CHAPTER 12
FALSE STATEMENTS AND PERJURIOUS TESTIMONY
Table of Contents

CHAPTER 12
FALSE STATEMENTS AND PERJURIOUS TESTIMONY

I. PRACTICE TIPS

A. ALL ATTORNEYS PROHIBITED FROM KNOWING USE OF FALSE EVIDENCE (INDIANA PROFESSIONAL CONDUCT RULE 3.3)

Lawyer cannot "knowingly" allow testimony that produces false, yet unquestioned evidence. Disclosures should be rare because practically impossible to know in advance for certain whether client will testify falsely.

Indiana Rules of Professional Conduct, Rule 3.3 provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of the defendant in a criminal matter that the lawyer reasonably believes is false.

(b) a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial matters, including, if necessary, disclosure to the tribunal.

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

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer, which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment [8] to Rule 3.3 attempts to clarify the lawyer's responsibilities:

> "The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false; however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood."

1. If a defendant wants to offer evidence

Err on the side of allowing defendants to present their side of the story:

> "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. Unless

the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify." Comment [9].

B. DILEMMA – YOUR CLIENT INSISTS UPON TESTIFYING

1. Considerations

Because of the right of an accused to testify, there are different considerations for defense attorneys (particularly public defenders) who have clients that insist upon testifying. There is no easy solution to the dilemma, but some suggested approaches are:

(1) Seek to persuade client to refrain from perjury.

(2) Motion to withdraw prior to trial.

(3) Refuse to put defendant on stand and face PCR hearing on IAC for not allowing client to testify. See, e.g., Curry v. State, 643 N.E.2d 963 (Ind.Ct.App. 1994) (defendant failed to establish by preponderance of evidence denial of right to testify where attorneys merely advised him, they could not ethically put him on stand knowing he was going to perjure himself; both attorneys denied they had communicated intent to withdraw if defendant decided to testify, direct examination had been carefully prepared in event he chose to testify).

(4) Permit client to testify by narrative. See Reynolds v. State, 625 N.E.2d 1319, 1320-21 (Ind.Ct.App. 1993) and Brown v. Commonwealth, 226 S.W.3d 74 (Ky. 2007). But see NACDL Opinion 92-2, The Champion 23 (March 1993), available at www.nacdl.org/public.nsf/freeform/EthicsOpinions?OpenDocument (expressly rejecting the "narrative solution," in which the lawyer forces the client to testify without the assistance of counsel, and in which the lawyer then omits reference to the client's testimony in closing argument).

(5) Court excuses lawyer from ethical duty to reveal perjury.

(6) Reveal perjury if necessary to rectify situation. But see United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988) (disclosures should be rare; practically impossible to know in advance for certain whether defendant will testify falsely).

(See section III. below).

C. PROSECUTOR'S USE -- SUMMARY OF THE LAW

1. Conviction must be vacated if prosecutor knowingly uses false testimony

If prosecutor knowingly uses false testimony without disclosing its falsity or attempting to correct it, a conviction must be vacated.

> A conviction obtained through evidence that the State knows to be false violates a defendant's due process rights. St. Johns v. State, 523 N.E.2d 1353, 1357 (Ind. 1988) (*citing* Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

2. Defendant must object, or waived

The defense must object and raise the issue at the earliest opportunity, or it may be waived. (See section II.D. below).

Many times, knowledge of the false testimony is not discovered until later. A PCR is an appropriate method of raising the issue post-trial (as long as it was discovered post-trial). (See section II.F.2. below).

3. Prosecutor charged with knowledge of agents and officers

Prosecutor is charged with knowing what the agents and officers know - it is prosecutor's duty to discover any promises or inducements given to a witness for testimony; all such information must be disclosed to the defense. Kyles v. Whitley, 514 U.S. 419, 447, 115 S.Ct. 1555, 1572, 131 L.Ed.2d 490 (1995). (See section II.B. below).

4. Prosecutor purchased testimony by inducements – request cautionary instruction

Indiana is one of few jurisdictions that have discouraged use of instructions directed toward a particular witness, but the probability of perjury by one who gains from testifying should merit an instruction. (See section I.D., below, for sample instructions).

D. SAMPLE INSTRUCTIONS REGARDING SNITCHES

Seventh Circuit Pattern Instruction. Recommended to be given at the time of the testimony and as a final instruction:

1. Witnesses Requiring Special Caution

You will hear testimony from several witnesses who:

(a) received immunity; that is, a promise from the government that any testimony or other information provided would not be used against that witness in a criminal case;

(b) received benefits from the government in connection with the case such as a lesser sentence, money or consideration for family members;

(c) admitted involvement in the commission of the offense charged; and/or

(d) pleaded guilty to an offense arising out of the same occurrence for which this trial is called. Those guilty pleas are not to be considered by you as evidence against any of the accused.

You may give such witnesses' testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Devitt, Blackmar § 15.02 CREDIBILITY OF WITNESSES—INFORMANT:

DEFENDANT'S TENDERED INSTRUCTION NO. _____

The testimony of an informant, someone who provides evidence against someone else for money, or to escape punishment for (his) (her) own misdeeds or crimes, or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated.

_____ _____ may be considered to be an informant in this case.

The jury must determine whether the informer's testimony has been affected by self-interest, or by the agreement he has with the government, or his own interest in the outcome of this case, or by prejudice against the defendant.

Committee on Pattern Jury Instructions, Fifth Circuit District Judges Association, Pattern Jury Instructions (Criminal Cases) 34 (1978):

DEFENDANT'S TENDERED INSTRUCTION NO._____

> The testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness's testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by his prejudice against the Defendant or by the benefits he has received either financially, or as a result of being immune from prosecution. If you determine that the testimony of such a witness was affected by any one or more of these factors, you should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict any Defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

II. PROHIBITED USE BY PROSECUTOR

A. STATE CANNOT KNOWINGLY USE FALSE TESTIMONY

1. Prosecutorial misconduct

Knowingly using false testimony constitutes prosecutorial misconduct. Myers v. State, 718 N.E.2d 783, 787 (Ind. Ct. App. 1999) and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

(a) Adhere to Rules of Professional Conduct

> Indiana Professional Conduct Rule 3.3(a) provides in part: "A lawyer shall not knowingly . . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. 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."

(b) Prosecutor may not use false testimony

Prosecutorial misconduct to knowingly use false testimony, and violation of defendant's due process rights as guaranteed under the Fourteenth Amendment. Lewis v. State, 629 N.E.2d 934, 937 (Ind. Ct. App. 1994). Conviction obtained by use of such testimony will not be upheld. Evans v. State, 489 N.E.2d 942, 948 (Ind. 1986).

> Madison v. State, 234 Ind. 517, 528, 130 N.E.2d 35 (1955) (conviction reversed where State deliberately opted to prejudice and inflame jury against defendant by making false charge that grenade loaded with nitroglycerine and have witness falsely testify there was nitroglycerine in explosive; references to nitroglycerine calculated to prejudice defendant, and false testimony of State's expert intended to create in minds of jury opinion that defendant reckless and dangerous person).
>
> Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) (failure of prosecutor in murder case to correct "false impression" in wife's testimony that wife and victim, her lover, were only casual friends violated due process where defendant-husband set up "heat of passion" defense).

2. Defendant must show knowing violation by State

To constitute violation, defendant must demonstrate prosecutor knowingly used false testimony. Klagiss v. State, 585 N.E.2d 674, 682 (Ind. Ct. App. 1992).

Hernandez v. State, 563 N.E.2d 560, 563 (Ind. 1990) (inconsistencies in testimony of witness, coupled with incredulous testimony, does not establish knowing use of false testimony).

(a) Knowledge of agents may be attributable to prosecutor

In Indiana, the knowledge held by State's investigators may be attributable to prosecutors under certain circumstances, regardless of whether the prosecutor has actual knowledge. Reid v. State, 372 N.E.2d 1149, 1154 (Ind. 1978). Thus, where the State's investigators are aware of a fact that the State would be obligated to make available to the jury, and the investigators fail to inform the prosecutor of such fact, the State's still has an obligation to disclose the fact to the jury. Carey v. State, 416 N.E.2d 1252, 1257 (Ind. 1981).

Carey v. State, 416 N.E.2d 1252, 1257 (Ind. 1981) (where police officer and DEA special agent aware of and cause arrangement for person who has committed crime to become informant, their failure to inform prosecutor of such act does not obviate State's obligation to make those facts available to jury).

Giglio v. United States, 405 U.S. 150 (1972) (witness falsely testified at trial that he received no promises of favorable treatment from prosecutor; although promise of immunity had been made by another prosecutor in grand jury proceeding, prosecutor's actual unawareness irrelevant because he should have known).

A prosecutor is also under a duty under Brady to disclose favorable evidence to the defendant, regardless of whether police investigators failed to inform the prosecutor of the evidence. Kyles v. Whitley, 514 U.S. 419 (1995).

Reid v. State, 267 Ind. 555, 372 N.E.2d 1149, 1154 (1978) ("only by charging the prosecution with knowledge held by the State's investigators can we be assured that the prosecutor, rather than the police, will be in control of the State's case");

3. False statements made during guilty plea process

Indiana Evidence Rule 410(a) provides: "In a civil or criminal case, evidence of the following is not admissible against the defendant who make the plea or participated in the plea discussions: (1) a guilty plea or admission of the charge that was later withdrawn; (2) a nolo contendere plea; (3) an offer to plead to the crime charged or to any other crime, made to one with authority to enter into or approve a binding plea agreement; or (4) a statement made in connection with any of the foregoing withdrawn pleas or offers to one with authority to enter into a binding plea agreement or who has a right to object to, approve, or reject the agreement."

(a) Exception – limited use in perjury or false statement prosecution

Ind. Evid. R. 410 provides in part: "The court may admit such a plea, offer, or statement: (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present."

(1) Statement by witness at guilty plea hearing

When witness breaches his or her oath at guilty plea hearing, that witness should face same penalties as witness who commits perjury in any other type of proceeding. State v. Wolff, 545 N.E.2d 39 (Ind.Ct.App. 1989).

(2) Statement by defendant

Any sworn statement made by defendant relating to plea agreement, or agreement itself, may be used in trial on charges other than original charges. Bell v. State, 622 N.E.2d 450, 453 (Ind. 1993). Further, any statements made can also be used as a basis for a subsequent perjury charge, if the plea statements are perjured. State v. Wolff, 545 N.E.2d 39 (Ind. Ct. App. 1989).

Bell v. State, 622 N.E.2d 450, 453 (Ind. 1993) (defendant's statement made to prosecutor during plea negotiations was involuntary; statement was result of direct or implied promises by prosecutor of mitigation).

4. Exception – false testimony to show consciousness of guilt

False testimony, tending to show an accused's attempt to conceal implicating evidence or manufacture evidence, is relevant and admissible since it reveals a consciousness of guilt. Grimes v. State, 450 N.E.2d 512, 521 (Ind. 1983).

Matthew v. State, 263 Ind. 672, 337 N.E.2d 821, 823-24 (1975) (testimony of defendant's secretary that she had conspired with defendant and had appeared before grand jury and lied in defendant's favor was admissible because it raised inference of consciousness of guilt).

B. STATE'S DUTY TO DISCLOSE AND CORRECT

In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the U.S. Supreme Court held that the government has an affirmative obligation to correct false evidence. McCord v. State, 622 N.E.2d 504 (Ind. 1993). Any lack of knowledge on the government's part does not relieve the government's obligation to correct false evidence. Giglio v. United States, 405 U.S. 150 (1972) (where prosecuting attorney let defendant's testimony go uncorrected because he was unaware of an agreement entered into between the witness and a previous prosecuting attorney).

1. When obligation arises

Duty to disclose and correct false testimony exists where: (1) State's case includes perjured or false testimony; and (2) prosecutor knew, or should have known, of perjury. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

2. State cannot escape obligation by omission

Prosecutors may not stand mute while testimony known to be false received into evidence. Biggerstaff v. State, 266 Ind. 148, 361 N.E.2d 895, 899 (1977) and Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App. 1994).

(a) Includes false testimony relating to credibility

Duty to disclose perjured testimony includes duty to disclose false testimony that goes only to credibility of State's witness. Birkla v. State, 263 Ind. 37, 42, 323 N.E.2d 645, 648 (1975) and Carey v. State, 416 N.E.2d 1252 (Ind. 1981).

Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App. 1994) (reversal required where prosecution failed to disclose witness's plea agreement for her testimony, as well as subornation of her perjurious denial that she had an agreement with State for her testimony).

Deatrick v. State, 392 N.E.2d 498 (Ind.Ct.App. 1979) (violation of due process where prosecutor failed to disclose false testimony when codefendant denied a deal or promise had been made for his testimony and prosecutor had written letter to parole board on his behalf; could not say suppressed evidence would not have affected

verdict, considering eyewitnesses were unable to identify faces of perpetrators, and only other witness to partially corroborate codefendant's testimony was his brother).

See also *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?,* 3 GEO. J. LEGAL ETHICS 657, 688 (1990).

3. Duty to disclose inducements or temptations to testify falsely

Prosecutors have a duty to disclose any offers of leniency, and failure to disclose agreement of leniency between an accomplice and State constitutes reversible error. Fox v. State, 497 N.E.2d 221, 225 (Ind. 1986).

(a) Inform jury about inducements to testify

Counsel should inform jury of any inducements and temptations to commit perjury by offers of leniency by the State to alleviate any inherent dangers that erroneous conviction will result from induced testimony. In cases where accomplice testimony is uncorroborated, State may use plea bargains as vehicle to induce perjured testimony by 'purchasing' testimony of accomplices in exchange for favorable plea bargain, grants of immunity, rewards or leniency.

(1) Request cautionary instruction about credibility of accomplice

Although Indiana courts have not allowed cautionary instructions telling juries to receive testimony from accomplice witness with caution due to his or her agreement with State to testify in exchange for lenient treatment, counsel should request such cautionary instructions because Indiana is among the minority of jurisdictions not allowing for such instructions and the law is ripe to change. See Tidwell v. State, 644 N.E.2d 557, 559 (Ind. 1994) and Cherry v. State, 280 N.E.2d 818 (Ind. 1972).

(See sample instructions on page 12-3).

C. GUIDELINES FOR PROVING PROSECUTOR'S USE OF FALSE EVIDENCE

1. Identify evidence

Counsel should specifically identify the false evidence solicited or knowingly used by the State without correction. Kindred v. State, 521 N.E.2d 320 (Ind. 1988).

Kindred v. State, 521 N.E.2d 320 (Ind. 1988) (request for evidentiary hearing properly denied; defendant should have included sworn statements of material witnesses, affidavits failed to specify what testimony was perjured or alleged sufficient facts for court to rule on allegations, and affidavits failed to allege that evidence of perjury was newly discovered).

2. Show facts material, not collateral

Materiality must be alleged and proven. Davis v. State, 218 Ind. 506, 34 N.E.2d 23 (1941).

Walker v. State, 503 N.E.2d 883 (Ind. 1987) (no error in refusing to grant new trial based upon alleged perjury, where witness claimed his wife was visiting her sister at time of crime and defendant claimed she was in sanitarium for alcohol rehabilitation; whereabouts of witness's wife had absolutely no bearing on facts of case, not even remote possibility witness's statement concerning whereabouts of his wife could have affected outcome of case).

3. Show more than inconsistencies in testimony

Although Indiana's perjury statute was amended to include the expanded definition of perjury that now includes inconsistent, not just false, statements, the presence of such "perjury" for

inconsistent statements, as defined by Ind. Code § 35-44.1-2-1, does not automatically require an appellate court to vacate a resulting conviction. Smith v. State, 34 N.E.3d 1211, 1220 (Ind. 2015). Mere inconsistencies in testimony or contradictory statements of witness do not lead to conclusion witness committed perjury. Timberlake v. State, 690 N.E.2d 243 (Ind. 1997).

Smith v. State, 34 N.E.3d 1211 (Ind. 2015) (defendant's girlfriend pled guilty to burglarizing the store where she worked, stated she acted alone; the State later charged defendant for the same crime and offered the girlfriend immunity in exchange for her testimony. At trial, she said defendant broke into the store while she served as an accomplice. Supreme Court held that although girlfriend's testimony constituted perjury under Ind. Code § 35-44.1-2-1(a)(2), the State did not impair defendant's due process rights because the jury was made aware of the "discrepancies" in the girlfriend's testimony and thus was able to "fully function as an informed fact finder").

Estep v. State, 486 N.E.2d 492 (Ind. 1985) (defendant not entitled to vacation of conviction due to perjury where entire argument consists of listing instances where witness's trial testimony conflicted with defendant's own testimony at post-conviction hearing, coupled with assertion witness's testimony false; no evidence to prove allegation of perjury).

(a) Jury reconciles inconsistencies in testimony

The jury is responsible for resolving inconsistencies from witness's testimony. Klagiss v. State, 585 N.E.2d 674 (1992) (*citing* Taylor v. State, 425 N.E.2d 141, 143 (1981)).

Dix v. State, 639 N.E.2d 363 (Ind.Ct.App. 1994) HN 9 (conflicts between witness's uncorroborated testimony and of defense's witnesses were for jury to reconcile).

D. WAIVER OF ERROR IF NO CONTEMPORANEOUS OBJECTION

A defendant may not sit idly by and refrain from making objection to alleged false testimony or from attempting to have corrective action taken and rely on such error for reversal. Johnson v. State, 390 N.E.2d 1005, 1009 (Ind. 1979).

Biggerstaff v. State, 361 N.E.2d 895 (Ind. 1977) (defendant knew transactional immunity had been granted, but accomplice falsely testified no type of bargain had been struck in return for his testimony; because defendant failed to object, he could not rely on error later).

E. STEPS TO PRESERVE ERROR

To properly preserve error for false testimony, counsel should take steps to disclose such false testimony when s/he reasonably believes perjury or false testimony has been given: (1) if counsel has positive proof that erroneous testimony has been committed, counsel should make objection and request court take corrective action; (2) present evidence which conflicts with alleged false testimony of witness, either through calling defense witnesses or through cross-examination of the witness who testified falsely; and (3) avoid asking unfocused and ambiguous questions during examination of witness.

Tyson v. State, 626 N.E.2d 482, 485-89 (Ind. Ct. App. 1993) (testimony of alleged victim and her parents concerning retaining a civil lawyer not perjurious or false as a matter of law due to ambiguous and unfocused nature of questions posed by defense counsel - defendant failed to specifically inquire about financial motives or existence of agreement between alleged victim and civil lawyer).

F. APPELLATE REVIEW

Prosecutors have the duty to disclose perjured testimony or testimony known to be false under the

Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Gordy v. State, 270 Ind. 379, 385 N.E.2d 1145 (1979), *citing* United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). In determining whether the State's use of false evidence warrants reversal, appellate courts should focus on whether the State impermissibly used false testimony to obtain a conviction in violation of a defendant's due process rights rather than considering only whether the witness' testimony would prove the crime of perjury under Ind. Code § 35-44.1-2-1. Smith v. State, 34 N.E.3d 1211, 1220 (Ind. 2015).

1. Highest level of scrutiny

Prosecutorial use of perjured testimony or testimony known to be false invokes the highest level of appellate scrutiny. Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App. 1994) (*citing* Gordy v. State, 270 Ind. 379, 385 N.E.2d 1145 (1979).

In Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1773 (1959), the U.S. Supreme Court stated that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life and liberty may depend."

2. Standard of review

The standard of review to be applied to these cases is: "the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." St. John v. State, 523 N.E.2d 1353 (Ind. 1988) and Parker v. State, 567 N.E.2d 105, 110 (Ind. Ct. App. 1991).

> Smith v. State, 34 N.E.3d 1211, 1220 (Ind. 2015) ("[t]he main thrust of the case law in this area focuses on whether the jury's ability to assess all of the facts and the credibility of the witnesses supplying those facts has been impeded to the unfair disadvantage of the defendant").

If post-conviction relief court determines perjury may have occurred, it may properly set aside defendant's conviction. State v. Hicks, 519 N.E.2d 1276, 1281 (Ind. Ct. App. 1988).

Indiana courts require a strict standard of materiality in light of the inherent dangers perjury plays in our system of justice. Biggerstaff v. State, 361 N.E.2d 895 (Ind. 1977).

3. Reversal even where prosecution lacked knowledge of perjury

Some cases support the argument that a conviction should be reversed on grounds that perjurious testimony was used in obtaining conviction, even if prosecution had no knowledge of the false evidence. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935) (violation of 14th Amendment for State to obtain conviction through admitted or proved use, knowingly or unknowingly, of perjured testimony);

> Key v. State, 235 Ind. 172, 179, 132 N.E.2d 143 (1956) (court should have sustained motion for new trial, where witness told deputy sheriff before trial that defendant not guilty of burglary, but witness intended to commit perjury because defendant had dates with witness's wife).

III. PROHIBITED USE BY DEFENSE COUNSEL

A. CANNOT KNOWINGLY USE PERJURED TESTIMONY

Lawyer cannot "knowingly" allow testimony that produces false yet unquestioned evidence. Disclosures should be rare because practically impossible to know in advance for certain whether client will testify falsely.

Indiana Rule of Professional Conduct 3.3 provides in part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of the defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial matters, including, if necessary, disclosure to the tribunal.

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

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

1. Comments on Rule 3.3

(a) Reasonable belief of falsity does not preclude presentation of evidence, but knowledge can be inferred from circumstances

Comment [8] to Indiana Rule of Professional Conduct 3.3 attempts to clarify the lawyer's responsibilities with regards to testimony that is known or reasonably believed to be false:

> "The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood."

(b) If a defendant wants to offer evidence, generally permitted

Err on the side of allowing defendants to present their side of the story:

> "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. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify." Indiana Rules of Professional Conduct 3.3, Comment [9].

2. Disclose client's perjury where absolutely convinced

Criminal defense lawyer obligated to reveal client's perjury only when necessary to do so under Indiana Professional Conduct Rule 3.3(a)(3). "If you become absolutely convinced your client intends to commit perjury, you must try to dissuade your client from doing so." *Ethical Problems Facing the Criminal Defense Lawyer: Anticipated Client Perjury,*

American Bar Association, page 152 (1995).

Attorney must not actively assist or encourage client to commit perjury. See Indiana Rules of Professional Conduct 1.2(d).

The National Association of Criminal Defense Lawyers (NACDL), in Ethics Advisory 92-2, recommends that the lawyer use "beyond a reasonable doubt" standard to determine whether he or she "knows" the client intends to commit perjury. The lawyer should not convict his or her client on a lesser standard than that used by a jury.

Note: If proceedings have already concluded, must maintain client's confidentiality under Indiana Professional Conduct Rule 1.6. and see Md. State Bar Ass'n Comm. on Ethics Op. 2005-15 (2005) (lawyer's obligation to reveal witness perjury by taking remedial measures does not extend through the appeals process).

There is a tension between the duty to keep client confidence under Indiana Rules of Professional Conduct 1.6 and the obligation to disclose under Indiana Rules of Professional Conduct 3.3(a)(3). In re Page, 774 N.E.2d 49 (Ind. 2002). Further, in some circumstances, resignation is an appropriate step; however, doing nothing is not an acceptable answer. Id.

> In re Page, 774 N.E.2d 49 (Ind. 2002) (Respondent violated Rule 3.3(a)(3) by remaining silent and taking no action when, in open court with his client, during hearing on client's petition for probationary license, client testified that he had not driven a car in nine years when in fact client had, a statement Respondent had reason to believe was untruthful).

3. Determining what is perjury

One standard is that the attorney "knows, or from facts within his knowledge should know, that such testimony…is false, fraudulent, or perjured." See State v. Chambers, 994 A.2d 1248 (2010). When the attorney lacks a "firm basis in fact" for believing the client would be committing perjury, then the attorney should resolve all reasonable doubts in favor of the client and permit the client to tell his or her story. If the attorney later is convinced it was perjury, then counsel should not argue it to the jury. See Hall, *Professional Responsibility in Criminal Defense Practice*, §26:11 (Thomson/West 2005).

4. Handling client's insistence on testifying

Criminal defendants have privilege to testify in their own defense, but not to commit perjury. Barker v. State, 440 N.E.2d 664, 667 (Ind. 1982).

However, a lawyer's ethical duty to reveal perjury may be qualified by Indiana constitution provisions of due process, right to counsel and right to testify.

The lawyer should continue trying to persuade client to refrain from perjury, advising regarding potential sentencing consequences.

Possible further choices:

(1) Motion to withdraw prior to trial.

(2) Refuse to put defendant on stand and face PCR hearing on IAC for not allowing client to testify.

> See, e.g., Curry v. State, 643 N.E.2d 963 (Ind.Ct.App. 1994) (defendant failed to establish by preponderance of evidence denial of right to testify where attorneys merely advised him, they could not ethically put him on stand knowing he was going to perjure himself; both attorneys denied they had communicated intent to withdraw if defendant decided to testify, direct examination had been carefully prepared in event he chose to testify).

(3) Permit client to testify by narrative. See Reynolds v. State, 625 N.E.2d 1319, 1320-21 (Ind.Ct.App. 1993) and Brown v. Commonwealth, 226 S.W.3d 74 (Ky. 2007).

But see NACDL Opinion 92-2, The Champion 23 (March 1993), available at www.nacdl.org/public.nsf/freeform/EthicsOpinions?OpenDocument (expressly rejecting the "narrative solution," in which the lawyer forces the client to testify without the assistance of counsel, and in which the lawyer then omits reference to the client's testimony in closing argument).

(4) Reveal perjury if necessary to rectify situation. In re Page, 774 N.E.2d 49 (Ind. 2002).

But see United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988) (disclosures should be rare, practically impossible to know in advance for certain whether defendant will testify falsely).

See also *Comments [7] and [9]* Indiana Rules of Professional Conduct3.3.

(a) Up to state court to decide

The U.S. Supreme Court leaves it up to individual state to decide which approach to condone when lawyer believes client will commit perjury. Nix v. Whiteside, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

For articles dealing with practical issues in handling client perjury, see Hall, *Handling Client Perjury after* Nix v. Whiteside*: A Criminal Defense Lawyer's View*, 42 MERCER LAW REVIEW 768-810 (Winter 1991); Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (2008); and Freedman, *Controversial No More—The Perjury Trilemma Revisited*, 9 Prof. Law 2, 13 (Summer 1998).

(b) ABA Standards, The Defense Function, Std. 4-7.7 (1st Ed. 1971)

Though expressly repudiated in the adoption of the Rules of Professional Conduct in 1983 and although the approach has been criticized, "this standard is still an important consideration in the area of client perjury in the courts because it still generally reflects the current thinking, even if the ABA could not go through with it." Hall, *Professional Responsibility in Criminal Defense Practice*, §26:4 (Thomson/West 2005). It provides as follows:

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court, if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial and the defendant insists upon testifying falsely in his or her own behalf, the lawyer may not lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer false testimony, the lawyer

> should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief and may not recite or rely upon the false testimony in his or her closing argument.

(c) ABA Standards, The Defense Function, Std. 4-7.5(a) (3rd Ed. 1993)

Standard 4-7.7 (above) was considered for inclusion in the Standards adopted in 1993 but was not adopted for lack of consensus as to the appropriate approach. Standard 4-7.5(a) provides: "Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity."

5. Perjured alibi testimony

If counsel knows defendant was present at crime, alibi cannot be pled and no evidence of alibi presented. In re Murray, 266 Ind. 221, 228, 362 N.E.2d 128 (1977) HN 10 (violation of ethical rules where defense counsel knowingly guided witnesses through false testimony in support of fabricated alibi);

> Brewer v. State, 496 N.E.2d 371, 373 (Ind. 1986) (no knowing introduction of perjured testimony and no Ineffective Assistance of Counsel where, at defendant's request and demand, counsel proceeded with alibi defense when a week before trial defendant told him alibi not true; defendant equivocated regarding alibi and attorney caught in potential ethical bind and did not know which version of defendant's story was truth given his insistence on presentation of his alibi).

Practice Pointer: Do not seek admission as to whether client committed crime. Advise client of nature of State's evidence and ask if he were to testify what would be said.

B. LAWYER'S OBLIGATIONS

1. Report client's fraud upon court

Attorney must report client's fraud upon court to court, if discovered any time prior to conclusion of proceeding (even if discovered after the fact). Indiana Professional Conduct Rule 3.3 and 4.1(b).

Note: Unclear whether "proceeding" in Indiana Professional Conduct Rule 3.3(c) refers to close of trial or point at which no longer opportunity for new trial, appeal, etc.

2. Cannot knowingly make false statement of fact or law

"A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . ." Indiana Professional Conduct Rule 3.3(a)(1).

Note: The amendments to the Rules of Professional Conduct, effective January 1, 2005, require lawyers to avoid making *any* false statements of fact or law, where Indiana Professional Conduct Rule 3.3(a) used to refer only to "material" fact or law. By contrast, a lawyer need only correct a false statement of *material* fact or law previously made. See subsection 3, *infra*.

3. Must correct material misstatements of fact or law

"A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Indiana Professional Conduct Rule 3.3(a)(1).

4. Eliciting/offering false evidence by person other than client

Lawyer must refuse to offer evidence he knows to be false provided by a person who is not the client, regardless of client's wishes.

> In re Murray, 362 N.E.2d 128 (Ind. 1977) (29 different violations included using perjured testimony, making false statements of fact and law, participating in creation of false evidence, failing to reveal to tribunal existence of fraud perpetrated by clients and witnesses, allowing third persons to direct and regulate professional judgment, engaging in conduct prejudicial to administration of justice, and acquiescence in payment of witnesses for favored testimony).

However, in criminal cases, lawyer may be denied this authority by constitutional requirements governing right to counsel. See Indiana Professional Conduct Rule 3.3(a)(3) (a lawyer may prevent a criminal defendant from testifying only if he *knows* the intended testimony to be false). If the lawyer only reasonably believes the intended testimony to be false, the lawyer may not prevent a defendant from testifying. See also Comment [7] and [9] to Indiana Rules of Professional Conduct 3.3.