

5K1.1 to be Obtained by Perjury— What to Do, What to Do?

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It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.¹

Section 5K1.1 of the United States Sentencing Guidelines creates pressure on a criminal defendant to cooperate and become a snitch. Not just pressure, but hydraulic pressure. Consider the proverbial sliding scale: the greater the client's exposure the greater the pressure, and a government 5K1.1 motion allows the court to go below a mandatory minimum.

The question every criminal defense lawyer thinks when the witness against the lawyer has a 5K1.1: will the truth fall victim? Some clients already know the drill and they will offer to say anything to cut their exposure,² and oftentimes believe they cannot help it because of this pressure. Seldom do our clients appreciate the consequences of their actions. Well, of course not; that is what got them in trouble in the first place.

If the government finds out that the client would testify falsely, the prosecutor must and will pull the plug on the 5K1.1 and leave the client near where she started,³ somewhat less prejudiced than by going through with her own bad decision. This is better than the alternative of the client testifying and having the perjury exposed. It usually will be, thereby earning her a perjury indictment plus an obstruction of justice sentencing enhancement.

Every client has a right to know from the lawyer that the 5K1.1 opportunity exists⁴ so she can make an informed choice whether to cooperate.⁵ The criminal defense lawyer does not have to fully participate, but the lawyer has to at least

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¹ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

² *See, e.g., United States v. Dumes*, 313 F.3d 372, 383–84 (7th Cir. 2002) (where the offer to say “whatever you want me to say” came in a letter to the prosecutor after the defendant’s debriefing went south).

³ *Id.*

⁴ Most clients will have heard about it from others on the street or in jail, and they may even bring it up first. Still, the lawyer has to consider it.

⁵ *United States v. Fernandez*, No. 98 CR. 961 JSM., 2000 WL 534449 (S.D.N.Y. May 3, 2000), *adhered to on reconsideration*, No. 98 CR. 961 JSM., 2000 WL 815913 (S.D.N.Y. June 22, 2000).

make it possible and not obstruct⁶ the “dirty business” of the client becoming a snitch.⁷

I. THE FIRST QUESTION: TELLING THE CLIENT ABOUT MR. KINGPIN

As Ms. Client’s criminal defense lawyer, you know that the government has an interest in Mr. Kingpin. A lawyer could conclude that this apparently is an unhealthy interest because the prosecutors are telling criminal defense lawyers about their desire to get Kingpin. And one might justifiably think that the prosecutors are tacitly soliciting information on Kingpin through the criminal defense bar. Not a good investigative technique, but they must be thinking, “when all else fails”

Through your representation of Ms. Client, you also know that she knows about and is “well acquainted with” Mr. Kingpin.

In your representation of her, has she ever suggested that Kingpin has committed a crime that she is aware of? From the problem presented, the answer has to be no because the lawyer is the source of the question about drugs. When the criminal defense lawyer is fishing for specific information from her about Mr. Kingpin, the lawyer is already playing into the potential for perjury. There is a difference between “What do you know about Mr. Kingpin?” and “What do you know about Mr. Kingpin and drugs [or his possession of drugs]?” So, let me slightly alter the first question: Should you specifically draw your client’s attention to the government’s interest in Mr. Kingpin, even though it might tempt the client to commit perjury? Police do it all the time, but they are not always concerned with the truth and justice “in the often competitive enterprise of ferreting out crime.”⁸

Adding drugs to the equation telegraphs where the lawyer is going. If the lawyer is going down that path, it is submitted that the purpose of the government’s inquiry is best left out or the lawyer risks spawning perjury.⁹ And, if the lawyer gets that information, should the lawyer act as gatekeeper and assess whether it is worth giving to the government for the benefit of the client? If it is unspecific and insubstantial, it may not be enough.

But, then again, it may. Sometimes prosecutors feel sorry for criminal defendants who are being hammered by a mandatory minimum, and they want to

⁶ Barry Tarlow, *The Moral Conundrum of Representing the Rat*, THE CHAMPION, Aug. 1995, at 15, reprinted in JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 15:12 (3d ed. 2005).

⁷ “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” *On Lee v. United States*, 343 U.S. 747, 757 (1952).

⁸ See *Johnson v. United States*, 333 U.S. 10, 14 (1948).

⁹ Worse yet, the lawyer risks being accused later of suborning perjury if the client decides that the debacle of her false testimony should be foisted onto the lawyer in her avoidance of personal responsibility.

help them cut their losses. Moreover, depending on the United States Attorney's Office, information that merely qualifies as "criminal intelligence" for future use may sometimes be enough to get a 5K1.1 and the client never has to testify.

This poses two ancillary problems.

First, when the client is being prepared for her 5K1.1 proffer, the client needs to know that the information has to be specific and truthful. If the government thinks that the client is lying, the client risks prosecution over the proffer.¹⁰ Not having a 5K1.1 motion filed on her behalf should be the least of our worries.

Second, what about the ethics of the defense lawyer seeing an opportunity to play the desperate prosecutor? The government may be so willing to aid Ms. Client, and at the same time desperate to get Mr. Kingpin, that they will settle for intel on Mr. Kingpin and cut the client some sentencing slack. Simply corroborating what they already know [or believe] may be all they want for the time being. So, can the lawyer tell the client what would help her with a 5K1.1, knowing that the client's perjury exposure is *somewhat* lessened? If the client is providing mere intel and not risking testimony, should the treatment be different? Two considerations with that: false intel could still get the client prosecuted for a false statement to a law enforcement officer, and aiding the client's short-term goal is not worth forever risking the lawyer's reputation with the United States Attorney's Office and the court by engaging in gamesmanship.

In the problem presented, without Ms. Client having prior knowledge of Mr. Kingpin, a criminal defense lawyer should not risk exposing the client to her own folly. Our ethics rules are client-centered and respect client autonomy.¹¹ But a lawyer is a counselor as well as an advocate expected to give "straightforward advice," even if the client will not like it.¹² This includes "doing no harm,"¹³ and negligently giving clients enough rope to hang themselves can be "doing harm." We still have to protect them from themselves, if we can.

II. THE SECOND QUESTION: WHAT TO DO ABOUT FALSE TESTIMONY

In our problem, Ms. Client's proffer satisfied the prosecutor, and she is going to get her 5K1.1. After her proffer, the government moved on Mr. Kingpin and indicted him.¹⁴ It must have been good information for the government to have indicted Mr. Kingpin after hearing from her when the case was so weak before.

¹⁰ 18 U.S.C. § 1001 (2006) (false statements to government); FED. R. EVID. 408(b) (proffer not admissible except for proving false statement).

¹¹ See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 59–61 (3d ed. 2004).

¹² MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2009) ("A client is entitled to straightforward advice expressing the lawyer's honest assessment.").

¹³ HALL, *supra* note 6, § 9:6.

¹⁴ Let us add another unanswered question: Did Ms. Client testify to her false story before the grand jury?

Or, is the government so desperate that it is going forward with a really lame case?

As Mr. Kingpin's trial approaches, the criminal defense lawyer learns from the client that her story about him is false, and the client confides to her lawyer that her story is "all lies—I figured out what those prosecutors wanted me to say, and I'm gonna say it." The lawyer tries in vain to dissuade her, but the client is adamant: "[B]esides, I'm convinced that guy is dirty, I just can't prove it." What to do?

A. Are You Required to Withdraw from Representing Your Client? If not, are You Permitted to do so?

Withdrawal of the criminal defense lawyer is no real remedy for client perjury. All withdrawal does is enable the client to perfect her perjury because the new lawyer is likely ignorant of why the first lawyer got out, unless the new lawyer figures it out.¹⁵

What we have here is a combination of the past crime of false statement to the government and the future crime of impending perjury. Confidentiality and the attorney-client privilege, of course, do not permit the lawyer to disclose past crimes. The scope of disclosure of future crimes varies from jurisdiction to jurisdiction, most merely permitting disclosure¹⁶ and some making it mandatory without regard to seriousness.¹⁷

When the lawyer was a facilitator and passive participant in advancing the perjury, can the lawyer disclose under the state's confidentiality rule?¹⁸ The operative words in the Model Rules are "may reveal," and it remains within the lawyer's professional discretion whether to disclose. To whom does the lawyer disclose? The Assistant United States Attorney (AUSA)? Mr. Kingpin's lawyer? The court? Which court? All of them? Some of them?

How does the lawyer evaluate the discretion to disclose? What is in the client's best interest? Clients have the right of self-determination. Does this right include the right to become the kamikaze pilot of her own destiny?

Is it in Ms. Client's best interest for the lawyer to disclose to protect her from her own folly? Does the client get veto power over lawyer disclosure in a discretionary disclosure state? Can the lawyer's duty to protect the client or attempt to cure another's injustice give the lawyer the power to make the call?

A client arguably has the constitutional right to commit perjury in her own defense,¹⁹ but this is not "in her own defense." This is in the case of another with

¹⁵ Indeed, withdrawal will likely exacerbate the client perjury if the new lawyer is unaware of the perjury. HALL, *supra* note 6, § 26:14.

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3) (2009).

¹⁷ See, e.g., N.J. RULES OF PROF'L CONDUCT R. 1.6(b)–(c) (2004).

¹⁸ Assuming that a wrongful conviction is "substantial bodily harm" under MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009).

¹⁹ The Ethics Advisory Committee of NACDL, *Ethics Advisory Opinion 92-2*, THE

a purpose to aid herself. The right to commit perjury on one's own defense, something to which I subscribe,²⁰ depends in large part upon the right to testify in one's own behalf.²¹ Ms. Client does not have the "right" to give false testimony against another.

B. *Client Warning of the Potential Disclosure?*

If the lawyer is faithful to the client, the client must first be given the chance to authorize the disclosure. If the lawyer makes the decision to disclose, the client is entitled to a warning that the lawyer will disclose if the client does not or does not permit it. Disclosure gives the lawyer and the client an opportunity to mitigate the effect of the client's proposed perjury, and the client is at least entitled to one last chance to know she can help herself and take the lawyer off the hook for making the disclosure.

C. *Whom Do You Tell: the AUSA, of Course. But the Court, too?*

Whom is the lawyer required to tell of her perjury when the client permits it? What about telling the prosecutor so he or she will not put the client on the stand to actually commit perjury? If the AUSA is going to put false testimony on the stand, should the prosecutor be given the first opportunity to put Ms. Client on as a government witness in *United States v. Kingpin*? The AUSA should be told as early as possible so the government can decide whether to go to trial on this indictment without Ms. Client as a witness or dismiss *Kingpin* without prejudice.

Since our problem posits the proposition that the client was giving false testimony, presumably the AUSA would determine not to put her on the stand and the perjury would not occur in a judicial proceeding.²² That would benefit the client. The client would lose her 5K1.1, of course, because nearly every reason for granting a 5K1.1 is no longer present, but she should not earn a few extra years imprisonment for actually testifying falsely. More importantly, her coming forward on the perjury question *may* persuade the prosecutor to show mercy and not indict her separately for perjury, merely as an exercise of prosecutorial discretion. If the lawyer comes forward against her, she will certainly lose that opportunity, no matter how slim the chance.

Our problem is based on telling the court, but which court: the one trying Mr. Kingpin, the one to where she plans to plead guilty and be sentenced, or both? In

CHAMPION, Mar. 1993, at 23, available at [http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/Ethics92-2.pdf](http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics92-2.pdf).

²⁰ HALL, *supra* note 6, §§ 26:12–26:16. But, it is never advisable.

²¹ *Rock v. Arkansas*, 483 U.S. 44, 49 (1987).

²² Unless it has already happened in a grand jury. If it did, it certainly appears that it is far too late to withdraw the perjury under 18 U.S.C. § 1623(d) (2006) because Kingpin's indictment almost certainly shows it "substantially affected the proceeding."

the proposed resolution of the problem by only telling the AUSA to obviate the problem of client perjury at trial, the government will have to decide what to do about it. The lawyer better served the client's interest by preventing her perjury in Kingpin's trial, and, thus, the client's interest, too.

What about the sentencing court? The AUSA should at least be asked whether the prosecutor will advise the sentencing court of Ms. Client's actions. If it seems relatively certain that the sentencing court is going to find out about the client's proposed perjury against Mr. Kingpin, defense counsel should be the first source for the sentencing court to attempt to mitigate the sentencing fallout, which there certainly will be.

III. CONCLUSION

Where one comes out on this problem depends on where one goes in. And when one goes in from the perspective of the criminal defense lawyer representing the proposed false witness, one should come out with more questions than answers. If you do not have more questions than answers, you just are not asking the right questions. It did not take me long to determine that the ethics rules could not and cannot answer all questions of the ethics of criminal defense,²³ and criminal defense lawyers usually are dealing with shades of gray. How we deal with shades of gray is what makes us good at our job. It is the nature of our work.²⁴ Criminal defense work is a four dimensional chess game with remarkable intellectual challenge.

The lawyer's goal here should be protecting the client from her own bad decisions. She has no constitutional right to testify falsely, except in her own defense. Here, she is not testifying in her own defense—it is on behalf of the government in Mr. Kingpin's case. Testifying falsely would harm her more in the long run than just admitting her mistake and dealing with the consequences, including her sacrificing her 5K1.1 on the altar of attempting to be a snitch at any cost.

Preventing her from testifying falsely serves the interest of justice in a truer outcome in Mr. Kingpin's case, and it ultimately serves her interest, too. And that is where I come out.

²³ Remember, ethics rules “simply provide a framework for the ethical practice of law.” MODEL RULES OF PROF'L CONDUCT, Scope ¶ 16 (2009). “Ethical rules cannot possibly resolve all questions of attorney ethics.” HALL, *supra* note 6, § 1:2.

²⁴ “[I]f there were no bad people, there would be no good lawyers.” CHARLES DICKENS, THE OLD CURIOSITY SHOP 421 (1841).