



**ETHICAL
STICKY WICKET**

**PROFESSIONAL
CONDUCT**



When the Criminal Client Intends to Commit Perjury

Grace M. Giesel

In the case of *Brown v. Commonwealth*, the Kentucky Supreme Court has provided trial courts and lawyers, especially criminal lawyers, with some much needed ethical guidance. While the case itself was a criminal appeal, not an attorney discipline matter, the Court's opinion provides insight into the ethical sticky wicket of the proper conduct of the lawyer for a criminal defendant when the defendant intends to commit perjury. Such a situation pits the constitutional rights of criminal defendants against the ethical duties of defense counsel to act with candor to the court.

Criminal defendants have the constitutional right to the assistance of counsel. Criminal

defendants also have the constitutional right to testify in their own defense, although the United States Supreme Court in *Nix v. Whiteside* clarified that a defendant has no constitutional right to testify falsely stating, "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely."

In addition, ethical standards prohibit attorney participation in the presentation of false evidence. The Kentucky Supreme Court has taken the opportunity presented by the *Brown* case to clarify an appropriate procedure for protecting the rights of defendants while also enforcing ethical attorney conduct in the context of a criminal defendant who intends to testify falsely.

Rule of Professional Conduct

Attorneys owe a special duty of candor to the court or other tribunal before which they appear. This duty trumps any duty of confidentiality attorneys otherwise owe to clients. Rule 3.3 of the Kentucky Rules of Professional Conduct (Kentucky Supreme Court Rule 3.130 (3.3)) deals with this duty. Rule 3.3 provides that a lawyer may not knowingly "make a false statement of material fact or law to a tribunal."

In addition, the rule provides that a lawyer may not knowingly "fail to disclose a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated upon the tribunal." This part of Rule 3.3 would be implicated if a lawyer made an untrue statement to a court or, for example, failed to disclose the death of the lawyer's client, a party, to the court.

Rule 3.3 also deals with the degree of candor required in an ex parte setting. In such a setting a lawyer must "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision."

Rule 3.3 states that a lawyer "shall not knowingly... [o]ffer evidence that the lawyer knows to be false." The Terminology section of the Rules of Professional Conduct defines knowledge as "actual knowledge of the fact

in question" but allows that knowledge "may be inferred from circumstances." The Rule provides that even if a lawyer does not know but "reasonably believes" evidence is false, he or she may refuse to offer the evidence.

As a matter of housekeeping, Rule 3.3 provides that a lawyer's duties under this rule continue to the conclusion of a proceeding and apply even if the rule requires the lawyer to disclose information otherwise protected by the duty of confidentiality. Rule 3.3 concludes by stating that the requirements of Rule 3.3 are "subordinate" to constitutional requirements.

Facts of *Brown v. Commonwealth*

The defendant in *Brown v. Commonwealth* was on trial for the possession of a controlled substance and several other offenses. Before the defense presented its case, the lawyer for the defendant informed the trial judge that he had a conflict that he would like to discuss with the court outside of the presence of the prosecution. The trial judge permitted an ex parte discussion. The defense attorney told the court that the defendant wished to testify in a manner inconsistent with the defense lawyer's investigation of the case. The defense lawyer stated that he believed his client had the right to testify but that he believed that he ethically could not participate in eliciting the testimony the defendant wished to give and could not rely on such testimony in his arguments.

The trial court discussed the matter at length with the defendant and the defendant's lawyer. The trial court explained to the defendant the repercussions of testifying falsely, including the ethical conflict such testimony created with the defendant's lawyer. The trial court told the defendant that if he wished to testify as he had indicated to his lawyer, he would be allowed to testify in a narrative statement and could make a closing argument. The trial court told the defendant that his attorney could remain in the courtroom or leave. The defense lawyer told the defendant that the situation might be worse if he remained in the courtroom.

After the prosecution completed the pre-

sentation of its case, defense counsel made appropriate motions for that stage of the proceeding and left the courtroom. The defense lawyer remained close at hand but not in the courtroom. The trial court told the jury that the defendant had chosen to represent himself for the remainder of the matter. The defendant then testified in a narrative statement. The prosecution cross-examined him and then the defendant gave his own closing argument.

The jury found the defendant guilty of possession of a controlled substance, guilty of operating a motor vehicle with a learner's permit but without a licensed operator and guilty of being a persistent felony offender.

Defense counsel returned for the sentencing phase of the trial. The defendant was sentenced to eighteen years in prison. On appeal the defendant claimed that he unconstitutionally was forced to proceed without a lawyer's assistance at trial.

Early Steps to Avoid the Problem

The analysis in the *Brown* opinion begins by noting that a lawyer who has determined that his or her client intends to testify falsely should attempt to convince the client to do otherwise. The opinion also notes that if the trial is not imminent the lawyer may be able to withdraw and thus avoid the ethical dilemma.

But in many matters, as in the *Brown* trial, the ethical problem does not present itself until the trial is imminent or in progress. Thus, the Kentucky Supreme Court undertook to provide guidance as to proper treatment of such a situation.

Commonwealth v. Mitchell

For assistance, the Court turned to the Massachusetts case of *Commonwealth v. Mitchell*, in which the Supreme Judicial Court of Massachusetts addressed a very similar set of facts. In *Mitchell*, the Court stated that when a lawyer has a "firm basis in fact" that his or her client intends to testify falsely, the lawyer must act. In *Mitchell*, defense counsel called the matter to the court's attention by informing the court that he had concerns about participating in a fraud on the court. The trial court allowed the lawyer

to call the defendant to the stand and allowed the lawyer to ask him his name. The lawyer then asked the defendant, "Mr. Mitchell, what do you wish to tell these jurors?" The trial court required the defense attorney to remain standing during the testimony and required the defense attorney to stand ready to make appropriate objections during cross-examination. The lawyer did not rely on the defendant's testimony in his closing argument. The Supreme Judicial Court of Massachusetts approved of this procedure.

Words of Wisdom:

The Duty to Inform the Trial Court

In establishing the governing principles for Kentucky, the Kentucky Supreme Court in *Brown* first addressed the issue of when any duty regarding a client's testimony under Rule 3.3 arises. Attorneys can easily rationalize that they do not truly know what clients will do when put on the stand to testify. Attorneys can then rationalize that they have no ethical duty under Rule 3.3. The *Brown* Court addressed this possibility and stated that a lawyer must bring the issue to the attention of the trial court if the lawyer "in good faith [has] a firm basis in objective fact" for the belief that the defendant client intends to testify falsely. Acknowledging that this is "a difficult judgment call" for the lawyer, the Court stated, "it is only one of many tightropes an attorney is called to walk during the complex process of litigation." Having made the determination that the defendant client intends to testify falsely, the lawyer must state "all material [f]acts (sic) necessary to establish the adversity between" the lawyer and the defendant.

Follow the Trial Court's Instruction

Once defense counsel has disclosed the issue, the trial court must determine the proper course of action and direct the proceedings accordingly. The *Brown* Court stated that the trial court need not conduct an evidentiary hearing but that it should have a substantive conversation with the defendant to inform the defendant of the importance of truthful testimony and the implications of the ethical conflict of the defense lawyer. The Court noted that a motion for new counsel and thus mistrial should be denied unless the defendant

can prove that the motion must be granted to prevent a "miscarriage of justice."

The *Brown* Court explained that allowing the defendant to testify in narrative form in the presence of defense counsel is a proper process but is not the exclusive process. Defense counsel's presence in the courtroom is imperative. Defense counsel should continue to represent the defendant and should make appropriate objections on cross-examination regarding truthful testimony. The Court clarified that the defendant makes a knowing waiver of counsel regarding the perjured testimony and continues to be represented by the defense lawyer regarding all else. The Court noted that the trial court "'possesses considerable discretion to vary any of the procedures discussed, if the interests of justice, or effective management of the trial so requires.'"

In a concluding comment about proper procedure, the *Brown* Court stated:

This process is not perfect; such could exist only in the absence of even the possibility of perjury. However, it addresses the competing interests created by this situation arising during trial. The defendant is never without counsel inappropriately. He is not denied his right to testify as he wishes. The attorney avoids participating in a fraud upon the court,

yet does not prematurely disclose the specifics of her client's confidence. The trial is not derailed by this controversy, and the Commonwealth is not prejudiced by undue delay. In future cases where this controversy arises, this is the approved approach to apply Rule 3.3 and Rule 1.6 without conflict.

The Result

Although the Kentucky Supreme Court noted that the trial court "valiantly" tried to "balance all the competing interests," the Court found fault with the process used at trial. Unlike the procedure used by the trial court in the *Mitchell* case, the defendant's lawyer in *Brown* left the courtroom during the defendant's testimony and cross-examination. This, said the Court, was improper. While the defendant knowingly and voluntarily waived his right to counsel regarding the perjured testimony, he did not waive the right to counsel otherwise. When defense counsel was not present in the courtroom and was not available to object during cross-examination, the defendant was improperly deprived of the assistance of counsel.

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