

When Spit Hits the Fan in Removal Proceedings!

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Introduction

Some clients lie, or may want to lie, for all kinds of reasons. Lying, of course, is not limited to clients. Some politicians lie, some law enforcement officers lie, some prosecutors lie, some lawyers lie, some doctors lie, and on and on. There are probably as many reasons for lying as there are different kinds of liars: the notorious liar, the consummate liar, the incorrigible liar, the inveterate liar, the congenital liar, the chronic liar, the pathological liar, the unconscionable liar, the glib liar, the egregious liar.

Of the myriad personalities of the last 600 years, I doubt anyone understood lying more than Shakespeare. Sigmund Freud came very close. But Shakespeare's characters are the best of the classic liars. Think of Lady Macbeth, Falstaff, Iago, or Tamora and Aaron.

Lady Macbeth for example instructs us on how to attempt to deceive: "To beguile the time / look like the time."² She also tells us "look like th' innocent flower / but be the serpent under't."³ Although Lady Macbeth lies right and left and ultimately enables the murder of King Duncan, she also deftly claims the mantle of victimhood. So it is sometimes nowadays.

Unlike tragic heroes with grand ambitions, one practicing law before a court or an administrative tribunal simply cannot engage in lying or deception because some end justifies it. There are rules that a lawyer must follow or risk reprimand, censure, or, in the most severe case, the loss of one's law license. Discussing those rules in the narrow context of court proceedings is the topic of this paper. Primarily

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² William Shakespeare, *Macbeth*, act I, sc. 5, l. 64-65 (The Yale Shakespeare, 1918, rev. ed. 1954).

³ *Id.*, l. 66-68.

by posing three distinct scenarios, my aim is to guide you as to what steps to take when your client wants to lie or has lied to a court or an administrative tribunal.

Issue: What are a lawyer's ethical obligations in the following scenarios?

1. A client tells his attorney that he intends to lie on the stand. The attorney advises him not to, but he insists on doing so. May the attorney call him to the stand to testify? What if he insists that he wants to testify?
2. An attorney discovers several days after a case concluded that the client lied under oath before the court. What is the attorney's obligation to the court and to the opposing counsel? What are the attorney's continuing obligations to the client?
3. A client, while testifying in court, lies under oath and the attorney immediately recognizes it. What should the attorney do? What are the attorney's obligations to the court, to opposing counsel, and to the client?

Brief Answer:

While lawyers generally must preserve confidential client information, they have a corresponding and a *superseding* obligation to the court to provide truthful information. Accordingly, they may not make use of or elicit false testimony. They should attempt to persuade their clients not to perjure themselves. If clients insist, their attorneys cannot call them regarding that matter. If the perjury has already happened, the attorneys should urge the clients to withdraw the false information and, if that is unsuccessful, they are obliged to disclose the truth to the court themselves.

Discussion:

Competing ethics principles

A lawyer has several competing ethical obligations in these scenarios. First, a lawyer has a duty of confidentiality to the client. The Texas Disciplinary Rules of Professional Conduct provide that:

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

- (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
- (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
- (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.⁴

A lawyer owes a duty of loyalty toward a client,⁵ and must abide by the client's decisions "concerning the objectives and general methods of representation," and in a criminal matter, as to "whether the client will testify."⁶

However, these rules of confidentiality and loyalty and consultation do not allow the lawyer to act as a party to falsification of evidence or other fraud.⁷ Candor toward the tribunal and protection of a trial as a truth-seeking mechanism in our system of justice outweigh even the profound interests of loyalty to one's client and protection of privileged disclosures.⁸

⁴ Tex. Disciplinary R. Prof. Conduct, Rule 1.05(b) (Texas Center for Legal Ethics, 2024) from legalethics.texas.com/resources/rules/texas-disciplinary-rules-of-professional-conduct/candor-toward-the-tribunal/.

⁵ Comment 1 to Rule 1.06.

⁶ Rule 1.02(a)(1), (3).

⁷ Rule 1.02(c).

⁸ Comment 10 to Rule 1.05 (noting that "Rule 503(d)(1), Texas Rules of Civil Evidence (Tex.R.Civ.Evid.), and Rule 503(d)(1), Texas Rules of Criminal Evidence (Tex.R.Crim.Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud."); Comment 11 to Rule 1.05 ("A lawyer's duty under Rule 3.03(a) not to use false or fabricated

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