

**RHODE ISLAND SUPREME COURT ETHICS ADVISORY PANEL
GENERAL INFORMATIONAL OPINION NO. 2
Issued August 2, 1990**

The Panel has received inquiries concerning proper conduct in situations in which an attorney learns either that his client plans to offer false testimony or has already done so.

Three of the Rules of Professional Conduct, taken together establish the parameters of proper conduct. It is important to note, at the outset, that all pertinent rules use the term "tribunal" to stress that their precepts are applicable in all adjudicative settings. I. G. Hazard, The Law of Lawyering 349 (1988) (hereinafter "Hazard").

Rule 1.2, titled "Scope of Representation" provides in pertinent part that:

(d) A lawyer shall not counsel a client to engage, or assist a client in conduct the lawyer knows is criminal or fraudulent.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.16 titled "Declining or Terminating Representation" provides, in pertinent part, that unless ordered to do so by a tribunal,

(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the rules of professional conduct

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . "

Rule 3.3, titled "Candor Toward the Tribunal," provides, in pertinent part:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

A lawyer may on occasion suspect, without having proof, that the evidence his client, wishes to offer is false. Rule 3.3(c) gives the lawyer some discretion in this situation; most authorities agree however, that where the lawyer's doubts are without reasonable basis he should resolve them in favor of the client under the duty to provide zealous representation.

During the debate over resolving the problem of client perjury, it was argued that a criminal defendant's constitutional right to testify, and his right to effective assistance of counsel, plus due process considerations distinguished his situation from that of a party in a civil case. After Nix v. Whiteside, 475 U.S. 157 (1986) this distinction is no longer valid. The majority position is that there is no difference between a lawyer's obligations in a criminal case and in a civil case. ABA/BNA Manual of Professional Conduct 61:415; ABA Formal Opinion 87-353 (April 20, 1987) Wolfram, Client Perjury 50 S. Cal. L. Rev. 809, 848 (1977).

Nix involved a criminal defendant who advised his attorney on the eve of trial that he was going to "improve" his case with certain untruthful testimony. The attorney admonished him to testify truthfully and told him that if he testified falsely it would be his duty, as counsel to so advise the court. The defendant testified truthfully, was convicted, and thereafter challenged his attorney's conduct on constitutional grounds, claiming principally that he was denied effective assistance of counsel. The Nix Court rejected this argument, stating that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely." 475 U.S. at 173. The court noted that admonishing a criminal defendant to testify truthfully, or, indeed, withdrawing should one's admonishments fall on deaf ears could not be said to force respondent "into an impermissible choice between his right to counsel and his right to testify as he proposed for there was no permissible choice to testify falsely. 475 U.S. at 172.(emphasis in original).¹

Nix v. Whiteside and the majority of American jurisdictions hold that when a lawyer learns that his client intends to commit perjury he must first attempt to dissuade the client from doing so. If this approach fails, the attorney must withdraw. Accord, Nix v. Whiteside; Hazard at 360.3; ABA/BNA Manual of Professional Conduct 61:410. The Panel will apply the Nix rationale to future attorney inquiries on this subject. The Panel rejects minority arguments that an attorney can resolve the ethical problem satisfactorily by allowing the client to present perjured testimony in narrative style. If the client's intention to commit perjury is discovered on the eve of trial, and the court is correspondingly unwilling to allow withdrawal, the attorney must advise the court of his reasons for seeking withdrawal. If the court nevertheless refuses to allow the attorney to withdraw, and orders him to continue, Rule 1.16(c) requires the attorney to do so, but relieves him of liability under Rule 3.3. In that situation the attorney may properly rely on the court's judgment since the court is then in a position to protect itself against false evidence. Hazard at 360.4.

The situation in which an attorney discovers only after the fact that his client has offered perjured testimony is governed by Rules 3.3(a)(4) and 3.3(b). Rule 3.3(b) provides that prior to the "conclusion" of a proceeding the lawyer is obligated to act on his discovery; a proceeding is concluded when a right of appeal has been exercised or foreclosed. Hazard at 365. An attorney discovering past client perjury affecting an ongoing proceeding must first call upon the client to rectify the situation. ABA/BNA Manual on Professional Conduct 61:417; Wolfram, Client Perjury 50 S. Cal. L. Rev. 809, 848 (1977). If the client will not do so the attorney must move to withdraw. If withdrawal is not permitted then the attorney "has an affirmative obligation to

¹Nix v. Whiteside did not, of course, establish a unitary and mandatory response to the ethical problem of client perjury. With respect to its review of state court criminal trials, the United States Supreme Court assesses only the quality of the legal representation under whatever ethical regime is in force. Hazard at 360.2-1.

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inform the court of the falsity of the client's assertions." ABA/BNA Manual on Professional Conduct 61:418, Nix v. Whiteside. Rule 3.3 expressly provides that the duties to rectify client perjury apply even when "compliance requires disclosure of information otherwise protected by Rule 1.6." Rule 3.3(a)(6).

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.