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Soft-Core Perjury

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by Len Niehoff

"Hard-core perjury" is unequivocal: The client lies under oath, and the lawyer knows it. There is no factual ambiguity. There is no epistemological mystery concerning the state of mind of the lawyer or the client. The situation is clear.

Sometimes it is clear because the lawyer has suggested perjury as the strategy of choice, as in the case in which a court reporter accidentally left her tape recorder running during a break in a deposition and documented an attorney advising his client to deny something they both knew to be true. *See In re Attorney Discipline Matter*, 98 F.3d 1082 (8th Cir. 1996). Or like *The New Yorker* cartoon by Leo Cullum in which the attorney is whispering to his client, "You're doing fine. A little more perjury and you'll be out of the woods."

Other instances of hard-core perjury are clear because the client tells the lawyer that he or she has lied under oath or intends to do so. Clients share this information for various reasons. Sometimes it is with the expectation that the lawyer will conspire with them to pull it off. Sometimes it is with the hope that confession will cleanse the soul, even if it dirties the attorney-client relationship. For our purposes, the client's motivations don't matter. What matters is that the lawyer harbors no uncertainties about what the client has done or plans to do.

The factual certainty that characterizes hard-core perjury does not, however, yield a corresponding moral clarity. Indeed, thousands of pages of case law and scholarly commentary have attempted to sort through the challenges faced by the lawyer who knows the client has lied or plans to lie under oath. Despite these efforts, little consensus has emerged beyond this general principle described by Geoffrey Hazard: "the lawyer must do something." *See* Geoffrey C. Hazard, Jr., et al., *The Law and Ethics of Lawyering* 653 (2005).

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Nor have the various American Bar Association ethics codes addressed the hard-core perjury problem in an entirely satisfactory way. In fact, this very journal had an important role in stimulating the debate over those rules when it printed in its first volume, more than 35 years ago, an article by Professor Monroe Freedman, Hofstra University School of Law, that provoked considerable discussion and controversy.

In that piece, Freedman argued that the then-existing ethics rules placed lawyers who found themselves confronted with a client's perjury in a moral "trilemma": "the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." *See* Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION, Winter 1975, at 26. Depending on one's point of view, the ethics rules either underwent successful surgery or never recovered after Freedman's critique.

Now, in contrast, let's call this situation soft-core perjury: The client may have lied under oath or may be planning to do so, but the lawyer can't be certain. There is factual ambiguity. There are questions about the client's state of mind and the attorney's capacity to divine it. Things are simply unclear. This may arise, for example, when a client offers us a story that varies with each telling—or, even more distressingly, a story that never varies at all.

To paraphrase Justice Potter Stewart's famous observation about pornography, we know hard-core perjury when we see it. It arouses conflicting urges and stimulates deep anxieties. Soft-core perjury is tougher to spot. It doesn't make our heart race and our scalp sweat—or at least not as much.

It seems likely that soft-core perjury arises much more commonly than hard-core perjury. After all, hard-core perjury requires that the client possess a combination of boldness, desperation, cluelessness, and, oddly, misdirected candor that we do not often encounter. Soft-core perjury requires nothing so idiosyncratic. Indeed, everyday life makes soft-core perjurers of us all. Most of us learn, over time, not to tell others

when we're lying and to tell only the lies we can get away with. Hard-core perjury usually involves clients who missed this part of life's lesson plan.

Despite its greater pervasiveness, however, soft-core perjury has generated considerably less discussion and debate than hard-core perjury has. There are reasons for this, but they are not good ones. Indeed, we might summarize the matter this way: Lawyers tend to dismiss the soft-core perjury problem because they do not see it as a problem. They do not see it as an ethical problem, and they do not see it as a practical problem. They are wrong on both counts.

The idea that soft-core perjury poses no ethical problem comes from the view that the lawyer's dilemma—or trilemma, if you will—arises only if he or she "knows" the client is committing perjury. In other words, soft-core perjury isn't ethically troublesome because, well, it isn't hard-core perjury. What we don't know can't hurt us, and we needn't trouble ourselves with the fact that it may still hurt the integrity of the justice system.

This view finds some support in the ABA Model Rules of Professional Conduct, which have been adopted in whole or in part by most of the states. Model Rule 3.3(a)(3) prohibits a lawyer from offering evidence he or she "knows to be false." If the lawyer "comes to know" that evidence he or she has offered is false, then the lawyer must take "reasonable remedial measures," including disclosure to the tribunal if necessary. The text of the rule thus creates a daunting obligation—the duty to rat out a client—but limits it to circumstances in which the lawyer "knows" the perjury has occurred.

The comments to Rule 3.3 reiterate this limitation. Thus, comment 5 to the rule declares—several times—that this duty arises only when the lawyer "knows" of the falsity. Similarly, comment 8 states that a "reasonable belief" of falsehood does not trigger an obligation to disclose. And ABA Formal Opinion 353 (1987) reiterates that the duty to disclose client perjury is "strictly limited" to circumstances in which the lawyer "knows" the testimony offered was false and does not arise merely because the lawyer has "suspicions."

It seems simple. It isn't.

The ABA Model Rules include definitions of certain terms. The definition of "knows" that is contained in Rule 1.0(f)—and that informs the determination of when a lawyer "knows" perjury has occurred under Rule 3.3(a)(3)—consists of two sentences. For these purposes, what the first sentence gives the second sentence takes away. Thus, the definition begins with the reassuring statement that the word "knows" denotes "actual knowledge of the fact in question." But the second sentence dispels any comfort the first might have offered: "A person's knowledge may be inferred from circumstances."

Lest there be any doubt, comment 8 to Rule 3.3 explicitly incorporates the definition of "knows" found in Rule 1.0. Thus, having informed us that "reasonable beliefs" of falsity do not create an ethical problem, the comment goes on to state that "[a] lawyer's knowledge that evidence is false . . . can be inferred from the circumstances," citing Rule 1.0(f). The comment then concludes by sternly warning us that "the lawyer cannot ignore an obvious falsehood."

Rule 3.3 thus apparently divides the world as follows: In some cases, *any reasonable person* would think the client was lying. The rule says this creates no ethical problem for the lawyer. In other cases, it is *obvious* that the client is lying. The rule says this creates a significant ethical problem for the lawyer. The rule therefore leaves us with the unenviable, and perhaps impossible, task of distinguishing statements that any reasonable person would identify as lies from statements that obviously are lies.

Consider this example, loosely based on a true case: In discovery, the client produces a copy of a document that bears a date important to the client's case. The client testifies at his deposition that he put the date on the document when he created it. When his lawyer goes rummaging through the client's papers, however, she discovers the original of the document—alas, undated. On one hand, the lawyer could say to herself: "Well, any reasonable person would think he lied about this, but reasonable beliefs are not enough to trigger an ethical problem. So I don't need to worry." On the other hand, the lawyer could just as plausibly say to herself: "Well, it is obvious that he lied about this. So I have to take steps to remedy his perjury." Which approach is correct? Who knows?

The marching orders provided by Rule 3.3 appear unworkable.

The marching orders provided by Rule 3.3 therefore appear unworkable if not downright incomprehensible, and there lies the trap. Lawyers tend to worry about hard-core perjury and not to worry about soft-core perjury because they believe a clear line, based on what they "know," distinguishes one from the other. The ABA Model Rules say that such a line exists, but, if it does, then clarity is not one of its hallmarks. Furthermore, it seems unlikely that anyone could find the line from the coordinates that the rules provide.

Lawyers lost in this troublesome territory may follow the guiding notion that they have an obligation to give the client the benefit of the doubt. Unfortunately, this principle doesn't help, particularly in close cases. Granted, comment 8 to ABA Model Rule 3.3 acknowledges that "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client." But that statement comes right before the admonition that "obvious falsehoods" cannot be ignored.

Giving the client the benefit of the doubt thus leads the lawyer right back into the conceptual swamp he or she was struggling to escape. The rules prohibit the lawyer from cutting slack to the client when it is obvious the client is lying, but the rules allow the lawyer to do so when any reasonable person would think the client is lying. So, again, we're left with the nettlesome project of trying to distinguish one of these things from the other, even though in close cases, they are indistinguishable.

Of course, many—perhaps most—instances of soft-core perjury do not present the lawyer with a serious ethical problem because they are not close calls. Sure, the lawyer has some doubts, but the attorney can resolve those questions in favor of the client without straining credulity. And the lawyer would feel comfortable defending that judgment in front of a court or an attorney disciplinary body if it came to that. Sometimes lawyers believe that soft-core perjury doesn't burden them with a messy ethical dilemma, and sometimes they're right.

Nevertheless, lawyers who dismiss the presence of an ethical problem because they engage in an overly literal assessment of what they "know" or of what they could "doubt" can land themselves in serious trouble. Here's one way it can happen: The lawyer encounters evidence that the client might have lied but shrugs it off. That seems reasonable enough. Then more evidence comes along; then more; then more. Of course, if you view each piece of evidence in splendid isolation, you might conclude that affording the benefit of the doubt to the client makes sense. But if you view the evidence retrospectively and cumulatively—which is precisely how judges and disciplinary bodies end up looking at it—a painful obviousness emerges.

Consider this example: The client tells you he was in Topeka, not Dallas, on the night in question; "nope," he insists, "never even been to Dallas." He says as much under oath, and you believe him. Later he tells you he hates Topeka because of the cold wind off the lake. When you question him about this, he says he thinks he might have been in Chicago rather than Topeka. Then you notice that his favorite coffee mug is emblazoned with the stirring words "Don't Mess with Texas." He accuses the opposing party of being "all hat and no cattle." You find an airline boarding pass to Dallas among his papers. You discover a photograph of him at a Cowboys game posted on his blog. Of course, at a theoretical level, one can continue to doubt anything despite the overwhelming evidence; in the real world, however, those who doubt gravity spend a lot of time falling down.

So it turns out that soft-core perjury does, or at least can, give rise to some fairly complicated ethical issues. Still, those issues pale in comparison with the practical and strategic problems that soft-core perjury creates. In large measure, those problems arise precisely because of the uncertainty that characterizes soft-core perjury and that necessarily infects the lawyer's decision making.

Let's start here. Lawyers want their clients to tell stories that reasonable people will find credible. If the lawyer thinks the client may be lying, odds are that other people—people like jurors and judges—will think so, too. A lawyer who hears a facially unbelievable story will therefore have a strong impulse to move the client away from it, as much for strategic as for ethical reasons. A leading criminal defense lawyer I know periodically offers this trenchant advice to such clients: "Your story may *be* the truth, but it sure doesn't *sound like* the truth, and so no one will *think* it's the truth."

The client who appears to be lying may actually be telling the truth.

It is often said that, when this concern arises, the lawyer must "remonstrate" with the client, making it sound as though the word comes from a Latin root meaning "to grab an idiot by the tunic and shake him until he comes to his senses." Indeed, that pretty much captures the sensibility of the directive. The lawyer must make sure that the client understands the full ramifications of a decision to stick with an implausible version of the events, and this requires an uncomfortably blunt discussion. The lawyer owes it to the client to explain that the jury may respond to unbelievable testimony by rendering an adverse verdict, but only after having recovered from convulsive fits of hysterical laughter.

These sessions in the woodshed must, however, take account of a remote, but real, possibility: The client who appears to be lying may actually be telling the truth. This happens, and it should not amaze us when it does. After all, we know that strange, unexpected, and inexplicable things occur. Litigators have to remain mindful of Mark Twain's assessment of the issue: "It's no wonder that truth is stranger than fiction. Fiction has to make sense." Some clients will have stories that don't make much sense but are nevertheless true.

In such cases, evidence that tends to corroborate the client's testimony takes on a vastly increased importance. The attorney must seek out even small and circumstantial support for the testimony because it can make a significant difference in how the fact-finder assesses credibility. A witness's testimony that he saw an elephant pulling a sleigh on Mulberry Street sounds like the stuff of wild invention. It doesn't take much pachyderm scat to knock the story into the realm of possibility.

But it is not just the implausibility of a story that may prompt an attorney to doubt a truthful client. The personality and mannerisms of the client can also feed such skepticism. In counseling our clients, we therefore have to remember that there are people who have the regrettable quality of looking like they're spewing vile falsehoods even when they're actually offering up unalloyed candor. Some people are good at lying. Some people are bad at telling the truth. Both are troublesome witnesses, but the latter bring with them the additional burden of innocence. The honest-but-looks-dishonest client thus poses a particularly daunting challenge to the lawyer because this type of obviously lying client actually deserves to *win*.

I've had a few witnesses like this, but one particularly haunts my memory. This fellow, whom we'll call Bill, owned a flourishing business, knew considerable success in his life and work, had strong religious convictions, and donated generously to charity. He had a multitude of gifts. He also had a multitude of nervous tics: a twitch, a tendency to avoid eye contact, a penchant for clearing his throat every few seconds, and an occasional shudder of the shoulders. If Bill told you the world was round, you'd go join the Flat Earth Society.

My first impulse was to keep Bill off the witness stand, perhaps even enlist him in the French Foreign Legion. That plan wouldn't work. I needed his testimony on a few key issues. And, of course, my opponent might call him if I did not, in which case the jury would have its first exposure to Bill's idiosyncrasies in the context of cross-examination.

That possibility gave me a few tics of my own. I could imagine the ladies and gentlemen of the jury, riveted to Bill's every fidget, perched on the edges of their seats, waiting eagerly for the moment when my opponent would have his Perry Mason moment of triumph and the witness would leap to his feet and confess or, better still, spontaneously combust. It didn't seem, shall we say, optimal. Fortunately, the court granted summary judgment in the case, and I never had to figure out what to do with Bill, poor Bill, a truly good man and a truly bad witness.

A case I had a few years later, though, offered an insight. In that case, my opposing counsel had a witness like Bill, whom we'll call Tracy. Tracy had a different but equally pronounced

set of tics—her eyes darted around; her voice rose and dropped for no apparent reason; and she constantly self-corrected ("Did I say Wednesday? Why would I say Wednesday? No, it was Thursday. Well, unless it was Friday"). Furthermore, Tracy was not just my opponent's key witness—she was his only witness. He had no choice but to put her on the stand and to take his chances.

In the course of her examination, however, an interesting thing happened: The longer she testified, tics and all, the more credible she seemed. The length of her testimony gave the jury an opportunity to see that these mannerisms persisted throughout, even when she talked about general background facts and other matters as to which she had no motive to lie. This extensive direct examination gradually transformed Tracy from a witness who looked dishonest into a witness who looked nervous—a process my opposing counsel fostered by making sure the jury knew Tracy had never testified at a trial before and by tossing shamelessly cloying words of consolation her way every now and then. "Take your time, Tracy. We understand you're a little nervous. Have a drink of water." Yes, please—or could I perhaps offer you a little hemlock?

Of course, Tracy prevailed. She prevailed because her story was true and made an irrefutable claim. And she prevailed because the jury could see the truth even through the fog of shifty eyes, odd inflections, and incessant testimonial backtracking. Her victory was the right and just result, which did not prevent my client from finding it extremely annoying.

In retrospect, I should have understood this phenomenon when I evaluated my own client, Bill, as a potential witness. Indeed, it explained why Bill had met with so much personal success. Everyone who did business with Bill probably struggled with their first impressions of him. In fairly short order, however, they came to understand that his mannerisms were just that, and nothing more. Time allowed them to see Bill as an honest man.

All this talk of honest witnesses raises a different, but related, problem: the witness who testifies, or plans to testify, falsely but who mistakenly believes he or she is telling the truth and doesn't take kindly to correction. Such witnesses can try the patience of the most patient among us. They can drive us to distraction with their damnable goodness. They are often deeply honest, highly principled people with a deep-seated and stubborn hostility to anything they take as an effort to manipulate their testimony. Unfortunately, in this particular instance, they also happen to be just plain wrong.

It might seem obvious that such witnesses do not raise any ethical issues for the lawyer. If the lawyer persuades the witness to testify differently, then the truth has been served. On the other hand, if the lawyer fails to persuade the witness, and the witness testifies to an honest but mistaken understanding of things, then the witness has not knowingly lied on the stand and so has not committed perjury. Again, things are not quite so tidy.

The issue is particularly complicated with respect to third-party witnesses. Such witnesses may distrust a lawyer who they don't know, who doesn't represent them, and who wants to change their testimony so it is more "accurate." Furthermore, ABA Model Rule 4.3 prohibits lawyers from portraying themselves to unrepresented third-party witnesses as disinterested Guardians of the Truth. A lawyer who presses a third-party witness too hard—even in the interest of securing true and complete testimony—may come to the attention of an unhappy judge or disciplinary tribunal and have some explaining to do.

Consider, for example, the adventures of the lawyers in *Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993). In that case, two lawyers presented a witness with a draft affidavit, which she revised. Unhappy with those revisions, the lawyers told the witness their understanding of the events, presented her with independent evidence in support of their version, and aggressively challenged some of the witness's assumptions. The witness, unconvinced, declined to alter the changes she had made. At this point, the lawyers incorporated her changes into a new draft, which she reviewed and edited

further. The witness approved this third draft, signed it, and left the lawyers' offices.

The witness initially described the lawyers' conduct as "almost like browbeating," and the district court took a dim view of what they had done. Indeed, because of their actions, the district judge disbarred the lawyers from practice in his court. The Fifth Circuit reversed, rejected the conclusion that the lawyers were "making or urging the making of 'false' statements" and concluded that the lawyers' "sometimes laborious interviews with [the witness] were conducted with the goal of eliciting an accurate and favorable affidavit from a key witness in the underlying case." *Id.* at 342. Or, as the witness herself later came to describe it, the lawyers were just "doing their job." *Id.* at 339.

We might conclude that all's well that ends well and write off the decision of the district court as an aberrant overreaction. If we do so, however, then we miss the value of this case as a cautionary tale. Granted, the lawyers ultimately received their vindication. But the journey to that destination proved long, bumpy, and unpleasant.

The witness's initial reaction to the lawyers' conduct has a lesson in it as well. We litigators live in a rough-and-tumble world and can grow a bit callous. As a result, what we intend as a firm but gentle nudge may be experienced by the witness as an overbearing and obnoxious shove. And if the third-party witness is a deeply honest, highly principled, and somewhat skeptical individual, then the lawyer could scarcely have chosen a strategy less likely to meet with success.

I've had a few third-party witnesses like this, but one sticks out in my mind. He was a distinguished physician with a keenly honed sense of rectitude and integrity. He wanted nothing to do with my case, but circumstances had conspired to make him a material witness regarding several critical facts. I met with him on a number of occasions, and he routinely got one particular fact absolutely, positively, objectively dead wrong.

In each meeting, I would therefore walk him through a collection of documents that demonstrated his error. The epiphany would come; I would leave; he would forget the entire exercise; and we would replay the drama when we met again. Every time, I brought the same documents. Every time, he brought the same robust skepticism and flawed memory. And, to his immense credit, every time he realized his mistake. But each meeting felt to me like a delicate surgical procedure in which, at any given moment, things could go terribly awry.

Of course, this ordinarily plays out differently when the witness is also the client. If all has gone well, the client has come to trust the attorney. The client sees the attorney as his or her champion and advocate. The client will therefore happily receive whatever guidance the attorney has to offer, even if that requires the client to re-think his or her understanding or memory of the salient facts.

If anything, the lawyer now encounters the exact opposite of the problem presented by third-party witnesses: The client may prove a little too malleable for the attorney's comfort. Anyone who practices law long enough encounters a client who, at some point in the representation, enthusiastically declares, "Just tell me what to say and I'll say it." This prompts a good lawyer to repress a wince, sit back, smile, shake his or her head, and respond, "I'm sorry, but it doesn't work that way."

Of course, in many cases, none of the possibilities discussed above will materialize. It will not be obvious that our client has lied or plans to do so. We will "remonstrate" with our client, but our client will stick with his or her story despite our questions. There will be no other evidence that tends to suggest our client's implausible story is true or that our client looks like a liar but isn't. We will find a story that looks and sounds more like the truth, but our client won't go there. We will find ourselves stuck with our unease and our doubts and our suspicions. We will swallow hard. And we will keep going.

It is not pretty, but it is, after all, our job description. People who might or might not be telling the truth need our zealous representation, not our speculative condemnation. In an adversarial system, that is the *other side's* job. To paraphrase a favorite quip of Edward Bennett Williams, we represent our clients with respect to matters of law; moral judgments we "leave to the majestic vengeance of God."

So, yes, some clients will lie, and we will unwittingly help them get away with it. We will avoid the worst ethical pitfalls and pursue the best practical strategies, but perjury will take place anyhow. We will harbor serious reservations but find ourselves powerless to take more extreme measures because the duty to prevent client perjury—unlike, for example, the duty of competent representation—exists in serious tension with other duties. Oliver Wendell Holmes once described freedom of expression as "an experiment, as all life is an experiment." The obligations involved in preventing client perjury are a compromise, and there is some of that in all of life as well.

So we soldier on. We console ourselves with the understanding that we censor the hard-core perjury from our professional lives. We comfort ourselves with the assurance that we'll know the truly indecent stuff when we see it. But we also struggle with the knowledge that, on some days, we wouldn't want the children to watch how we make a living.