Clancy** (1985) 39 Cal.3d 740, 747: "[T]he contingent fee is generally considered to be prohibited [in] the

⁵⁹ EC 2-20.

prosecution and defense of criminal cases....”]; ABA Code DR 2-106(C); Model Rule 1.5(d)(2).

A fee that is contingent on the successful resolution of a criminal case is illegal. (**In re Fasig** (Ind. 1983) 444 N.E.2d 849 (attorney given public reprimand for promising client that his fee would be reduced and would be contingent upon her receipt of a lesser criminal penalty).)⁶⁰ DR 2-106(C) of the ABA Code condemns such fees in strong language, deeming them void, illegal and grounds for disciplinary action.⁶¹

Smith's offer of a bonus for acquittal is such a contingent fee offer and should therefore be rejected by defense counsel.

PROBLEM FOURTEEN

As a fee for representing a defendant charged with kidnap and murder, defense counsel draws up a retainer agreement taking an assignment of the defendant's right to money seized by the police, a lien on the defendant's home, and all publication rights to the story of the defendant's life and trial. The defendant also gives defense counsel funds received as ransom, but the attorney refuses to apply this to the fee and places the money in a safe deposit box until the conclusion of the case.

During pre-trial motions, a serious rift develops between the defendant and defense counsel over the retainer agreement. Defense counsel seeks to withdraw from the case against the defendant's wishes, while the defendant wants a revised retainer agreement excluding the publicity rights section.

What are the issues concerning the attorney's actions?

⁶⁰ See also **State v. Hilton** (Kan. 1975) 538 P.2d 977; **Peyton v. Margiott** (1959) 398 Pa. 86 [156 A.2d 865].

⁶¹ See also ABA Standards, The Defense Function, 3.3(f) and commentary, p. 157 (3rd Ed. 1993).

A. Ransom money for safe keeping

This issue has been covered somewhat by the **People v. Meredith** (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612] question and answer. See Problem Eight. A case closely analogous to this one is **In re Ryder** (E.D.Va. 1967) 263 F.Supp. 360. There an attorney took possession of stolen money (knowing it had been stolen) in order to keep it out of sight pending his client's trial. The federal district court suspended the attorney from practice for eighteen months, holding that it is not only unethical but illegal for the attorney knowingly to receive stolen money and keep it from the government's attention. As DR 7-102(A)(3) warns: it is improper for an attorney in his representation of a client to "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."

Having taken possession of the money, the more dicey question for the attorney is how does the attorney bring the ransom money to the state's attention and yet protect the client? In **Baird v. Koerner** (9th Cir. 1960) 279 F.2d 623, suggests an approach to solving this problem. There a client provided his attorney with money he had not paid in federal income tax. The attorney forwarded the money to the Internal Revenue Service. The IRS then subpoenaed the attorney to discover the identity of the person who had provided the money. On appeal, the attorney's claim that the identity of his client was protected by the attorney-client privilege was upheld by the Ninth Circuit. The Seventh Circuit has followed **Baird**. In **Tillotson v. Boughner** (7th Cir. 1965) 350 F.2d 663, the court declared:

[c]onsidering the peculiar facts of this case, we subscribe to the statement in 97 *C.J.S. Witnesses* §283, at p. 803: "...[a]n attorney may not be compelled, at the insistence of a hostile litigant, to disclose his retainer or the nature of the transaction to which it is related, when such information could be the basis of a suit against his client."

An attorney in the situation posed by problem fourteen, therefore, should turn the ransom money over to the authorities, but should try to do so in a manner not identifying who gave it to him.

B. Property assignments as a fee

It is not ethically improper for a lawyer to protect the right to collect a fee for services by the assertion of legally permissible liens, even though by doing so

he may acquire an interest in the outcome of the litigation.⁶² Also, assignments of future interests or the client's right to seized property would also appear permissible.⁶³ But, when clients put up their property as security for a legal fee, there is an adversary relationship established since the attorney has acquired an interest in the client's property adverse to that client. *See Rule 3-300*, requiring full disclosure, fair terms, and client consent in writing after having consulted independent counsel. (**Hawk v. State Bar** (1988) 45 Cal.3d 589.)⁶⁴

Special considerations come into play when as part of a fee in a notorious case the attorney acquires an interest in publication rights concerning the subject matter of the case. DR 5-104(B) states:

Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or his proposed employment.

The concern over publication rights agreements stems from a fear that a defense lawyer may be influenced to represent his client in such a way that the "value" of the trial as a book or motion picture or the like will be enhanced to the detriment of the client. Thus, "such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment...."⁶⁵ *See In re Corona* (1978) 80 Cal.App.3d 684, 720 [145 Cal.Rptr. 894]; **Maxwell**

⁶² EC 5-7.

⁶³ *See* DR 5-103.

⁶⁴ California Business & Professions Code § 6148(a) requires that, when the foreseeable total expense to the client will exceed \$1,000, the contract for services shall be in writing.

⁶⁵ EC 5-4. *See also* Model Rule 1.8(d) and (j); ABA Standards, The Defense Function, 3.4 (3rd Ed. 1993) which says that it is unprofessional conduct for a lawyer, prior to the conclusion of all aspects of the case, to enter into any agreement with a client by which he acquires an interest in publication rights with respect to the case.

v. Superior Court (1982) 30 Cal.3d 606 (client can waive conflict for a book contract).

The attorney in the problem should not have acquired any publication rights to the case.

C. Withdrawal of counsel because of a fee dispute

The general rule in California is that attorneys may withdraw from a case if they follow the procedure of C.C.P. §284 which requires that they give notice to the client and then obtain a court order to be relieved. The purpose of giving notice to the client is to allow the client to state any objections to the court before the attorney is relieved. *See* **People v. Bouchard** (1957) 49 Cal.2d 438 [317 P.2d 971].

If the client's funds are exhausted, or if the latter simply refuses to make further contractual payments on a retainer, the defense attorney may move for withdrawal from the case: "It is generally recognized that the failure or refusal of a client to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so will furnish grounds for the attorney to withdraw from the case." (**People v. Prince** (1968) 268 Cal.App.2d 398, 406 [74 Cal.Rptr. 197, 201].) However, the court retains the discretion to deny counsel leave to withdraw.

In **People v. Collins** (1966) 242 Cal.App.2d 626, 636 [51 Cal.Rptr. 604, 612], for instance, the defense attorney "stated to the court that he had been retained by his client with the understanding that he would not commence preparation for trial until his fee had been paid, and therefore he had not prepared." On this basis, counsel moved for a continuance which was denied. He then made a motion to be relieved as counsel for the defendant without stating any grounds. The court denied the attempt to withdraw and the appellate court affirmed, deeming it a "device to force a postponement of the trial." (**Id.** at 637 [51 Cal.Rptr. at 613].) The inferred basis of the attempted withdrawal was the failure of the client to make payments toward the fee. However, note that DR 2-110(C)(1)(f) permits the withdrawal of defense counsel when the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees."

PROBLEM FIFTEEN

The defendant appears in court, declares indigency, and is appointed an attorney. Counsel is then appointed. Soon after receiving the appointment, counsel is called by a distant family relation who offers to pay all legal fees and expenses for representing the defendant. Also, during the initial interview with the defendant, the latter reveals to counsel that he has assets far in excess of what he told the court. The prosecutor gets whiff of this and subpoenas all information from the attorney's files concerning the financial eligibility of the defendant.

What courses of action are open to the attorney?

1. Receiving Fees From a Third Party

The distant family member's offer to pay fees raising several issues. It is unethical for the lawyer to receive compensation from any source without the knowledge and consent of his client.⁶⁶ There is always the potential for an actual conflict where attorney is paid by third party unknown to the client given possibility that the fee could have been paid by an unindicted co-conspirator with the idea of keeping the client's mouth shut. *See Quintero v. United States* (9th Circuit 1994) 33 F.3d 1133, which reversed the denial of a 2255 habeas petition to vacate the sentence. The issue was whether the attorney's advice to the client not to accept a government offered plea agreement was influenced by any attorney loyalty to the fee payor who happened to be an unindicted co-conspirator.

California Rules of Professional Responsibility, Rule 3-310, states:

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship;

⁶⁶ *See* EC 2-21; Model Rule 1.8(f); California Rules of Professional Conduct 3-310(F); ABA Standards, The Defense Function, 3.3 Commentary, p. 155 (3rd Ed. 1993).

and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if: (a) such nondisclosure is otherwise authorized by law; or (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Here, there is not enough data to suppose that the family member's contribution would compromise the independence of the attorney, but this should be explored and then discussed with the client. Rule 3-310 requires the discussion and representations be in writing.

Case law is clear that if the government suspects that the fee payor is part of the overall criminal enterprise, it often can subpoena the attorney to the grand jury to find out who paid the fee. *See In re Osterhoudt* (9th Cir. 1983) 722 F.2d 591 **In re Grand Jury Proceedings (Lawson)** (9th Cir. 1979) 600 F.2d 215, 218; **United States v. Hodge & Zweg** (9th Cir. 1977) 548 F.2d 1347, 1353; **In re Michaelson** (9th Cir. 1975) 511 F.2d 882.

2. Retaining Appointed Counsel?

Assuming that disclosure and consent is not a problem, another issue arises where counsel has been appointed. Of course, the courts should be delighted that private funding will cover counsel's fees and costs and thus they should be willing to end the appointment and allow counsel to proceed as retained counsel. But this will require full disclosure to the court.⁶⁷

ABA Informal Opinion 733 (March 12, 1964), involving a court-appointed attorney who received money and an interest in an estate from relatives of the

⁶⁷ **Roswall v. Municipal Court** (1979) 89 Cal.App.3d 467, holds that a court does not have the power to relieve the Public Defender where the defendant's financial situation changes so he no longer qualifies.

indigent defendant, recommended that in such a situation the attorney must fully inform the court of receipt of the compensation. The opinion further stated that when a court-appointed attorney comes upon a client who is not indigent, the lawyer may not make a private employment contract for legal services with him in lieu of the fee to be paid by the court. The lawyer should require that the client advise the court of the actual facts. An agreement with the client as to legal fees must then await the court's redetermination of the client's indigency. Any retainer paid by the defendant or his relatives should be returned, leaving them free to employ other counsel.

3. Affidavit of Indigency versus Affluence: Another Problem

The hypothetical fact situation raises another problem. If a client fills out an affidavit of indigency and receives a court-appointed lawyer, the client runs the risk of a perjury indictment if it later appears that he had funds to hire an attorney. In **People v. Canfield** (1974) 12 Cal.3d 699 [117 Cal.Rptr. 81], the California Supreme Court held that statements made by an indigent defendant to a public defender concerning his financial status for the purposes of receiving appointed counsel were privileged within the lawyer-client relationship. As the Court stated: "The lawyer-client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results." (*Id.* at 705, [117 Cal.Rptr. 84-85] (citation omitted).) Thus, if an appointed attorney discovers from the client has assets in excess of those revealed to the court at the time of the appointment, counsel should not be so hasty as to run to the court with this new information.

DR 7-102(B)(1) of the ABA Code requires an attorney to bring to the attention of the court any fraud committed on it by the client except when the information is protected as a privileged communication.⁶⁸ The ethical problem for the attorney in this area is the familiar tug-of-war between the competing demands of the client and those of the court. There is no question but that the defense attorney should choose the path that best protects the client. When the source of information is the client, the privilege requires non-disclosure.

⁶⁸ *But see* corresponding Model Rule 3.3 and commentary.

PROBLEM SIXTEEN

Your client, whom you are representing in an assault with intent to commit murder case is now out on bail pending trial. Having interviewed the client and familiarized yourself with his background, you that he has a potential for violence based on his previous convictions for assault, arson, and voluntary manslaughter. He has confidentially related to you that he has committed a great number of as yet undetected violent acts. Having just discussed the facts of the current case, the client abruptly interrupts the interview with the following statement: "I am not going to go through any prosecution. I'm going to take out Charlie [the victim in this case]. So don't you worry about preparation. So long." You chase after the client in an attempt to stop him from leaving the office, but are unsuccessful. What do you do?

Answer: These issues create difficult situations involving assessments of the credibility of the client. Does he really mean it? Is he just blowing off steam? The above question assumes the attorney has a solid basis to believe the threat is real. *See ABA Opinion 314* (1965) states that action is required when the attorney's belief is at the beyond-a-reasonable-doubt level.

By far the best course of action in such circumstances is not to let the client leave the office and to explain why his conduct could produce a series of actions which deepen his legal predicament. A lecture on the dangerousness of such a course of conduct coupled with an admonition that you will have to take action to warn the victim will hopefully discourage any further talk of violence. But this problem assumes that either the client cannot be reached for such a session, or ignores the advice and appears set on a path of violence.

The ABA Code of Professional Responsibility, DR 4-103(c)(3) states that a lawyer may reveal the intention of the client to commit a crime. The ABA Standards for Criminal Justice, Defense Function (Approved 1993) §4-3.7(d) states the following in the Commentary:

The confidentiality rule is subject, however, to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. To the extent a lawyer is required or permitted to disclose a client's

purposes even in such circumstances the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. In general, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Nonetheless, where defense counsel reasonably believes that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm, it is in the public interest that counsel have professional discretion to reveal information necessary to prevent such consequences. Section (d), following the ABA Model Rules of Professional Conduct, 2 takes this position. A lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer "reasonably believes" is intended by a client. The lawyer need not "know" such a result is intended. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

Defense counsel's exercise of discretion in this regard requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. Defense counsel's decision not to take preventive action permitted by section (d) does not violate this Standard.

Section (d) of the standard states that "counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm."

California Evidence Code section 956.5 states, "There is no privilege .. if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from

committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."⁶⁹

This statute, passed in 1993, apparently was a response to the Supreme Court decision in **People v. Clark** (1990) 50 Cal.3d 583, 621-622, which stated:

No express exception to the attorney-client privilege exists for threats of future criminal conduct... ¶ The comments of the California Law Revision Commission accompanying these sections suggest that no exception was intended to apply to a statement of intent to commit a crime alone. The comment on Evidence Code section 956 states only that "California now recognizes this exception. **Abbott v. Superior Court**, 78 Cal.App.2d 19, 177 P.2d 317 (1947). *Cf. Nowell v. Superior Court*, 223 Cal.App.2d 652, 36 Cal.Rptr. 21 (1963)." (29B West's Ann. Evid. Code (1966 ed.) § 956, p. 553.) The comment on Evidence Code section 981 states, however, with regard to substantially the same wording [concerning communications to enable a fraud to be committed]: "... It is important to note that the exception provided by Section 981 is quite limited. It does not permit disclosure of communications that merely reveal a plan to commit or plan to commit a crime or fraud; it permits disclosure only of communications made to *enable* or *aid* anyone to commit or plan to commit a crime or fraud. Thus, unless the communication is for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof, it is not made admissible by the exception provided in this section." (Italics in original.)

In response, the new statute specifically states that confidential communications lose that status if it appears that the client will commit a criminal act which will cause death or substantial injury.

⁶⁹ While the meaning of the statute is not at all clear with respect to a duty to warn, it does clearly mean that a court could require disclosure of these communications because they would not be privileged. See **Aceves v. Superior Court** (1996) 51 Cal.App.4th 584, 595 n. 11; *accord* **People v. Gionis** (1995) 9 Cal.4th 1996, 1208, n.4).

Thus, the issue of what to do is anything but clear cut. The San Diego Bar has issued an ethics opinion stating that an attorney could be subjected to discipline if he or she discloses the client's comments to any third party. (SDCBA Opn. No. 1990-1.) A Los Angeles Committee, however, adopts the ABA position to permit disclosure. (LACBA Opn. No. 436.) The California Supreme Court has three times rejected a proposed ethics rule that would allow lawyers to disclose in these contexts, as reported in the **LA Daily Journal** under the misleading caption, "Client Privilege Refuses to Yield, Even for Death," p. 1 (September 3, 1998). The Supreme Court may be rejecting these proposed ethics rule amendments because it believes this is a matter for the legislature to resolve by amending, Bus. & Prof. Code § 6068(e).

Nevertheless, the attorney saddled with this problem has to decide what to do with it. While the new statute does not say anything about the professional duty of the attorney to take action in that situation, given the lack of confidentiality, the above ethics opinions (primarily the ABA) and the Supreme Court decision in **Tarasoff**, it would appear that action is necessary when take to forestall death or serious injury at the hands of the client.

In **In re Tarasoff v. The Regents of University of California** (1976) 17 Cal.3d. 425, the Supreme Court held a psychotherapist duty-bound to attempt to warn the intended victim of a patient's threat to harm her. If **Tarasoff** applies, the attorney who believes that there is a serious chance that a client is intent on injuring a third party, must make an effort to warn the victim.

"When a therapist determines, or pursuant to the standards of his should determine profession, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever steps are reasonably necessary under the circumstances." (**Id.** 431.)

Tarasoff involved the killing of Tatiana Tarasoff by Prosenjit Poddar (*see People v. Poddar* (1974) 10 Cal.3d 750). Justice Tobriner, then the court's authority on tort law, traced the history of the duty to come to the aid of another:

...under the common law, as general rule, one person owed no duty to control the conduct of another [citations] nor to warn those endangered by such conduct (Rest.2d Torts, supra, § 341, com. c.; Prosser, Law of Torts (4th ed. 1971) §56, p. 341), the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct (see Rest.2d Torts, supra, §§ 315-320). Applying this exception to the present case, we note that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care; as explained in section 315 of the Restatement Second of Torts, a duty of care may arise from either "(a) a special relation ... between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation ... between the actor and the other which gives to the other a right of protection. (**Id.** at 435.)

Justice Tobriner noted that the common law rule of no duty to aid is under a process of steady erosion:

This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. (See Harper & Kime, *The Duty to Control the Conduct of Another* (1934) 43 Yale L.J. 886, 887.) Morally questionable, the rule owes its survival to "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue." (Prosser, Torts (4th ed. 1971) § 56, p. 341.) Because of these practical difficulties, the courts have increased the number of instances in which affirmative duties are imposed not by direct rejection of the common law rule, but by expanding the list of special relationships which will justify departure from that rule. (See Prosser, supra, § 56 at pp. 348-350.) (**Id.** at n.5.)

Tarasoff discusses tort law liability and exposure to money damages. The problem addressed in this article encompasses ethical liability (*i.e.*, discipline) as well. The two concepts are interrelated because the ethical standard for lawyers may serve as a "reasonable lawyer" negligence standard.

Tarasoff's analysis is certainly not startling. The difficult question is how far one must go in alerting the victim of the danger of harm. For example, would an anonymous phone call telling the victim, or victim representative, that the named

defendant is on his way to kill be a sufficient warning? Must the attorney reveal his or her name to the victim? This may depend on an assessment of whether the warning can be communicated effectively. Practically speaking, the attorney had better make good file notes that a warning call was made; perhaps it would be best to record your side of the call, or both sides if appropriate disclosure is made.

What if the victim cannot be located? Should the attorney call a representative of the victim? What about calling the police? Since **Tarasoff** indicates a professional has an obligation to warn of intended harm, warnings should be made to the most likely person to render timely assistance to the victim in such circumstances. See **Tarasoff**, *supra* at 439, n. 11, which states there is no "hard and fast rule."

If the client delivered the threatening message over the phone and hangs up, the attorney's troubles are enhanced as he or she is unable to make contact with the client to try to stop him. In that event, given the appropriate level of confidence that the threat is actual, counsel will have to take action to warn the victim. As Justice Tobriner noted:

The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime. (**Id.** at 440.)

But see **McClure v. Thompson**, 323 F.3d 1233 (9th Cir. 2003) (where D told attorney he committed a crime against a missing child and says where the child may be found, the attorney could reasonably believe the child is alive, then there is no 6th Amendment violation by anonymously phoning the police and revealing the child's location.)

Important Tarasoff Update: Business & Professions Code 6068(e) was amended to repeat the provision of Evidence Code 956.5 (also slightly expanded by this amendment). The latter now reads: "There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an

individual.”

Notice that the Evidence Code provision only states that there is no confidential communication privilege. It states no duty to act and did not address a contrary provision of Business & Professions Code 6068(e) which required attorneys: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

Section 6068(e) now reads: “Notwithstanding paragraph [(e)](1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”

The Legislative Counsel’s Digest states that the “bill would authorize an attorney to reveal confidential information to the extent that the attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm to an individual.” Note that the law focuses not only on client actions, but also on information from the client concerning any criminal act likely to harm another no matter whom the perpetrator might be.

The Bill went into effect July 1, 2004. Comments to the new section are extensive and the new Rule 3-100 is quoted in full below. But it answers several related questions:

1. When should the attorney inform the client about the attorney’s discretion to reveal the threatening communication when the threshold of believability is crossed?

Answer: The attorney can do so at the outset of the relationship or wait until the matter becomes relevant.

2. Must the attorney attempt to dissuade the client from acting upon the threat?

Answer: yes, a good faith effort must be made to dissuade the client.

3. If such a threat is made, will a conflict-of-interest arise between the attorney and client if the attorney elects to disclose?

Answer: Usually, yes. And this will mean the attorney will have to withdraw from the case unless informed consent is given by the client to remain.

One other recommendation by the Task Force was that in some circumstances the attorney may make disclosure of the threat to the potential victim or law enforcement anonymously.

See Rule 3-100 which follows:

Rule 3-100. Confidential Information of a Client

2. (A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to

himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In *Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of

confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

2. the amount of time that the member has to make a decision about disclosure;
4. whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
6. whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
8. the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
10. the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
12. the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse

disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal

confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

2. whether the client is an experienced user of legal services;
4. the frequency of the member's contact with the client;
6. the nature and length of the professional relationship with the client;
8. whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
10. the likelihood that the client's matter will involve information within paragraph (B);
12. the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
14. the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and

client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)

FINAL PROBLEM: THE SUICIDAL CLIENT

1. See Richard Dieter, "Ethical Choices for Attorneys Whose Clients Elect Execution," 3 *Georgetown Journal of Legal Ethics* 799.
2. Christy Chandler, "Voluntary Executions" 50 *Stan. L.Rev.* 1897 -- 1998 a very recent article.
3. The ABA Guidelines, 11.8.6, require counsel to present "all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." By that it is meant that electing not to present specific testimony would enhance the mitigation case.

Guideline 11.4.2 which addresses client contacts, state "it is the defendant's life you are trying to save." It goes on to say that "The complexity and unique nature of the legal proceedings, stemming from the potentially lethal outcome, mandate careful consultation with the person who may be killed. Furthermore, counsel may

have to try to keep the client from making suicidal choices about the case. Capital counsel frequently 'must not only struggle against the public and prosecution, but against the self-destructive behavior of the client as well.' . . ."