# speaking of ethics

By Saul Jay Singer

## The Client Perjury Problem

Mick Wiggins

A few months ago, I rediscovered *L.A. Law* on one of the "classic TV" cable stations and, although it is dated and hackneyed in many respects, I am very much enjoying my reunion with the show and its characters. Particularly interesting to me now is how the series consistently plays fast and loose with the rules of professional conduct. Though I appreciate that it may be necessary to take certain liberties to promote dramatic development, some of the scenarios are so ethically untenable that I am reduced to screaming at the television set. In one particularly egregious episode, for example, one long-term client of McKenzie Brackman sues another such client, and two firm lawyers enter their respective appearances—on opposite sides of the same case.[1]

A very interesting episode raises a different ethical issue. Victor Sifuentes, who has been appointed by the court to defend Lionel Sands in a murder case, is disgusted by his cold-blooded client, whom he is virtually certain has committed the heinous crime. With the evidence overwhelmingly against him and facing certain conviction, Sands instructs Sifuentes to call him as a witness to testify in his own defense.

In a highly dramatic moment, Sifuentes, oozing skepticism and doubt, sternly warns Sands about the penalties of perjury and asks his sociopathic client if he intends to lie under oath. The cunning Sands ducks the issue, responding that everyone is probably better off if Sifuentes does not know the answer to that question.

Sands invents a preposterous, but devilishly clever, narrative: he admits to raping the decedent, but denies killing him. He testifies that the decedent died when, in sheer horror and utter despondency at being sexually violated, he killed himself with the "murder weapon." The jury, finding reasonable doubt, acquits the defendant, who gleefully exults in victory. A rape conviction means, at most, seven years incarceration, but a murder conviction would have resulted in a life sentence.

Sifuentes' nightmare scenario led me to consider whether he could offer Sands' testimony at trial in a District of Columbia court. Doesn't a D.C. lawyer have the duty to refuse to offer evidence that he knows to be false? On the other hand, doesn't he also have a duty to competently and zealously advocate the client's position and preserve client confidentiality?

In a significant departure from the American Bar Association Model Rules of Professional Conduct, which are more-commonly adopted and better known, the District of Columbia Rules of Professional Conduct walk a somewhat unique path between these conflicting ethical duties.[2] The analysis begins with Rule 3.3(a)(4) (Candor to Tribunal):

> A lawyer shall not knowingly offer evidence that the lawyer knows to be false, except as provided in paragraph (b). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Thus, in general, if a lawyer *knows* that the proffered evidence is false, he may not offer it. However, there are two reasons under the D.C. rules why Sifuentes may, nonetheless, offer his client's testimony here.

First, he does not *know* that Sands is lying. The standard for refusing to offer a client's testimony is *actual knowledge*[3] of its falsity. Reasonable suspicion—or even when the client's testimony is outlandish, unsupported by other evidence, and contradicted by credible evidence—is insufficient to prevent the lawyer from eliciting the testimony.[4] As such, Sands was very wise, indeed, for refusing to admit his intention to commit perjury to his counsel.

Second, Rule 3.3(a)(4) carves out a significant and important exception under Rule 3.3(b) for a defendant's testimony in a criminal case, even when defendant's counsel has actual knowledge that the testimony is false:

> When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

Thus, Sifuentes must first talk to his client and take every reasonable step, short of disclosure, to encourage Sands not to commit perjury. Failing that, he would be required to seek leave of court to withdraw from the case,[5] but only if withdrawal can be accomplished without harming the client.[6] Otherwise, Sifuentes can permit Sands to testify, but only under limited conditions, which include eliciting the perjured testimony in narrative form (i.e., no direct examination)[7] and eschewing the use of such testimony, in final argument and otherwise.[8]

It is important to note that the "criminal exception"—i.e., where the D.C. rule permits a lawyer in criminal cases to offer testimony which she knows to be false—applies only to testimony *by the defendant*. That begs the question: What should Sifuentes do if an exculpatory witness he calls to testify at Sands' trial offers testimony which Sifuentes knows to be false? Similarly, in a civil case where the criminal exception does not apply, what is a lawyer to do if her client commits perjury?

Comment [4] to Rule 3.3 provides that "when evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes."[9] But what is a lawyer to do when the witness

*unexpectedly* perjures himself at trial?

Legal ethicists have struggled with this question, and there is simply no satisfactory solution. For Sifuentes to continue to elicit testimony that he knows to be false would violate Rules 3.3(a) and 1.2(e),[10] but to disclose that the witness testified falsely would, among other things, violate the duties of loyalty and confidentiality[11] and would irreparably damage the client. His only possible course of action at a D.C. trial is to exercise a "silent veto"—turn to the tribunal, announce "I have no more questions for this witness," take his seat, and refuse thereafter to refer to or rely upon the perjured testimony. Though the reality is that everyone in the courtroom will understand exactly what has just happened, and though it is likely that the client's case will be effectively sabotaged, this may be the only step Sifuentes can take that is consistent with the D.C. rules.

Next episode: Arnie Becker violates every rule of professional conduct—in a single, 24-hour period. Stay tuned.

---

*Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 3231 and 3232, respectively, or by e-mail at ethics@dcbar.org.*

## Notes

1 Pursuant to D.C. Rule 1.7(a) (Conflict of Interest: General), there is an absolute proscription against such representation, even if both clients give informed consent. It turns out, however, that under the California Rules of Professional Conduct in effect at the time, such representation apparently was permitted with the clients' written consent. California Rule 3-310(C)(2).

2 The D.C. rules specifically reject the ABA approach, which more broadly permits the attorney to disclose her client's perjury.

3 As Rule 1.0(f) (Terminology) provides, "'Knowingly,' 'known,' or 'knows' denotes *actual knowledge of the fact in question*. A person's knowledge may be inferred from circumstances." (Emphasis added). *See also* Rule 3.3, Comment [6].

4 As per Rule 3.3, Comment [7]: "Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false." On the other hand, as the rule makes clear, were Sands not a criminal defendant, Sifuentes could refuse to offer his testimony even if he had only a "reasonable belief" that his client is lying.

5 "Withdrawal is strongly preferred to the presentation of false testimony, and must be attempted absent serious prejudice to the client." D.C. Bar Legal Ethics Committee Opinion 234.

6 *See* Comments [7] and [8] for a discussion regarding the parameters of the potential "harm to the client" contemplated by Rule 3.3.

7 *See* Legal Ethics Committee Opinion 320:

> while most lawyers operate under an absolute obligation of candor to the tribunal, in this jurisdiction defense counsel who are unable to dissuade their clients from presenting false evidence and cannot withdraw from the representation without harming the client may put their client on the stand to testify in a narrative fashion. . . . This D.C. provision, which reflects solicitousness to a defendant's right to testify, seeks to assure that a criminal defense lawyer's ethical obligations do not abridge a defendant's right to present a defense.

Nonetheless, the lawyer may not assist the client in preparing the perjured narrative statement, as to do so would violate Rules 3.3(a)(2) and 1.2(e) (Scope of Representation). *See* Legal Ethics Committee Opinion 234.

8 Counsel may not examine his client in such a way as to elicit testimony the lawyer knows to be false, nor may he argue the probative value of the client's false testimony in closing argument. However, Rule 3.3(b) does not prevent the lawyer from engaging in normal examination—question and answer style—on subjects where the lawyer believes the client will testify truthfully. *Id.*

9 *See also* Rule 3.3, Comment [11]: "Generally speaking, a lawyer may not offer testimony or other proof, through a non-client, that the lawyer knows to be false."

10 "A lawyer shall not . . . assist a client to engage in conduct that the lawyer knows is criminal or fraudulent . . ." Rule 1.2(e).

11 There are important exceptions that arise under Rule 1.6(d) (Confidentiality of Information) which are beyond the scope of this article. The interested reader, however, should carefully consider those exceptions.

## Disciplinary Actions Taken by the Board on Professional Responsibility Hearing Committees on Negotiated Discipline

IN RE QUINNE HARRIS-LINDSEY. Bar No. 451238. August 12, 2009. The Board on Professional Responsibility's Ad Hoc Hearing Committee recommends that the D.C. Court of Appeals accept Harris-Lindsey's petition for negotiated disposition and suspend her for one year, with six months stayed. Harris-Lindsey also will face one year of probation to begin at the commencement of the period of suspension, with the conditions that she attend a continuing legal education course, and that she consult with the D.C. Bar Practice Management Advisory Service before entering private practice, for violations of Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.5(f), 1.15(a), and 8.4(d) and D.C. Bar R. XI, § 19(f).

IN RE MICHAEL J. RIGAS. Bar No. 317909. August 12, 2009. The Board on Professional Responsibility's Hearing Committee Number Four recommends that the D.C. Court of Appeals accept Rigas' petition for negotiated disposition and suspend him for one year, nunc pro tunc, to January 25, 2007, for violations of Rules 8.4(b) and 8.4(c) and D.C. Bar R. XI, § 10(d).

## Disciplinary Actions Taken by the Board on Professional Responsibility

### *Original Matters*

IN RE KARL W. CARTER JR. Bar No. 113449. August 5, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Carter for 18 months with his reinstatement conditioned upon his (1) providing Bar Counsel, to the extent he has not done so, with a full answer and all the documents he has been ordered to provide in the board's order issued on May 8, 2006, in Bar Docket Nos. 015-06 and 071-06, and all the documents he has been ordered to provide Bar Counsel in the court's order entered on August 3, 2006, in Bar Docket No. 071-06; (2) providing prompt and full restitution of fees paid to him by two clients; and (3) demonstrating his fitness, under D.C. Bar Rule XI, § 16, to resume the practice of law. The matter arose from five consolidated disciplinary proceedings stemming from Carter's representation of three clients in employment discrimination cases and from Bar Counsel's investigation of allegations in two other unrelated matters. In regard to the first employment matter, Carter failed to represent the client with diligence and zeal, to respond with reasonable promptness, and to return unearned fees. Additionally, he engaged in conduct involving dishonesty. In the second and third employment matters, Carter failed to provide competent representation, to represent the client with commensurate skill/care, to represent the client with diligence and zeal, to respond with reasonable promptness, to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and to return unearned legal fees. He also seriously interfered with the administration of justice. Additionally, in regard to the second employment matter, Carter failed to comply with reasonable requests for information. Finally, regarding the two other unrelated matters, Carter failed to respond to Bar Counsel, seriously interfered with the administration of justice, and failed to comply with a board order and an order of the D.C. Court of Appeals regarding a subpoena *duces tecum.* Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.16(d), 8.4(c), and 8.4(d) and D.C. Bar R. XI, § 2(b)(3).

IN RE IDUS J. DANIEL JR. Bar No. 405077. August 3, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Daniel for one year. Daniel violated the rules in connection with his management of a purported Interest on Lawyers' Trust Account and in connection with statements

he made to the Internal Revenue Service relating to that account. Two members of the board wrote separate statements recommending the imposition of a fitness requirement as a condition of Daniel's reinstatement. Rules 1.15(a) and 8.4(c).

IN RE ROBERT J. PLESHAW. Bar No. 938241. August 7, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Pleshaw. While representing clients in three separate matters, Pleshaw violated multiple Rules of Professional Conduct, including reckless misappropriation, making a false statement to a tribunal, and intentionally charging an illegal fee. The first matter related to Pleshaw's handling of a civil action on behalf of a client. In that matter, he incompetently handled a case resulting in default judgment by knowingly making false statements to the court. In the second matter concerning Pleshaw's misconduct as conservator for a client, he engaged in reckless misappropriation on two occasions by paying himself commissions without prior court approval. The third matter arose out of Pleshaw's service as counsel for the personal representative in a probate matter where he engaged in reckless misappropriation by taking fee without prior court approval and knowingly making false statements to Bar Counsel during the disciplinary investigation. Rules 1.1(a), 1.1(b), 1.3(c), 1.5(a), 1.5(b), 1.15(a), 1.16(a)(3), 3.3(a)(1), 8.4(a), 8.4(c), and 8.4(d).

IN RE L. SAUNDRA WHITE. Bar No. 463929. August 20, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend White for six months with fitness. White accepted employment on behalf of a client in a matter on which White had been personally and substantially involved as an employee of the District of Columbia Office of Human Rights. Two members of the board concurred and dissented in part, stating that White also violated Rule 8.4(d) by seriously interfering with the administration of justice. Rule 1.11.

## Disciplinary Actions Taken by the District of Columbia Court of Appeals

### *Original Matters*

IN RE K. DUFF LEWIS. Bar No. 392240. August 13, 2009. The D.C. Court of Appeals reinstated Lewis, conditioned upon his continued compliance with the repayment plan he has entered into with the Clients' Security Fund.

IN RE GARLAND H. STILLWELL. Bar No. 473063. August 27, 2009. The D.C. Court of Appeals accepted Stillwell's petition for negotiated disposition and suspended him for 60 days. Specifically, Stillwell acknowledges he inaccurately represented his status at the law firm where he was employed, made a false representation on behalf of a friend, improperly charged personal expenses to others, worked outside the law firm against the firm's written policies, and asserted a position on behalf of clients that was adverse to a position taken by a client of his firm without first obtaining informed consent of all parties. Rules 1.7(b)(1) and 8.4(c).

### *Reciprocal Matters*

IN RE NATHAN H. WASSER. Bar No. 77297. August 6, 2009. In this reciprocal matter, the D.C. Court of Appeals imposed disbarment as reciprocal discipline. Wasser was disbarred by consent in Maryland and also disbarred by order of the Virginia State Bar Disciplinary Board.

IN RE CHANDRA MAHINDA BOGOLLAGAMA. Bar No. 418491. August 20, 2009. In a reciprocal matter from Virginia, the D.C. Court of Appeals disbarred Bogollagama as identical reciprocal discipline. The Circuit Court of Virginia revoked Bogollagama's license to practice law for engaging in misappropriation of entrusted funds.

IN RE MARK S. GUBERMAN. Bar No. 442683. August 13, 2009. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed nonidentical reciprocal discipline and suspended Guberman for 18 months, effective November 17, 2006, the date on which Guberman filed an affidavit in compliance with the requirements of D.C. Bar Rule XI, § 14(g). Additionally, within six months after his resumption of law practice in the District of Columbia, Guberman shall enroll in and complete a continuing legal education course in professional responsibility for attorneys. The Court of Appeals of Maryland disbarred Guberman for engaging in conduct involving dishonesty and misrepresentation by falsely representing to representatives of his law firm that he had filed an appeal on behalf of a client. Further, the Maryland court found that Guberman engaged in conduct prejudicial to the administration of justice by creating falsified filing stamps on the purported pleadings, falsely certifying that the pleadings had been filed with the court. No misstatements concerning the purported appeal were directed to the courts or to the client.

IN RE LAWRENCE T. ROBINSON. Bar No. 210823. August 27, 2009. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended Robinson, with the right to apply for reinstatement after being reinstated in Maryland or after five years, whichever comes first. Robinson stipulated, and the Maryland court found, that he had violated Maryland Rules of Professional Conduct 8.4(b) and 8.4(d).

## Informal Admonitions Issued by the Office of Bar Counsel

IN RE NASH Y. FAYAD. Bar No. 482605. July 23, 2009. Bar Counsel issued Fayad an informal admonition for failing to ensure the client knew his appeal was denied and failing to communicate the basis or rate of the legal fee in writing while representing a client in an immigration matter. Rules 1.4(a), 1.5(b), and 1.16(d).

IN RE JOHN A. NOWACKI. Bar No. 474492. July 23, 2009. Bar Counsel issued Nowacki an informal admonition for drafting a proposed U.S. Department of Justice response to a media inquiry which he knew was inaccurate. Additionally, Nowacki concealed from Department of Justice officials his knowledge that staff from the Office of the Attorney General used political affiliation when accessing candidates from the Executive Office for the United States Attorney. Rule 8.4(c).

IN RE DAVID F. POWER. Bar No. 360411. July 23, 2009. Bar Counsel issued Power an informal admonition for filing a claim on behalf of his client after the statue of limitations had expired while representing a client in an employee benefits matter. Rules 1.1(a), 1.1(b), and 1.3(c).

*The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the* Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.*