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## Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law

Wayne D. Brazil

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## UNANTICIPATED CLIENT PERJURY AND THE COLLISION OF RULES OF ETHICS, EVIDENCE, AND CONSTITUTIONAL LAW

Wayne D. Brazil\*

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\* Associate Professor of Law, University of Missouri-Columbia; B.A. Stanford University, 1966; M.A. 1967; Ph.D., 1975, Harvard University; J.D., University of California, Berkeley, 1975.

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## I. INTRODUCTION

One of the most difficult dilemmas attorneys confront is how to respond after a client has committed unanticipated perjury or fraud<sup>1</sup> while

1. Perjury is statutorily defined in Missouri: "A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths." RSMo § 575.040.1 (1978). This definition was adopted by the new Missouri Criminal Code which took effect January 1, 1979. For opinions by Missouri courts which discuss the definition of perjury, see *State v. Vidauri*, 305 S.W.2d 437, 440 (Mo. 1957); *State v. Roberson*, 543 S.W.2d 817, 820 (Mo. App., D. St. L. 1976).

The federal statutory definition of perjury provides:

Whoever—(1) *having taken an oath* before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, *that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or*

(2) *is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both.* This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1621 (1976) (emphasis added).

For an instructive analysis of the reach of the federal statute, see *Bronston v. United States*, 409 U.S. 352 (1973). For an interesting discussion of the ethical problems created by client perjury, see Wolfram, *Client Perjury*, 50 S. CALIF. L. REV. 809 (1977).

Unlike perjury, the term "fraud" admits of no precise, uniformly applicable definition. Dean Prosser has observed that the word is "so vague that it requires definition in nearly every case." W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 105, at 684 (4th ed. 1971). See also the discussion of the ambiguity of this term and some of its common law definitions in Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct In An Adversary System*, 29 RUTGERS L. REV. 332, 359-60 (1976). While the Callan & David article is one of the very few that pays significant analytical attention to fifth amendment problems created by DR 7-102(B)(1), the reliability of their

testifying.<sup>2</sup> The purposes of this essay are: (1) to explore the values and responsibilities that are in conflict in this situation; (2) to describe how that conflict has been resolved in other jurisdictions; and (3) to suggest a course of conduct for lawyers in Missouri that would do as little damage as possible to the principles and interests that collide when, on the basis of confidential communications, attorneys conclude that their clients have perpetrated a testimonial fraud or committed perjury.

In this situation there are three protagonists, each competing for the attorney's allegiance. First, there are the commandments of the Code of Professional Responsibility. Second, counsel must also consider the obligations imposed by the law of attorney-client privilege. Finally, there are the constitutional rights of a client to effective assistance of counsel and to not be "compelled in any criminal case to be a witness against himself."<sup>3</sup>

## II. THE DILEMMA'S FIRST HORN: DISCIPLINARY RULE 7-102(B)(1)

### A. *The Missouri Version of the Rule*

The first horn of the dilemma faced by Missouri lawyers who believe that their client has committed testimonial fraud or perjury stems from the

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essay is compromised by some overbroad generalizations and perhaps too hastily drawn conclusions. See note 5 *infra*.

For purposes of this article, which is concerned primarily with testimonial situations (both before and during trial), the term "fraud" should be read as embracing both conduct that satisfies the statutory requirements of perjury and intentionally deceptive material testimony that might not satisfy the technical requirements of perjury, e.g., the defendant's apparently intentionally non-responsive answers in *Bronston v. United States*, 409 U.S. 352 (1973).

2. This essay focuses on the problems of testimonial misrepresentation and not those created by other forms of intentionally deceitful conduct. This article also will not discuss directly the dilemma counsel faces when he knows in advance that his client intends to testify falsely. An attorney in that situation, however, should consider many of the values, policies and rights discussed in this article. For more direct confrontations with the issues raised when a client expresses his intention to lie on the stand, see *Ingle v. Fitzharris*, 283 F. Supp. 205, 207 (N.D. Cal. 1968), *aff'd*, 411 F.2d 611 (9th Cir. 1969); *McNamara v. State*, 502 S.W.2d 306, 308 (Mo. 1973); *Allen v. State*, 518 S.W.2d 170, 172 (Mo. App., D. St. L. 1974); *Callan & David*, *supra* note 1; *Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); *Lefstein, The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978); *Pye, The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 924 n.17; *Wolfram, supra* note 1. See also MO. SUP. CT. R. 4 Disciplinary Rule [hereinafter cited as MO. SUP. CT. R. 4, DR] 4-101(C)(3), which expressly permits an attorney to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."

3. U.S. CONST. amends. V & VI. See also MO. CONST. art. 1, § 19 ("no person shall be compelled to testify against himself in a criminal cause"); RSMO § 491.040 (1978) ("[n]othing in sections 491.010 and 491.030 shall . . . be so construed as to compel any person to subject himself, by his testimony, to any prosecution for a criminal offense").

version of Disciplinary Rule 7-102(B)(1) which the Missouri Supreme Court has adopted in its Rule 4.<sup>4</sup> This Rule commands:

[A Missouri] lawyer who *receives information clearly establishing that:*

- (1) His client has, in the course of the representation, perpetrated a fraud<sup>5</sup> upon a person or tribunal [,to] promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, [to] reveal the fraud to the affected person or tribunal.<sup>6</sup>

4. MO. SUP. CT. R. 4, DR 7-102(B)(1).

5. The term "fraud" as used here is nowhere defined in Rule 4, *supra* note 2, or in the ABA CODE OF PROFESSIONAL RESPONSIBILITY. While Callan & David, *supra* note 1, at 358, contend that the term "fraud" in DR 7-102(B)(1) does not embrace past conduct that "also constitutes a crime," including the crime of perjury, this narrow interpretation of the reach of the rule is not sustainable. Both the ABA Committee on Ethics and Professional Responsibility and the Advisory Committee of the Missouri Bar Administration clearly believe that the broader term "fraud" was intended to embrace the concept of "perjury" as a subspecies of a larger classification of misconduct. See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS [hereinafter cited as ABA OPINIONS] No. 341 (1975); ADVISORY COMMITTEE OF THE MISSOURI BAR ADMINISTRATION, INFORMAL OPINIONS [hereinafter cited as MO. BAR ADVISORY COMMITTEE, INFORMAL OPINION], March 5, 1975, September 10, 1977, and April 6, 1978. See also Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976); Wolfram, *supra* note 1, at 820, 864-66.

6. MO. SUP. CT. R. 4, DR 7-102(B)(1) (emphasis added). The form of the Disciplinary Rule that the ABA currently recommends includes an important amendment that the Supreme Court of Missouri has not adopted. The ABA's version reads:

(B) A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, *except when the information is protected as privileged communication.*

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (emphasis added). The underscored last clause was added by the ABA in 1974. See notes 80-86 and accompanying text *infra*.

The situation in other states varies. States retaining the original 1969 version of DR 7-102(B)(1) are: Arizona, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, Wisconsin and Wyoming.

States that have adopted the ABA's amended version of DR 7-102(B)(1) are: Arkansas, Colorado, Illinois, Kentucky, Maine, Minnesota, Nebraska, Nevada, New York (substitutes "confidence or secret" for "privileged communication" in last clause), North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont and West Virginia.

Other states have chosen to adopt rules differing in varying degrees from either the original or the amended ABA versions. Those states include:

Alabama—Code of Professional Responsibility of the Alabama State

Bar, 293 Ala. XCVII (1975) DR 7-102(B)(1) states:

A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall withdraw from employment.

Alaska—That state's rule provides:

A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person.

California—Rules of Professional Conduct of the State Bar of California, CAL. BUS. & PROF. CODE, following § 6076 (West Supp. 1978). Rule 7-105(1) states:

In presenting a matter to a tribunal, a member of the State Bar shall . . . [e]mploy, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law. A member of the State Bar shall not intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. A member of the State Bar shall refrain from asserting his personal knowledge of the facts at issue, except when testifying as a witness.

District of Columbia—8 D.C. Code Encycl.—Code of Professional Responsibility (West Supp. 1978). DR 7-102(B)(1) states:

A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same.

Montana—DR 7-102(B)(1) states:

A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the court.

ABA Committee on Ethics and Professional Responsibility, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1977).

North Carolina—4A N.C. GEN. STAT. App. VII (Michie Cum. Supp. 1977). DR 7-102(B)(1) states:

A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, committed a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw but without necessarily revealing his reason for wishing to withdraw.

While this rule may appear self-explanatory, the full scope of the obligations it imposes is by no means clear.<sup>7</sup> Because the Missouri Supreme Court has never confronted a case that compelled it to explicate or defend this rule, the court's view of what Disciplinary Rule 7-102(B)(1) requires of attorneys remains undetermined.<sup>8</sup>

Although Missouri appellate courts have not had occasion to define the reach of this Disciplinary Rule, the Advisory Committee of the Missouri Bar Administration has published three informal opinions in response to questions provoked by Disciplinary Rule 7-102(B)(1).<sup>9</sup> In the first of these opinions, the Advisory Committee considered the following situation:

What should the defense lawyer do if the defendant tells the lawyer that he committed the offense for which he is on trial and that case goes to trial and the client elects to testify and denies he committed the offense?<sup>10</sup>

The Advisory Committee counseled Missouri attorneys who were faced with this situation to take the following course of action:

The defense attorney should advise the defendant before the client takes the stand that should any perjured testimony be given by the client, that the attorney will have to reveal it to the court. If the

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notice by supreme court order within the various jurisdictions. Therefore, although this information is accurate to the best of the author's knowledge, there may have been some very recent changes in these rules which the above list does not reflect.

See also ABA Committee on Ethics and Professional Responsibility, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE, (rev. ed. to be published in late Fall, 1979 by the ABA's Center for Professional Discipline, Chicago, Ill.).

7. Other commentators have discussed the ambiguity of several key terms in this Disciplinary Rule and the failure of the CODE OF PROFESSIONAL RESPONSIBILITY to define their reach. See, e.g., the very helpful annotation of the CODE OF PROFESSIONAL RESPONSIBILITY by Olavi Maru, to be published by the American Bar Foundation in the Fall of 1979. This author is indebted to Mr. Maru for sharing his manuscript and for directing attention to several useful articles concerning the problems that DR 7-102(B)(1) and the SEC are creating for securities lawyers. See note 19 *infra*. See also Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 COLUM. L. REV. 412, 416-17 (1974).

8. Opinions from other jurisdictions also fail to satisfactorily answer this question. Instructive but inconsistent and incomplete discussions appear in Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976) (while this opinion has many implications for interpreting DR 7-102(B)(1), the holding in the case is premised explicitly on Iowa statutes and not on any portion of the CODE OF PROFESSIONAL RESPONSIBILITY); *In re Malloy*, 248 N.W.2d 43 (N.D. 1976); *In re A*, 276 Or. 225, 554 P.2d 479 (1976). See also Barnes Freight Line, Inc. v. ICC, 569 F.2d 912, 922-23 (5th Cir. 1978); Wolfram, *supra* note 1, at 820-22, 846-47, 854, 864-66.

9. MO. BAR ADVISORY COMMITTEE, INFORMAL OPINIONS of March 5, 1975, September 10, 1977, and April 6, 1978.

10. MO. BAR ADVISORY COMMITTEE, INFORMAL OPINION of March 5,

client then takes the stand and does give perjured testimony, the attorney should request a recess and advise his client that he must correct his testimony or the lawyer will reveal it to the court. Counsel should then proceed to follow through with whatever is necessary.<sup>11</sup>

Two and one-half years later<sup>12</sup> the Advisory Committee was asked to reconsider its opinion in light of *United States ex rel. Wilcox v. Johnson*,<sup>13</sup> a decision by the United States Court of Appeals for the Third Circuit. The *Johnson* court suggested in dictum that "an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured."<sup>14</sup> In reaffirming the position it took in its earlier opinion, the Advisory Committee emphasized that:

The *Wilcox* case is based upon counsel's private conjectures about the guilt or innocence of his client which differs materially from the direct admissions of guilt from the client which the Advisory Committee considered in rendering its March 5, 1975, informal opinion.<sup>15</sup>

#### B. *Limitation on the Reach of the Rule*

This response by the Advisory Committee highlights one very important aspect of Disciplinary Rule 7-102(B): under that rule an attorney ac-

11. *Id.*

12. MO. BAR ADVISORY COMMITTEE, INFORMAL OPINION of September 10, 1977.

13. 555 F.2d 115 (3d Cir. 1977).

14. *Id.* at 122.

15. MO. BAR ADVISORY COMMITTEE, INFORMAL OPINION of September 10, 1977. The Commentary to § 7.7 (testimony by the defendant) in the 1971 Supplement to the *Standards Relating to the Prosecution Function and the Defense Function* (published by the American Bar Association's Project on Standards for Criminal Justice) contains a bold and arresting declaration which does not seem to have been embraced by courts and commentators. The Commentary states, without explanation or elaboration, that "[i]t should be noted that DR 7-102(B), which requires a lawyer to reveal a 'fraud' perpetrated by his client on a tribunal, is construed as not embracing the giving of false testimony in a criminal case." Supp. at 18. The Commentary cites no authority for this interpretation of the Disciplinary Rule; nor is there anything in the language of the Rule that would appear to offer even the faintest support for this view. (The ABA House of Delegates recently has reconsidered the situation discussed in § 7.7. The only consensus reached was to defer thorough reexamination of the issues surrounding this subsection until after completion of the ABA's current systematic reexamination of the entire Code of Professional Responsibility.)

The informal opinions by the Advisory Committee of the Missouri Bar Administration that are discussed in the text clearly are premised on the assumption that Disciplinary Rule 7-102(B) applies to both civil and criminal matters. That assumption seems supported by common sense (if the drafters of the Rule had intended it not to apply in criminal cases they could easily have said so, but they did not) and, as Professor Wolfram points out, by "a long history of the predecessor Canons [29 and 41] and their interpretations in many ethics committee opinions." Wolfram, *Client Perjury*, *supra* note 1, at ¶ 225.



quires no ethical obligation to disclose anything unless she "receives information clearly establishing"<sup>16</sup> the fraud by the client. As *Wilcox* and the Advisory Committee's second informal opinion emphasize, an attorney would be violating professionally compulsory loyalties to his client<sup>17</sup> if he took any action that might be detrimental to the client without first receiving information "clearly establishing" the client's wrongdoing.

### 1. What Level of Certainty is Required?

No Missouri court has defined the *level of certainty* required by the phrase "clearly establishing" in Disciplinary Rule 7-102(B). Nor do opinions from other jurisdictions provide reliable guidance for resolving this question.<sup>18</sup> Several factors suggest, however, that information that leaves counsel with any significant doubt cannot be considered to "clearly establish" the wrongdoing of the client.<sup>19</sup> Ethical Consideration 7-3 explicitly directs "a lawyer [, while serving as an advocate, to] resolve in favor of his client doubts as to the bounds of the law."<sup>20</sup> Reflection about the suspecting attorney's situation reinforces this ethical directive. Because the conduct by the client (which Disciplinary Rule 7-102(B)(1) would require an attorney to disclose) frequently would constitute a crime—perjury or perhaps criminal fraud<sup>21</sup>—and because making the disclosure is likely to severely damage a client's interests (*e.g.*, by leading to prosecution for an additional crime and, if a mistrial is declared, forcing the client to undergo a second trial on the original charge), it seems fair to assume that counsel should not reach a conclusion that would force him to turn against his client and disclose alleged misconduct unless he is convinced at least

16. MO. SUP. CT. R. 4, DR 7-102(B) (emphasis added).

17. MO. SUP. CT. R. 4. Canons 7 & 4.

18. See Wolfram, *supra* note 1, at 812 n.10; Callan & David, *supra* note 1, at 332-33.

19. Other commentators, focusing primarily on problems confronted by securities lawyers, also have argued that no duty to disclose should arise if counsel is not convinced that the client has committed illegal acts. See, *e.g.*, ABA Committee on Counsel Responsibility and Liability, *The Code of Professional Responsibility and the Responsibility of Lawyers Engaged in Securities Law Practice*, 30 BUS. LAW. 1289, 1297-98 (1975); Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U.L. REV. 437, 456 (1974); Myers, *The Attorney-Client Relationship and the Code of Professional Responsibility: Suggested Attorney Liability for Breach of Duty to Disclose Fraud to Securities and Exchange Commission*, 44 FORDHAM L. REV. 1113, 1128-30 (1976).

20. MO. SUP. CT. R. 4, Ethical Consideration [hereinafter cited as MO. SUP. CT. R. 4, EC] 7-3; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration [hereinafter cited as ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC] 7-3.

21. For a discussion of the definition of perjury in Missouri, see note 1 *supra*. For Missouri statutory definitions of criminal conduct which could include "fraud," see RSMO §§ 570.010(7), .030, .140, .180 and §§ 575.050, .060, .100,

*beyond a reasonable doubt* that the client has committed fraud or perjury.<sup>22</sup>

Moreover, because of the unique character of the relationship between attorney and client, a strong argument can be made that the level of certainty of wrongdoing an advocate should reach before revealing the client's alleged wrongs is even higher than the level of certainty required of the trier of fact in a criminal proceeding. The trier of fact has an entirely different relationship with the accused than does the advocate/counselor and performs a very different function in the system of justice. Unlike the trier of fact, the attorney is charged with a unique form of loyalty<sup>23</sup> to his client and a special responsibility to earn and maintain his client's trust.<sup>24</sup> These obligations are based on a societal judgment that it is highly unfair to force an accused person to face the powerful machinery of our adjudicatory system without the full support of an attorney who understands its processes and is capable of doing battle within it on equal terms with the representatives of the state. The relationship between client and attorney that our system promotes is thus more than fiduciary; it also involves an acutely personal form of dependence. Great violence would be done to that relationship and the values it reflects if clients could not be confident that their lawyer would not turn against them unless their wrongdoings were completely indisputable.

## 2. Does Counsel Have a Duty to Investigate Suspect Testimony by His Client?

The phrasing of Disciplinary Rule 7-102(B) suggests another potentially significant limitation on its reach. The Rule implies that attorneys are *passive* participants in the process that creates the obligation. The attorney the Rule describes is one "*who receives* information clearly establishing" the fraud.<sup>25</sup> This construction of the Rule provokes an additional question: Is an attorney obligated to make inquiries or to conduct investigations to determine whether or not her client has committed fraud or perjury? Because neither the appellate courts of Missouri nor the Advisory Committee have addressed this question,<sup>26</sup> guidance to its answer must be

22. Requiring at least this level of certainty seems appropriate even though the attorney's revelations would not, of course, formally convict his client of any crime. Cf. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977). The attorney-client privilege probably would bar use of the attorney's disclosures as evidence in a subsequent perjury prosecution. *But see* discussion of the possible role of the concept of "continuing crime" on the inapplicability of the privilege, notes 68-80 and accompanying text *infra*.

23. MO. SUP. CT. R. 4, Canon 7.

24. *Id.*, Canons 4 & 9.

25. MO. SUP. CT. R. 4, DR 7-102(B).

26. Professor Wolfram addressed this question in the following fashion:

The attorney should not be able to evade the responsibility of correcting false testimony by wilfully remaining ignorant where known facts call for further investigation. So long as the rules compellingly suggest possible

sought elsewhere. While there is some authority supporting the proposition that an attorney has a duty to conduct an investigation into the truthfulness of testimony already given by her client, the arguments in support of the conclusion that no such duty exists are substantially more persuasive.

Professor Wolfram<sup>27</sup> offers significant support for the view that an attorney does have an obligation to investigate the truthfulness of his client's testimony in at least some circumstances.<sup>28</sup> Wolfram argues that:

The attorney should not be able to evade the responsibility of correcting false testimony by wilfully remaining ignorant where

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serious falsity, an attorney should be under a responsibility to conduct such further investigation as an attorney desiring to protect the interest of a client would conduct under similar circumstances. [*Cf.* Florida Bar v. McCaghren, 171 So. 2d 371, 372 (Fla. 1965) (suspension of attorney who failed to make inquiry during divorce proceedings of suspicious circumstances surrounding divorce client's gathering of evidence of opposite spouse's adultery); People *ex rel.* Attorney Gen. v. Beattie, 137 Ill. 553, 576, 27 N.E. 1096, 1103 (1891) (disbarment of attorney after *ex parte* divorce case marked with client's perjury; the attorney "either actively assisted her, or purposely shut his eyes to what she was doing"); State v. Zwillman, 112 N.J. Super. 6, 16, 270 A.2d 284, 289 (1970) ("It is not an attorney's responsibility to decide the truth or falsity of a client's representations unless he has actual knowledge or unless from facts within his personal knowledge or his professional experience he should know or reasonably suspect that the client's representations are false"). It would seem required by minimal standards of attorney competence to conduct such investigation as is necessary to determine the extent to which cross-examination or other impeachment of a client's intended testimony would effectively rebut the testimony." Wolfram, *supra* note 1, at 843 n.126]. Where the claimed failure to know is obviously the product of negligence, this will often rather strongly indicate a guilty mind. Practice such as informing the client about the kind of testimony that would be required in order to produce evidence for a favorable argument in litigation, when it is known that the client will employ the legal advice to commit perjury, is of course a more obvious example of knowing participation in perjury.

Wolfram, *supra* note 1, at 843. As the discussion in the text makes clear, this author believes Professor Wolfram has overstated counsel's obligation to monitor and investigate possible client misconduct.

27. Professor of Law, University of Minnesota.

28. Wolfram, *supra* note 1. Some additional support for the view that in certain circumstances DR 7-102(B)(1) may create limited duties to investigate the representations made by clients is offered by one faction of the commentators. This faction is concerned about the arguably unique roles played by counsel in connection with offerings of securities. See, e.g., Johnson, *The Dynamics of SEC Rule 2(e): A Crisis for the Bar*, 1975 UTAH L. REV. 629, 647; Marquis, *An Appraisal of Attorneys' Responsibilities Before Administrative Agencies*, 26 CASE W. RES. L. REV. 285, 290 (1976). Other commentators concerned about the same problem appear to believe that an attorney acquires no obligations under the rule until after he receives (without conducting a special investigation) sufficient information to dissolve all real doubts about the client's conduct. See authorities

known facts call for further investigation. So long as the clues compellingly suggest possible serious falsity, an attorney should be under a responsibility to conduct such further investigation as an attorney desiring to protect the interest of a client would conduct under similar circumstances.<sup>29</sup>

There are several difficulties present in Wolfram's position. The first derives from the logical precariousness and practical unmanageability of his description of the conditions that trigger the duty to investigate. He maintains that the duty arises when "clues compellingly suggest possible serious falsity." There is a formidable tension between the words "clues," "suggest," and "possible" on the one hand, and the term "compellingly" on the other. This logical tension creates considerable ambiguity in the standard offered by Wolfram. That ambiguity would not only make it difficult for practicing lawyers to determine when they incur an investigatory duty, but also would lead different attorneys to fix that point in different places.

A second, and more important, difficulty with Wolfram's position is his failure to lay a proper foundation for the duty he would impose. He appears to premise the duty to investigate the accuracy of a client's testimony upon counsel's obligation "to protect the interest of a client."<sup>30</sup> Wolfram insists that "[i]t would seem required by minimal standards of attorney competence to conduct such investigation as is necessary to determine the extent to which cross-examination or other impeachment of a client's intended testimony would effectively rebut the testimony."<sup>31</sup> At the heart of the duties which Wolfram refers to are the commitments of loyalty and service to clients that are so fundamental to our system of justice. It would distort those commitments to use the duties they create as premises for an attorney's obligation to turn on a client by conducting an active investigation into his honesty. Moreover, there frequently would be important differences between investigations based on a desire to serve a client's interests well and investigations designed to determine the accuracy of a client's testimony. Obviously, the purpose of an investigation can determine whether it occurs at all as well as what it covers. While it often would be necessary to conduct investigations before a client testified in order to prepare for cross-examination, after a client has testified the obligation to serve him well frequently would provoke no need for any investigation at all. Furthermore, an attorney whose purpose is to protect his client would not always pursue the same leads or explore the same matters as would an attorney whose purpose was to judge his client's veracity. For example, while an attorney whose purpose was to protect his client would be concerned primarily about the *admissibility* of damaging evidence, an

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29. Wolfram, *supra* note 1, at 843.

30. *Id.*

31. *Id.* at 843 n.126.

attorney whose purpose was to evaluate his client's truthfulness would be concerned primarily with the *existence* of such evidence.

Because the duties of competence and loyalty to one's client cannot support an obligation to pursue suspicions about a client's veracity, if Wolfram's view is to be accepted it must be upon some other basis. The only other authority he offers consists of three judicial opinions, two of which were issued before the Code of Professional Responsibility existed.<sup>32</sup> More significantly, only the shortest and least developed of these three opinions clearly supports his position. In a one and one-half page opinion,<sup>33</sup> the Florida Supreme Court held that an attorney "should have made inquiry of his client concerning the suspicious circumstances" after there appeared "at several stages of the divorce proceedings . . . red flags which bore the indicia of his client's improper conduct."<sup>34</sup> The persuasiveness of this conclusion is seriously compromised by its summary presentation, by the lack of a logical argument by the court justifying it, and by the absence of citation to even a single supporting authority.

The other two cases cited by Wolfram serve even less well in his effort to establish authority for a duty to investigate a client's veracity. In an 1891 Illinois case,<sup>35</sup> an attorney was disbarred for intentionally presenting and capitalizing on testimony he knew in advance to be false. While the court alluded in dictum to the possibility that the attorney had purposely shut his eyes to possible misconduct by a client, the court's decision clearly rested on the attorney's knowing and intentional effort to defraud the trial court. Nowhere in the opinion is there any reference to a duty to investigate possibly disingenuous testimony by a client.

Professor Wolfram also cites *State v. Zwillman*,<sup>36</sup> a 1970 opinion by the Appellate Division of the Superior Court of New Jersey. In the only portion of *Zwillman* that is arguably relevant here, the court concluded that a trial judge had prejudiced the rights of an attorney-defendant in a criminal prosecution by not answering the following question, posed by the jury during its deliberations: "Is it a lawyer's responsibility to determine the truthfulness of a claim in a negligence case or does his responsibility lie in only representing his client to the best of his knowledge?"<sup>37</sup> The *Zwillman* court's effort to answer this question is not itself free from ambiguity.<sup>38</sup>

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32. The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association in August 1969 and became effective January 1, 1970. American Bar Association, Code of Professional Responsibility and Code of Judicial Conduct, Preface (as amended August 1978).

33. Florida Bar v. McCaghren, 171 So. 2d 371 (Fla. 1965).

34. *Id.* at 372.

35. People *ex rel.* Attorney Gen. v. Beattie, 137 Ill. 553, 27 N.E. 1096 (1891).

36. State v. Zwillman, 112 N.J. Super. 6, 270 A.2d 284 (1970).

37. *Id.* at 15, 270 A.2d at 288.

38. The ambiguous sentence in the opinion, quoted by Wolfram, *supra* note 1, at 843 n. 129, reads: "It is not an attorney's responsibility to decide the

The impression its answer creates is that an attorney has no obligations with respect to a client's veracity unless counsel already has received information from which he knows or should know that the client presented false testimony. The primary source of this impression is the *Zwillman* court's emphasis on Ethical Consideration 7-26 of the Code of Professional Responsibility,<sup>39</sup> which the court quoted in full and with obvious approval.<sup>40</sup> This Ethical Consideration addresses the attorney who must decide before putting his client on the stand whether the client's proposed testimony would be false. After declaring that counsel "who knowingly participates in introduction of such [false] testimony or evidence is subject to discipline," Ethical Consideration 7-26 proceeds to point out that: "A lawyer should, however, present any admissible evidence his client desires to have presented unless he *knows, or from facts within his knowledge should know*, that such testimony or evidence is false, fraudulent, or perjured."<sup>41</sup>

Ethical Consideration 7-26 makes no reference to suspicions (however strong) or to duties to investigate the credibility of one's own client. The obligation it imposes to not present certain evidence arises only if the information counsel already has acquired, in the normal course of the representation, is such that he knows or should know that the evidence would be false. Thus, while Ethical Consideration 7-26 prohibits counsel from intentionally ignoring information he already possesses, it also clearly implies that an attorney has no affirmative duty to launch an investigation for the purpose of verifying his client's proposed testimony.

This aspect of Ethical Consideration 7-26 reinforces the conclusion which the structure of Disciplinary Rule 7-102(B)(1) compels. It would be unreasonable to assume that the lawyers who carefully drafted this Rule for the ABA were not well aware of its language and structure. The drafters of this Rule must have intended that an attorney incur no obligation to make disclosure or to take any other action adverse to her client

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truth or falsity of a client's representations unless he has actual knowledge or unless from facts within his personal knowledge or his professional experience he should know or reasonably suspect that the client's representations are false." The sentence immediately following this one appears to remove the ambiguity by declaring that "[t]he duty of the attorney is to seek for his client all that the client is entitled to under the law and not to act in the first instance as judge and jury." 112 N.J. Super. at 16, 270 A.2d at 289.

Additional support for the view that the *Zwillman* court did not intend to obligate attorneys to conduct investigations of clients based on mere suspicions derives from the court's substantial reliance on the ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-26. See notes 39-41 and accompanying text *infra*.

39. Missouri's Ethical Consideration 7-26 is identical to the ABA version. Compare MO. SUP. CT. R. 4, EC 1-26 with ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-26.

40. 112 N.J. Super. at 16, 270 A.2d at 289.

41. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-26 (emphasis added).

unless the information she has already received clearly establishes the client's wrongdoing. The phrasing of the Rule thus belies any intention to require counsel to take affirmative steps to verify the truthfulness of testimony already given by her client.

A close look at the role of counsel and her relationship to her client reinforces this conclusion. An attorney in civil litigation is not an agent of adverse parties; defense counsel in a criminal matter is not an arm of the prosecution. Lawyers are not to perform the functions of judges or jurors. Instead, they are advocates whose primary responsibility is to pursue their clients' interests as vigorously as possible within the bounds of the law.<sup>42</sup> To compel attorneys to monitor their clients' behavior, to pursue vigorously any suspicions that might occur to them about possible wrongdoing by their clients, and to develop evidence against the people they represent, would undermine the fundamental character of the attorney-client relationship and bastardize the role of defense counsel. Imposing such obligations on attorneys also would create pressure on clients to conceal information from their lawyers and to try to make the tactical judgments about the use of evidence that only attorneys are fully equipped to make. It seems unlikely that courts would impose duties on counsel that would have such negative effects. It follows that attorneys should interpret Disciplinary Rule 7-102(B)(1) as imposing upon them no obligation at all until *after* a suspicion that a client might have committed fraud or perjury has been converted into an undeniable conclusion by information counsel has acquired in the normal course of the representation and without actively investigating her client's credibility.<sup>43</sup>

### 3. What Constitutes "Fraudulent" Testimony for Purposes of the Rule?

There is another important ambiguity lurking beneath the surface of the apparently clear language of Disciplinary Rule 7-102(B)(1). The Rule fails to define precisely what it is that counsel's information must "clearly" establish. By its own language the Rule imposes duties on the attorney only when the client "has . . . perpetrated a fraud." Unfortunately, the Code of Professional Responsibility does not even attempt to define the crucial term "fraud." Without such a definition, attorneys are left to guess what the elements are of the wrongdoing they are supposed to police. Commentators<sup>44</sup> and ethics committees<sup>45</sup> appear to have made the reasonable assumption that the kind of "fraud" which Disciplinary Rule 7-102(B)(1) was intended to reach has three *essential* elements: (1) the client's representation or conduct must create a *false* impression; (2) that impression

42. MO. SUP. CT. R. 4, Canon 7.

43. Cf. United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977).

44. See Callan & David, *supra* note 1, at 359 & n.120.

45. See ABA OPINION 341; MO. BAR ADVISORY COMMITTEE, INFORMAL OPINIONS of March 5, 1975, September 10, 1977, and April 6, 1978. See also the court's discussion of OREGON STATE BAR COMMITTEE ON LEGAL ETHICS, OPINION 277 (1972) in *In re A*, 276 Or. 225, 239-40, 554 P.2d 479, 486-87 (1976).

must be *material*; and most importantly, (3) the client must have *intended* to create that material misconception. Before the Disciplinary Rule can come into play at all, then, an attorney must reach a firm conclusion not only about the falsity and materiality of his client's testimony, but also about something much more elusive and much more difficult to "clearly" establish: the subjective intentions behind his client's conduct.

Despite the limitations on the reach of Disciplinary Rule 7-102(B) that derive from the requirement that counsel take no action against her client's interests until she already has received information "clearly establishing" the client's "fraud," there will be occasions when attorneys will be certain that the testimony their client has given is perjurious or fraudulent. The most obvious case would be when the client frankly admits that he lied on the stand. In such cases, if the client refuses (or is unable) to rectify the fraud, the Missouri version of Disciplinary Rule 7-102(B)(1) commands counsel to "reveal the fraud to the affected person or tribunal."<sup>46</sup> Before attempting to define what information counsel would have to disclose under this directive, it is important to determine whether there are other rules of law or rights of clients that counsel who *comply* with this disciplinary rule might be in danger of violating.

### III. THE DILEMMA'S SECOND HORN: THE ATTORNEY-CLIENT PRIVILEGE

The most obvious obligations that disclosure of a client's fraud or perjury might violate are based on the attorney-client privilege. Through the oath that attorneys must take on admission to the Missouri bar, the Missouri Supreme Court compels lawyers to promise "to maintain the confidence and preserve inviolate the secrets" of their clients.<sup>47</sup> In Ethical Consideration 4-4 of the Code of Professional Responsibility the court also commands Missouri attorneys to "endeavor to act in a manner which preserves the evidentiary privilege . . . [and] timely to assert the privilege unless it is waived by the client."<sup>48</sup> In order to determine whether there could be a conflict between these general commandments and the specific directive of Disciplinary Rule 7-102(B)(1), it is necessary to ascertain whether the attorney-client privilege would apply in Missouri to an attorney who felt obligated by the disciplinary rule to disclose testimonial fraud his client had perpetrated. To answer this question it will be necessary to examine legal authority both from Missouri and from other jurisdictions.

#### A. *Does the Privilege Embrace the Disclosure Contemplated in DR 7-102(B)(1)?*

Opinions by the Missouri Supreme Court have made it clear that Mo. Rev. Stat. section 491.060, which declares that an attorney is "incompetent

46. MO. SUP. CT. R. 4, DR 7-102(B)(1).

47. MO. SUP. CT. R. 8.11.



to testify . . . concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client,"<sup>49</sup> simply adopts the common law of attorney-client privilege<sup>50</sup> and does not limit its scope. While decisions by Missouri courts have not established the outermost bounds of the reach of the attorney-client privilege, they have made it clear that the privilege can apply to non-testimonial situations. For example, in *State ex rel. Cain v. Barker*,<sup>51</sup> the Missouri Supreme Court held that written statements given by an insured to a representative of his insurer were protected by the attorney-client privilege and therefore did not have to be produced in pretrial discovery proceedings.<sup>52</sup> Even more recently, in *State ex rel. Great American Insurance Co. v. Smith*,<sup>53</sup> the Missouri Supreme Court held that letters from an attorney to his client that consisted of opinion and advice were covered by the privilege, were not discoverable, and could not be inspected *in camera* by the trial court.<sup>54</sup>

While the holding in *Smith* is instructive, the court's extended discussion of the rationale of the attorney-client privilege is even more significant. In that discussion, the supreme court unequivocally endorsed a view of the privilege that gives it a very broad reach and elevates it to a high place among the values that our adjudicatory system serves.<sup>55</sup> Judge Finch's opinion for the majority<sup>56</sup> openly acknowledged that within the American legal community there are "two prevailing views as to the scope of the attorney-client privilege."<sup>57</sup> He recognized that the difference between these views is based on a different ordering of the importance of "two different fundamental policies."<sup>58</sup> Those two "fundamental policies" are (1) the "societal need to have all evidence having rational probative value placed before the trier of facts in a lawsuit" and (2) the "societal need for confidentiality" of communications between attorney and client.<sup>59</sup>

Dean Wigmore, the most influential scholarly proponent of the narrower view of the scope of the privilege, believed that the policy of disclosure was more important than the policy of confidentiality. He therefore argued that the attorney-client privilege should be considered

49. RSMo § 491.060 (1978).

50. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 382 (Mo. 1978).

51. 540 S.W.2d 50 (Mo. 1976).

52. *Id.* at 53.

53. 574 S.W.2d 379 (Mo. 1978).

54. *Id.* at 387.

55. For a very broad reading of the scope of the attorney-client privilege by the Missouri Supreme Court long before the *Smith* case, see *State v. Dawson*, 90 Mo. 149, 155, 1 S.W. 827, 829 (Mo. 1886).

56. Judges Seiler and Donnelly dissented in separate opinions. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d at 387.

57. *Id.* at 382.

58. *Id.* at 382-83.

59. *Id.*

only an exception to a more fundamental rule and should be "strictly confined within the narrowest possible limits consistent with the logic of its principle."<sup>60</sup>

In contrast, proponents of the broader interpretation of the privilege<sup>61</sup> "view confidentiality of communications between attorney and client as the more fundamental policy, to which disclosure is the exception."<sup>62</sup> The only such exception acknowledged under this view is "a very limited privilege of disclosure" which the rules of professional responsibility create when a client announces in advance his intention to commit a crime.<sup>63</sup> Neither Judge Finch nor the proponents of the broader view of the privilege whom he cited in *Smith* discussed the possibility that fraud or perjury committed by a client in the past might create an additional exception to the general rule against disclosure. Although the *Smith* opinion does not disclose how the Missouri Supreme Court would resolve a direct conflict between the evidentiary privilege and the commandment in Disciplinary Rule 7-102(B)(1) to reveal frauds by clients, it leaves no doubt about which view of the scope of the attorney-client privilege the court has adopted for Missouri. Openly embracing the broader view, the court stated:

[C]onfidentiality of the communications between client and attorney is essential for such relationships to be fostered and to be effective . . . . The nature and complexity of our present system of justice and the relationships among people and between the people and their government make the preservation and protection of the attorney-client privilege even more essential. If this is to be accomplished, when one undertakes to confer in confidence with an attorney whom he employs in connection with the particular matter at hand, it is vital that all of what the client says to the lawyer *and* what the lawyer says to the client . . . be treated as confidential and protected by the attorney-client privilege. This is what a client expects.<sup>64</sup>

The *Smith* court therefore decided that the values supporting "confidentiality of communications between attorney and client" are more fundamental in the adversary system of adjudication than the values supporting

60. 8 J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961).

61. In explicating this second view, Judge Finch relied heavily on an article that was co-authored in 1963 by Joseph J. Simeone, later a judge on the Missouri Supreme Court. See Sedler & Simeone, *Privileges in the Law of Evidence: The Realities of Attorney-Client Confidences*, 24 OHIO ST. L.J. 1 (1963). Another proponent of the broader view who Judge Finch cited was the late David W. Louisell. See Louisell, *Confidentiality, Conformity and Confusion: Privilege in Federal Court Today*, 31 TUL. L. REV. 101 (1956). Both the Sedler & Simeone article and the Louisell essay were cited by Judge Finch in the *Smith* case. 574 S.W.2d at 383.

62. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d at 383.

63. *Id.* See also Sedler & Simeone, *supra* note 61, at 41-44.

64. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d at 383-84.

disclosure and, accordingly, that the law in this state should reflect a strong presumption in favor of protecting confidences.

The Missouri Supreme Court's adoption of such an expansive view of the scope of the attorney-client privilege—refusing to confine its application to testimonial situations—makes it clear (absent the rules of professional responsibility) that if an attorney learns in confidence from her client that the client had committed fraud or perjury, the attorney-client privilege prevents her from revealing the misconduct "to the affected person or tribunal."<sup>65</sup>

Authority from other jurisdictions supports the conclusion that even though the disclosure required by the Disciplinary Rule does not constitute "testimony," this fact would not prevent the privilege from applying to such revelations. Section 955 of the California Evidence Code, for example, explicitly requires an attorney "who received or made a communication subject to the privilege" to assert the privilege on behalf of his client "*whenever he is present when the communication is sought to be disclosed.*"<sup>66</sup> Professor Wigmore, in summarizing the common law elements of the privilege, similarly asserted that the confidential communications from client to attorney are "*permanently protected*" if they otherwise qualify for protection by the privilege.<sup>67</sup>

#### B. *Does the Concept of "Continuing Crime" Leave Communications About Testimonial Fraud Unprotected by the Privilege?*

There remains one other potentially significant issue the resolution of which could affect whether the attorney-client privilege applies in the situation contemplated in Disciplinary Rule 7-102(B)(1). One of the most important and widely-recognized exceptions to the attorney-client privilege is the rule that no protection can attach to communications that are made for the purpose of seeking assistance in the commission of a future or continuing crime.<sup>68</sup> Unfortunately, "neither logic nor judicial precedent

65. MO. SUP. CT. R. 4 DR 7-102(B)(1).

66. CAL. EVID. CODE § 955 (West 1966) (emphasis added).

67. 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961) (emphasis added).

68. See, e.g., *State v. Ross*, 312 Mo. 510, 522, 279 S.W. 411, 414 (1925); *Gebhardt v. United Rys.*, 220 S.W. 677, 679 (1920); *Jafarian-Kerman v. Jafarian-Kerman*, 424 S.W.2d 333, 338-40 (K.C. Mo. App. 1967). *But see* *United States v. Goldenstein*, 456 F.2d 1006, 1011 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974); *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *United States Auto. Ass'n v. Werley*, 526 P.2d 28, 31-33 (Alas. 1974); *Standard Fire Ins. Co. v. Smithhart*, 183 Ky. 679, 682-85, 211 S.W. 441, 443-44 (1919); *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978); *In re Selser*, 15 N.J. 393, 402-10, 105 A.2d 395, 399-404 (1954). See also *Hazard, An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062-67 (1978); 8 J. WIGMORE, EVIDENCE §§ 2298-99 (McNaughton rev. ed. 1961); UNIFORM RULES OF EVIDENCE rule 26 (1953); MODEL CODE OF EVIDENCE rule 211 (1942); Committee on Rules of Prac-

has set any definite boundary to this aspect of the privilege. Moreover, though the privilege ceases for advice as to future wrongdoing (as contrasted with past acts), this line of distinction varies with different transactions."<sup>69</sup> Another important question is whether testimonial fraud or perjury, once committed, should be categorized as past misconduct or "present, continuing illegality."<sup>70</sup> Cases from Missouri and other jurisdictions offer no clear answer to this question.<sup>71</sup> Nor can a reliable answer be constructed from clues that might be found in the status of the doctrine of recantation. One reason that doctrine can offer no firm guidance is that there is no consensus as to its meaning. The federal law remains that perjury is a completed crime as soon as materially false statements are intentionally given under oath and that a perjurer has no power to erase his crime by recanting (correcting his false testimony), regardless of how promptly he does so or whether his misconduct has been detected by others.<sup>72</sup>

The rule in some states, in contrast, is that recantation made during the proceeding in which the false testimony was made and before its falsity is otherwise disclosed can serve as a complete defense to a perjury charge.<sup>73</sup> In Missouri, the legislature has resolved the tension between incompatible and judicially unreconciled supreme court precedents, the older of which rejected recantation as a defense<sup>74</sup> and the more recent of which appeared to acknowledge it<sup>75</sup> by declaring that timely retraction of false testimony is a complete defense in a perjury prosecution.<sup>76</sup>

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tice and Procedure of the Judicial Conference of the United States, PROPOSED FEDERAL RULE OF EVIDENCE rule 503, 51 F.R.D. 315 (1971).

69. 8 J. WIGMORE, EVIDENCE § 2299, at 578 (McNaughton rev. ed. 1961).

70. *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971).

71. *But see McKissick v. United States*, 379 F.2d 754, 761 (5th Cir. 1967) ("perjury [is] . . . in effect a continuing [offense] so long as allowed to remain in the record to influence the jury's verdict").

72. *United States v. Norris*, 300 U.S. 564, 574 (1937). *See also* Annot., 64 A.L.R.2d 276, 284-88 (1959). Under the federal rule, recantation can do no more than serve as evidence that the false testimony was not inspired by the required criminal intent. *See United States v. Norris*, 300 U.S. 564, 574 (1937); *People v. Hamby*, 6 Ill. 2d 559, 129 N.E.2d 746 (1955).

73. *See, e.g., People v. Ezangi*, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957). *But see Black v. State*, 13 Ga. App. 541, 542, 79 S.E. 173, 174 (1913) (implying that the crime of perjury is completed and wholly beyond the power of the perpetrator to rectify as soon as the intentionally false testimony is given).

74. *Martin v. Miller*, 4 Mo. 47 (1835).

75. *State v. Brinkley*, 354 Mo. 337, 189 S.W.2d 314 (1945) (the opinion fails to mention the contrary position taken in *Martin*, *supra* note 74).

76. This legislation provides:

It is a defense to a prosecution under subsection 1 of this section that the actor retracted the false statement in the course of the official proceeding in which it was made provided he did so before the falsity of the statement was exposed. Statements made in separate hearings at separate stages of the same proceeding, including but not limited to statements made before a grand jury, at a preliminary hearing, at a

The existence of the recantation defense in states like Missouri at first glance appears to support the view that unrectified perjury or testimonial fraud should be considered a crime that continues at least until the proceeding in which it occurred is terminated and, thereby, the opportunity to void the offense is foreclosed. There are several difficulties, however, with attempting to determine whether or not the privilege should apply by so defining the duration of the offense. One such difficulty derives from the fact that Missouri law has not made clear what role, if any, recantation might play as a defense to fraud that does not rise to the level of perjury but which would trigger the obligations of Disciplinary Rule 7-102(B)(1). Nor are there clear guidelines for distinguishing between fraud that exposes a client to criminal penalties and fraud that is subject only to civil redress. The uncertainty that pervades this area of the law would make it impractical and unfair to demand that clients and attorneys use the doctrine of recantation to determine whether given misrepresentations would be considered as either "continuing" or as "past" misconduct.

Moreover, such difficulties represent only the tip of the iceberg of illogic and impracticality into which efforts to fix the scope of the attorney-client privilege by categorizing offenses as "past" or "continuing" would crash. The Aristotelian conceptual tidiness that categorizing different kinds of conduct would appear to offer is itself a simplistic deception. Reality has a way of wreaking havoc with rigidly formalistic approaches. The greatest difficulty with trying to categorize different types of misconduct as either "continuing" or as "past" derives from the fact that there are very few kinds of misconduct whose effects do not in a very real sense "continue" well after the acts which constitute the misconduct have been completed. The effects of a murder, for example, may persist through generations. Similarly, the effects of a robbery of a bank clearly continue until the stolen money is returned and, in more subtle ways, may continue for much longer periods through lost opportunities to invest the stolen funds, in lost customer confidence in the bank as a safe repository of funds, in higher insurance premiums, and in countless other ways. Despite the fact that the evil effects of murders and bank robberies may persist through long periods, neither of these types of misconduct is considered a "continuing" crime in the sense that confidential communications from client to attorney about the misconduct are deemed outside the protection of the attorney-client privilege.<sup>77</sup> This appears to be true even when the information the attorney receives from his client could help remedy the consequences of the crime, e.g., it is not at all clear that an attorney whose

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deposition or at a previous trial, are made in the course of the same proceedings.

RSMo § 575.040 (1978).

77. See, e.g., *State v. Dawson*, 90 Mo. 149, 1 S.W. 827 (1886); *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964); *State v. Sullivan*, 60 Wash. 2d 211, 388 P.2d 474 (1962); *State v. Douglas*, 20 W. Va. 770 (1882).

client gives him clues as to the whereabouts of the fruits of a robbery is obligated to disclose those clues to the police. If communications from clients that could help remedy the most obvious ill-effects of bank robberies are protected by the attorney-client privilege, it is difficult to understand why communications from clients that could help remedy the effects of fraud or perjury are *not* so protected. If there is a principle that would distinguish these situations and would make it reasonable to apply different rules to them, that principle is hardly obvious.

There are yet other dimensions of arbitrariness that would accompany basing the availability of the attorney-client privilege on an effort to categorize fraud or perjury either as "past" or as "continuing" misconduct. That arbitrariness inheres in the difficulty of defining when, if ever, perjury is to be considered a "completed" crime. If the doctrine of recantation is used as the basis for deciding the question then, at least in jurisdictions like Missouri where recantation can void the offense, "perjury" would become a completed and, therefore, past crime as soon as the proceeding in which it has been committed was terminated. One question this line of reasoning provokes is *why* the availability of recantation should determine whether or not the crime is "continuing." Clearly the ill-effects of perjury can persist well after the proceeding is completed; the consequences of a judgment obtained unjustly through perjury may endure for a very long time indeed. Further, some of those effects might be remedied if the perjury were disclosed and a new trial were ordered.<sup>78</sup> Neither is it clear why the privilege should attach to communications about perjury that was committed in a proceeding that was terminated five minutes earlier, but should not attach to such communications if they are made immediately before judgment is entered.

One additional difficulty with the approach that would condition the availability of the privilege on the status of the misconduct as "past" or "continuing" warrants mention. Technically, under this approach, *not all* communications with respect to "continuing illegality" are unprotected by the privilege; instead, the only communications that are subject to disclosure over the client's objection are those made with "the purpose . . . to further" future intended or present continuing illegality.<sup>79</sup>

This qualification compounds the impracticality of this approach by requiring counsel to go through another exercise in categorization before deciding whether the privilege attaches to communications. An attorney operating under these formalistic rules could disclose no communications from his client unless he concluded both that the *subject* of the

78. See Wolfram, *supra* note 1, at 814 & n.17.

79. United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); Gebhardt v. United Rys., 220 S.W. 677, 679 (Mo. 1920); Jafarian-Kerman v. Jafarian-Kerman, 424 S.W.2d 333, 338-39 (Mo. App. 1967).

communications was a "continuing" crime and that his client made the communication for the purpose of securing aid in furtherance of that crime. To ask counsel to pass judgment on the subjective purposes which motivated his client's communications to him not only would impose an unrealistic burden on attorneys but also would threaten the fiduciary nature of the attorney-client relationship. It is worth noting, moreover, that even under this heavily formalistic reasoning, a client's confession to his attorney of perjury would remain protected by the attorney-client privilege, even if the misconduct were categorized as "continuing," as long as the confession was not transparently motivated by a desire to enlist the attorney's aid in furthering the effects of the false testimony.

In sum, there appears to be no principled and practical way to condition the availability of the attorney-client privilege on the definitional status of perjury or fraud as either "continuing" or "past" misconduct. The more reasonable approach is to assume that perjury or testimonial fraud enjoys the same status as other criminal conduct that is not actively ongoing and, therefore, that the privilege can attach to communications between client and attorney that relate to testimony that already has been given.

This assumption appears to have been made by the groups of ABA lawyers who determined the shape of the Code of Professional Responsibility. It is the history of the ABA's version of Disciplinary Rule 7-102(B)(1) which offers perhaps the most dramatic evidence in support of the view that the attorney-client privilege would apply to lawyers contemplating disclosing fraud or perjury committed by their clients. The version of Disciplinary Rule 7-102(B)(1) that was adopted by the ABA in 1969 was identical to the version of the Disciplinary Rule that currently is in force in Missouri.<sup>80</sup> After the ABA adopted the 1969 form of the rule, however, many attorneys concluded that complying with it would force them to violate their obligation under the common law rules of privilege not to disclose their clients' confidences.<sup>81</sup> This concern led the District of Columbia Bar<sup>82</sup> and then the ABA itself to amend the original version of Disciplinary Rule 7-102(B)(1).<sup>83</sup> The amendment the ABA adopted in 1974, but which the Missouri Supreme Court has not embraced, qualified the Disciplinary Rule's directive so that an attorney would not be bound to "reveal the fraud to the affected person or tribunal . . . when the information is protected as a privileged communication."<sup>84</sup> As the ABA's Committee

80. See ABA Special Committee on Evaluation of Ethical Standards, CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (Final Draft July 1, 1969).

81. See Callan & David, *supra* note 1, at 359-60; Freedman, *Letter to the Editor*, 59 A.B.A.J. 114 (1973); Note, *Attorneys' Liability—Advising, Abetting, and the SEC's "National Student Marketing" Offensive*, 50 TEX. L. REV. 1265 (1972).

82. Freedman, *supra* note 81.

83. ABA OPINION No. 341.

84. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (emphasis added).

on Ethics and Professional Responsibility subsequently explained in Formal Opinion 341, the primary reason for adopting the amendment was the belief that Disciplinary Rule 7-102(B)(1) as originally adopted required "a lawyer in certain instances to reveal privileged communications which he also was duty-bound not to reveal according to the law of evidence. The amendment of February 1974 was necessary in order to relieve lawyers of exposure to such diametrically opposed professional duties."<sup>85</sup> Adding that it was "unthinkable . . . that a lawyer should be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client," the Committee declared that the effect of the 1974 amendment was to extricate the attorney from "that untenable position."<sup>86</sup> The Missouri version of Disciplinary Rule 7-102(B)(1) appears to leave attorneys practicing in this state in "that untenable position."

Before exploring alternative ways to respond to testimonial fraud that would do less damage to the attorney-client privilege than the response described in the Rule 4 version of Disciplinary Rule 7-102(B)(1), it is important to recognize that there are other basic values to which the compulsory disclosure required by this Rule could do violence. Those values are embodied in the right of criminal defendants to the effective assistance of counsel, and in the rights of all persons not to be compelled by the government to incriminate themselves.

#### IV. THE DILEMMA'S CONSTITUTIONAL HORNS

##### A. *The Sixth Amendment Right to Effective Assistance of Counsel*

The sixth amendment right to effective assistance of counsel is in some measure jeopardized by any rule of law that discourages a defendant from sharing openly and fully with his lawyer all information that may be relevant to his defense.<sup>87</sup> It is likely that the flow of information from criminal defendants to their counsel will be constricted if defendants know that a rule of professional responsibility will compel their attorney to disclose their confidences whenever the attorney concludes that the accused has lied or perpetrated a fraud. Conscientious criminal defense attorneys may feel constrained to warn their clients at the outset of their relationship that the attorney will be obligated to disclose any conduct by the client that occurs during the representation that the attorney believes constitutes fraud. Such warnings probably will make those accused more cautious and

85. ABA OPINION No. 341, at 2.

86. *Id.* at 3.

87. The author wishes to express his appreciation to Professor William A. Knox of the University of Missouri-Columbia School of Law for his considerable assistance in understanding the relationship between the attorney-client privilege and the sixth amendment right to effective assistance of counsel. See also Wolfram, *supra* note 1, at 840-42.



calculating about their communications to their attorneys. It seems reasonable to predict that such caution and calculation will decrease the amount of relevant information that reaches the lawyer. If so, defense counsel's capacity to assist his client will be diminished correspondingly. Thus it appears that the vitality of the sixth amendment right to the effective assistance of counsel is dependent upon the breadth and impenetrability of the attorney-client privilege to a significant degree.

### B. *The Fifth Amendment Privilege Against Compelled Self-Incrimination*

Less directly, but no less importantly, a rule that compels an attorney to disclose what he believes to be fraud or perjury by a client also threatens at least the spirit of the fifth amendment right against self-incrimination.<sup>88</sup> It appears that "at least the spirit" of the right against self-incrimination is threatened because the full reach of the fifth amendment privilege remains unclear.<sup>89</sup> Recent opinions by the United States Supreme Court which purport to elucidate the purposes and to restrict the applicability of this privilege are confused at crucial junctures and therefore do not provide clear answers to the questions most pertinent here: (1) may (or must) an attorney raise a fifth amendment objection on behalf of his client and (2) could an assertion of that privilege by either an attorney or his client justify an attorney's refusal to "reveal" a client's testimonial fraud or perjury?

It is apparent that there is no clear answer to the first of these two questions: whether the courts will permit an attorney on his own initiative to raise his client's fifth amendment right not to "be compelled in any criminal case to be a witness against himself."<sup>90</sup> In its most recent pronouncement on the subject the Supreme Court expressly refused to "resolve this question."<sup>91</sup> While there is some division among state and

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88. See 8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. ed. 1961); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 383-84 (1977). See also Hazard, *An Historical Perspective of the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978), where Professor Hazard writes:

Total abolition [of the privilege] would mean that an accused in a criminal case could not explain his version of the matter to his lawyer without its being transmitted to the prosecution. Defense counsel would become a medium of confession, a result that would substantially impair both the accused's right to counsel and the privilege against self-incrimination. Hence, it is common ground that the privilege ought to apply at least to communication by an accused criminal to his counsel, in contemplation of defense of a pending or threatened prosecution, concerning a completed crime.

89. See, e.g., Hazard, *supra* note 88. Much of Professor Hazard's article is devoted to the theme that the history of the privilege contains no clear guidance to the full reach of the doctrine.

90. U.S. CONST. amend. V.

91. *Fisher v. United States*, 425 U.S. 391, 402 n.8 (1976).

lower federal courts on the question, the majority view appears to be that counsel may raise the fifth amendment objection on behalf of his client, at least where it does not appear that the client wishes to forego the privilege or has knowingly waived it.<sup>92</sup> This issue was squarely presented in *United States v. Judson*,<sup>93</sup> where Judge Jertberg concluded his careful and persuasive analysis with the following paragraph:

We feel that the privilege-holder's mental attitude was sufficiently demonstrated by the circumstances to be consistent with a desire for the protection of the privilege and inconsistent with an inference of waiver. This is enough, when coupled with a timely and effective assertion by the attorney, to invoke the privilege. The privilege must then be respected if the client himself could have successfully raised it.<sup>94</sup>

### 1. On Whom Must the Compulsion Be Exerted?

The more important and more difficult question is whether an assertion of the client's fifth amendment privilege could justify an attorney's refusal to disclose his client's fraud or perjury. Three relatively recent opinions by the Supreme Court appear to offer some guidance in this area and to suggest a negative answer to this question: *Fisher v. United States*,<sup>95</sup> *Andresen v. Maryland*,<sup>96</sup> and *Couch v. United States*.<sup>97</sup> The reliability of the guidance these decisions can offer is compromised, however, both by the fact that they address distinguishable situations (the production or seizure of incriminating documents) and, more importantly, by the poor quality of the analysis and research they reflect.

*Fisher v. United States* is the most important of these opinions for present purposes because the factual situation the Supreme Court confronted was more closely analogous to the situation of an attorney who knows his client has committed perjury than were the factual circumstances before the Court in *Andresen* or *Couch*.<sup>98</sup> In *Fisher*, taxpayers who knew they were objects of federal tax investigations had removed from their accountants and delivered to their attorneys certain workpapers and reports the accountants had generated while preparing the taxpayers' income tax

92. 8 J. WIGMORE, EVIDENCE § 2270, at 416 (McNaughton rev. ed. 1961).

93. 322 F.2d 460 (9th Cir. 1963).

94. *Id.* at 467. See also *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); *People v. Myers*, 35 Ill. 2d 311, 220 N.E.2d 297 (1966), cert. denied, 385 U.S. 1019 (1967).

95. 425 U.S. 391 (1976).

96. 427 U.S. 463 (1976).

97. 409 U.S. 322 (1973).

98. In *Couch* the holder of the fifth amendment privilege attempted without success to use the privilege to prevent her accountant from producing the business records she had left in the accountant's possession. In *Andresen* the Court rejected an argument that seizure of a person's business records by law enforcement officers and pursuant to a valid search warrant violated the fifth amendment privilege.

returns. The taxpayers had retained the attorneys to give them legal advice with respect to the pending investigations. After learning who possessed the documents "the Internal Revenue Service served summonses on the attorneys directing them to produce"<sup>99</sup> specified workpapers and reports. Relying in part on their client's fifth amendment rights against self-incrimination, the attorneys refused to comply with the summonses.

The Court, speaking through Justice White, decided that compelling the *attorneys* to produce the accountants' workpapers could not violate the clients' fifth amendment rights against self-incrimination, regardless of the status of their attorneys as their agents, and even if "the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands."<sup>100</sup> Justice White reached these conclusions by interpreting the scope of the fifth amendment privilege in the narrow, literalistic manner that has characterized the Burger Court's approach to self-incrimination issues.<sup>101</sup> Drawing heavily on its opinion in *Couch*, the Court insisted that the fifth amendment's protection against self-incrimination is an exclusively "personal privilege"<sup>102</sup> in the sense that it adheres solely to the person of the accused and not to incriminating information *per se*.<sup>103</sup> In the Court's view, it followed that there could be no violation of the privilege unless the governmental compulsion was exerted directly on the person of the accused. Regardless of other considerations (such as the legitimacy of the accused's expectation of privacy when he shared information with his attorney) the Court contended that the privilege against self-incrimination cannot come into play at all when "the ingredient of personal compulsion against an accused is lacking."<sup>104</sup> Justice White made the same point in different language in another part of the opinion when he wrote: "The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege . . ."<sup>105</sup> The Court reasoned that since the summonses to the attorneys exerted no compulsion directly on the persons of the taxpayers, their fifth amendment rights could not have been infringed, regardless of the authorship and the incriminatory character of the materials thus discovered.

A mechanical application of this portion of the *Fisher* reasoning could lead to the conclusion that the fifth amendment privilege against self-incrimination is not involved at all in the situation contemplated in Disciplinary Rule 7-102(B)(1). The compulsion of the Disciplinary Rule, like the compulsion of the summonses in *Fisher*, is formally directed not

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99. 425 U.S. at 394.

100. *Id.* at 397.

101. Ritchie, *supra* note 88, at 384-85, 430-31.

102. 425 U.S. at 398.

103. *Id.* at 398-99.

104. *Id.* at 397, quoting *Couch v. United States*, 409 U.S. 322, 329 (1973).

105. *Id.* (citations omitted).

toward the client-accused, but toward the attorney. Because the ingredient of personal compulsion exerted directly against the accused would be lacking, the logic of this first section of the *Fisher* opinion would suggest that Disciplinary Rule 7-102(B)(1)'s directive to the attorney could not violate his client's fifth amendment privilege.<sup>106</sup>

## 2. When Is Disclosure "Voluntary"?

The Court in *Fisher* did not conclude its analysis at this point, however. Instead, it went on to posit a relationship between the privilege against self-incrimination and the attorney-client privilege that leaves the fifth amendment privilege in a position to play a vital role in situations where the government pressures attorneys to make disclosures that could incriminate their clients. Before evaluating this second portion of the *Fisher* opinion, however, it is necessary to examine aspects of the Supreme Court's reasoning in *Andresen* and *Couch* which, if accepted at face value, would appear to reinforce the *Fisher* conclusion that compelling an attorney to disclose incriminating client confidences could not violate the client's fifth amendment privilege.

In *Andresen*, the accused challenged the government's use of a search warrant to seize self-incriminating business records directly from his office.<sup>107</sup> Treading a thin logical tightrope, the Court concluded that this forced seizure did not violate the accused's fifth amendment privilege both because he was not compelled to participate at all in the physical process by which the government acquired the documents (government agents executed the warrant and made the seizure as the accused looked on) and because he had been under no governmental compulsion when he recorded the incriminating information that appeared in the seized papers.

It takes no great leap of legal imagination to anticipate courts that share the *Andresen* majority's predisposition using its approach to conclude that compelling a criminal defense attorney to disclose his client's fraud or perjury does no violence to the client's fifth amendment privilege. Disciplinary Rule 7-102(B)(1), like the seizure in *Andresen*, does not compel the client to participate physically in the process by which disclosure is made. It also is true that, at least formally, the Disciplinary Rule exerts no compulsion directly on the accused to make any statements at all; instead, the argument would run that the rule merely permits the state to "seize,"

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106. Superficially reasoned support for Justice White's conclusion can be found in *Bouschor v. United States*, 316 F.2d 451, 458-59 (8th Cir. 1963) and *United States v. Boccuto*, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959). Professor Ritchie suggests that the Burger majority may be moving toward limiting the protection the fifth amendment privilege affords to blocking the use at trial of self-incriminating declarations (and, perhaps, their fruits) that were acquired by governmental compulsion. See Ritchie, *supra* note 88, at 386-92, 430.

107. 427 U.S. at 471-72.

through defense counsel's disclosure, the statements the accused made "voluntarily" to his attorney.

The superficiality of this kind of mechanical application of the *Andresen* approach invites an immediate rejoinder.<sup>108</sup> Why courts should ascribe such importance to whether or not the accused participates physically in the disclosure process is not at all clear. The history of the privilege against self-incrimination reflects a major concern with curtailing the state's power to invade the psychic space and the mental processes of the accused.<sup>109</sup> As Justice Powell wrote for the Court in *Couch*: "By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."<sup>110</sup> In addition, Justice Powell cited with approval the Court's description of the "policies and purposes of the privilege"<sup>111</sup> in *Murphy v. Waterfront Commission*,<sup>112</sup> a description that included "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'"<sup>113</sup> Because such concerns inform the history and spirit of the fifth amendment privilege, it makes no sense when deciding whether the privilege is violated to focus exclusively on whether or not the governmental compulsion requires physical participation by the accused in the process of disclosure.

In a separate concurrence in *Couch*, Justice Brennan offered support for this view in the following words:

[T]here is no doubt that the Fifth Amendment is concerned solely with *compulsory* self-incrimination. But surely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my

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108. For a more thorough re-examination of the role the fifth amendment privilege should play in the situation contemplated in DR 7-102(B)(1), see text accompanying notes 88-156 *infra*.

109. See, e.g., 8 J. WIGMORE, EVIDENCE §§ 2250-51 (McNaughton rev. ed. 1961).

110. 409 U.S. at 327.

111. *Id.* at 328.

112. 378 U.S. 52, 55 (1964).

113. 409 U.S. at 328, quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

view, to incriminate himself within the meaning of the Fifth Amendment.<sup>114</sup>

As the Court has many times indicated, the policies reflected in the fifth amendment privilege are endangered whenever the thoughts or the "inner sanctum" of the accused are invaded by governmental pressure to make self-incriminatory disclosures.<sup>115</sup> Nor must the prohibited "compulsion" be exerted on the accused physically. For at least fifty years, the Court had recognized that the fifth amendment reaches governmental misuse of either "physical or moral compulsion."<sup>116</sup>

It hardly seems reasonable to view disclosure to counsel by a client who fears he has committed perjury as wholly "voluntary." A client who fears he has committed perjury is likely to feel great pressure to disclose his concern to his lawyer. That pressure, all of which is directly or indirectly attributable to the state, derives from: (1) the fact that conviction for perjury can result in severe penal sanctions; (2) the fact that discovery of perjury can badly damage a defendant's case; and (3) the need the client experiences for professional help in determining what constitutes an offense and how to proceed if an offense has been committed.

When these kinds of pressures result in a client confiding in counsel about his testimony, the Code of Professional Responsibility compels the attorney not only to involve his client in the process that can lead to an incriminating disclosure, but also to exert additional pressure on the client to reveal his own perjury.<sup>117</sup> By requiring the attorney to "promptly call upon his client to rectify" his fraud, Disciplinary Rule 7-102(B)(1) forces the attorney (who would be acting at this juncture as an officer of the court and, therefore, of the state) to invade the client's "private enclave" and to exert moral pressure on him to become a witness against himself. Such pressure by the government would appear to implicate the fifth amendment privilege unless the client were thoroughly protected by an immunity that prohibited the government from using his self-incriminating disclosures (or the fruits thereof) in any subsequent criminal or quasi-criminal proceeding.<sup>118</sup>

In Missouri, Mo. Rev. Stat. section 575.040.4 appears to offer an accused immunity from prosecution for the offense of perjury if he "retracted the false statement in the course of the official proceeding in

114. 409 U.S. at 337\* (Brennan, J., concurring). See also Justice Brennan's dissent in *Andresen*, 427 U.S. at 484.

115. See, e.g., *Fisher v. United States*, 425 U.S. 391, 416-17 (1976); *United States v. Nobles*, 422 U.S. 225, 233-34 (1975); *Couch v. United States*, 409 U.S. 322, 327-28 (1973); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 54-77 (1964); *Ullmann v. United States*, 350 U.S. 422, 426-28 (1955).

116. *Fisher v. United States*, 425 U.S. 391, 397 (1976).

117. MO. SUP. CT. R. 4, DR 7-102(B)(1), EC 7-7 & 7-8.

118. *Kastigar v. United States*, 406 U.S. 441 (1972). See also *Ritchie*, *supra* note 88, at 387-93; *Strauchan*, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978).

which it was made . . . [but only if] he did so before the falsity of the statement was exposed."<sup>119</sup> Even if this statute is construed as offering a complete defense to a prosecution for perjury that has been properly rectified, it offers no defense or immunity when the proceedings in which the fraud occurred have been terminated or when the fraud is disclosed before the client can rectify it. Moreover, it does not bar use of either the client's admission or its evidentiary fruits in subsequent prosecutions on charges other than perjury.

### 3. When Is An Expectation of Privacy Legitimate?

While the Court in *Andresen* focused much of its analytical attention on the requirement of the fifth amendment privilege that disclosure not be "voluntary," the Court in *Couch* explored another requirement of the privilege: the expectation of privacy. Justice Powell, writing for the *Couch* majority, declared without equivocation that "no Fourth and Fifth Amendment claim can prevail where . . . there exists no legitimate expectation of privacy."<sup>120</sup> While it might seem indisputable that a client who confides in his attorney about the character of testimony he has given has a legitimate expectation of privacy, the way Justice Powell analyzed the privacy question in *Couch* casts a shadow of doubt over this issue. The relationship in question in *Couch* was not between attorney and client, but between client and accountant. The Court noted that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases."<sup>121</sup> Conceding that the absence of such a privilege was "not in itself controlling,"<sup>122</sup> Justice Powell proceeded to determine whether a taxpayer who turned over her business and tax records to an accountant could legitimately expect their contents to remain confidential. In concluding that any expectation of privacy or confidentiality would be illegitimate in this situation, Justice Powell relied on two related factors: (1) the formal obligation the income tax laws impose on the accountant (and taxpayer) to disclose most of the contents of the business records and (2) the fact that since the accountant would risk criminal prosecution if he wilfully withheld information, "[h]is own need for self-protection would often require the right to disclose the information given him."<sup>123</sup> It was largely because the client-taxpayer was seeking fifth amendment protection "in the very situation where [such] obligations of disclosure exist" that the Court in *Couch* concluded that she could have no legitimate expectation of privacy in the documents.<sup>124</sup>

A mechanical application of Justice Powell's approach to the privacy question could lead courts to the conclusion that in jurisdictions which em-

119. RSMO § 575.040.4 (1978).

120. 409 U.S. at 336.

121. *Id.* at 335.

122. *Id.*

123. *Id.*

124. *Id.* at 335-36.

brace the Missouri version of Disciplinary Rule 7-102(B)(1), no client could have a legitimate expectation of privacy when he reveals information to his attorney that leaves his attorney convinced that he has perpetrated a fraud. The use of Justice Powell's logic would proceed as follows: Since the Missouri version of the Disciplinary Rule requires counsel to reveal frauds which clients leave unrectified, and since breach of that obligation exposes counsel to the risk of severe sanctions and, thereby, creates in counsel a "need for self-protection [that] would often require the right to disclose the information given him,"<sup>125</sup> no client legitimately could expect his attorney to keep private the confidential communications which clearly establish the proscribed conduct.

The simple symmetry of this argument masks some serious flaws in it. Unlike the relationship between client and accountant, the relationship between client and attorney is permeated with expectations of confidentiality which individual attorneys cultivate in order to secure the information and cooperation from their clients which is necessary for effective legal representation. Recognizing the indispensability of client confidence in counsel, our system aggressively encourages its users to expect the information they share with their lawyers to remain private. It seems unreasonable to foster and reinforce that expectation with respect to all categories of past conduct except one: fraud that occurs while a person is being represented.

The unreasonableness of trying to insulate information about that one category of past conduct from the expectation of privacy becomes more apparent in light of the uncertainty clients frequently will feel concerning the implications of information they would like to share with counsel. Because the term "fraud" is so ill-defined (even by courts and legal scholars),<sup>126</sup> there will be many instances in which individual clients will not be able to predict whether certain information will lead their attorneys to conclude that they have committed fraud or perjury. If they cannot foresee what the information will mean to their lawyer, how can clients form an expectation about the status of its confidentiality? Moreover, it is wholly unrealistic to assume that the information and feelings clients have are neatly separable into two completely distinct categories: one that includes the data that is relevant only to whether fraud has been committed and another that includes only the data that is needed to represent the client in the matter for which counsel was hired. Since it will happen frequently that some information clients possess both will have implications about their veracity, and will be necessary for effective representation, clients frequently will be encouraged to form mutually exclusive expectations about the same information. Clients will be encouraged to expect the information to remain confidential when used in the matter for which counsel was retained, but simultaneously will be encouraged to expect it to

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125. *Id.* at 335.

126. See notes 1, 5 & 3 *supra*, in which the confused concept of "fraud" is discussed further.



be disclosed for the purpose of initiating proceedings against them for fraud or perjury.

It is impossible for clients to separate their information into two wholly independent categories and to attach one clear expectation (of confidentiality) to the data in one category while attaching an opposite but equally clear expectation (of disclosure) to the information in the other category. In addition, a large percentage of all the relevant communications from clients to lawyers is *not* subject to disclosure. In light of these two factors, it would appear reasonable for a client to develop one expectation about the confidentiality of all of the information she shares with her attorney. Regardless of the version of Disciplinary Rule 7-102(B)(1) that happens to be in effect at a particular time in a given jurisdiction, the client's expectation would be that her communications to her lawyer will remain confidential.

The reasonableness (and therefore the legitimacy) of that expectation of confidentiality seems even clearer when one compares certain characteristics of the attorney-client privilege and the Missouri version of Disciplinary Rule 7-102(B)(1). The privilege reflects the general rule from which Disciplinary Rule 7-102(B)(1) represents a narrow exception. The privilege has occupied a central place in the Anglo-American legal tradition for generations and is recognized in all jurisdictions in the United States.<sup>127</sup>

The duty of disclosure that is embodied in Missouri's version of the Disciplinary Rule, by contrast, has not always been recognized in the past. For example, between 1953 and 1969 the ABA did not recognize the duty of disclosure at all.<sup>128</sup> Even today there are many jurisdictions which do not recognize the duty.<sup>129</sup> In short, while the availability to individual criminal defendants of the attorney-client privilege has remained relatively constant over time and between jurisdictions, the same cannot be said of the Disciplinary Rule. Clients who consult lawyers from different jurisdictions or in different years cannot predict with confidence when, if ever, their counsel will be subject to a duty to disclose. Nor can a client assume that when such duties exist in different jurisdictions they always extend to the same information or arise in the same circumstances.<sup>130</sup> Because the existence and reach of the duty to disclose is so unpredictable, it is not reasonable to assume that clients will shape their expectations of privacy around it.

The United States Supreme Court again confronted the role expectations of privacy should play in analysis of fifth amendment privilege pro-

127. See 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961) (discussing the history and development of the attorney-client privilege).

128. See ABA OPINION No. 341, at 85-86.

129. See note 6 *supra*.

130. See discussion of *In re A.*, *In re Malloy*, and *Committee on Professional Ethics v. Cavanaugh* in *Woods*, *supra* note 1, at 827-31. See also note 6 *supra* for discussion of the current status of the Rule in each state.

blems in *Fisher*. In an opinion to which seven justices subscribed, Justice White concluded that the framers did not intend the fifth amendment to "serve as a general protector of privacy."<sup>131</sup> Instead, he declared, the fifth amendment right can offer protection to interests in personal privacy only when the government invades those interests by attempting to compel self-incriminating testimonial information directly from individual holders of the privilege.<sup>132</sup> According to the *Fisher* Court, individuals seeking to protect self-incriminating testimony that the government pursued through means other than direct compulsion on an accused would have to look to sources other than the fifth amendment for help.

#### 4. Can Fifth Amendment Rights Justify Assertions of the Attorney-Client Privilege?

Of the three possible sources of such help which Justice White identified in *Fisher*,<sup>133</sup> the only one that is arguably applicable to the facts of that case and to the situation contemplated in Disciplinary Rule 7-102(B)(1) is the "evidentiary . . . attorney client privilege."<sup>134</sup> The irony of the *Fisher* opinion, however, is that after purporting to discard the fifth amendment privilege as a basis upon which counsel could refuse to disclose the information sought by the government, the Court construed the attorney-client privilege in a way that would permit the client's privilege against self-incrimination to block governmental use of that same information. The portion of the *Fisher* opinion where Justice White explores the availability of the attorney-client privilege and its relationship with the fifth amendment privilege is critically important to understanding how to resolve the conflicts between the policies and interests that are involved when an attorney in Missouri is convinced that his client has committed fraud or prejury. Unfortunately, this portion of Justice White's opinion is badly confused and based on misreadings of both a key section of Dean Wigmore's treatise on evidence and relevant lower federal court opinions.<sup>135</sup>

In essence, the *Fisher* court boot-strapped the fifth amendment privilege back into its analysis through the evidentiary attorney-client privilege. This boot-strapping proceeded as follows. Since the fifth amendment privilege cannot be violated when the government compulsion is directed not toward the accused but toward his attorney, the only privilege that remains in issue when the government seeks information from an attorney that could incriminate his client is the evidentiary

131. 425 U.S. at 401.

132. *Id.* at 400.

133. The other two were the first and fourth amendments, neither of which seems applicable to the situation contemplated in DR 7-102(B)(1). *Fisher v. United States*, 425 U.S. 391, 401 & n.7 (1976).

134. *Id.*

135. See notes 138-40 and accompanying text *infra*.

attorney-client privilege. That privilege may play a role when the immediate object of the government pressure is the attorney, even though the holder of the privilege is the client, because "it is universally accepted that the attorney-client privilege may be raised by the attorney."<sup>136</sup> The purpose of the attorney-client privilege is to encourage clients to make disclosures to their attorneys that are "necessary to obtain informed legal advice"<sup>137</sup> and that might not be made if the privilege were not recognized. If a client possessed information (in documentary form in *Fisher*) that would be protected by the fifth amendment privilege against self-incrimination *if* he retained possession of it, the purpose of the attorney-client privilege would be defeated if the law made that same information subject to disclosure merely by virtue of the fact that the client shared it with counsel (assuming that the sharing was in confidence and for the purpose of securing legal advice). To conclude his argument Justice White borrowed a passage from what he assumed was the relevant portion of Dean Wigmore's treatise: "It follows, then, that *when the client himself would be privileged* from production of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce."<sup>138</sup> In addition to this section of Dean Wigmore's treatise and the cases it cited, Justice White offered as support for this reasoning two opinions by United States Courts of Appeals: *United States v. Judson*<sup>139</sup> and *Colton v. United States*.<sup>140</sup>

A major difficulty with this crucial portion of Justice White's opinion is that the authorities on which he relied do not support the line of reasoning he employed. In fact, these authorities squarely support the proposition rejected by Justice White earlier in the *Fisher* opinion, namely, that counsel could assert his client's fifth amendment privilege as an independently sufficient ground for refusing to disclose data acquired from his client as long as the client could have asserted that privilege if the government had exerted its compulsion directly on him.<sup>141</sup>

136. *Fisher v. United States*, 425 U.S. at 402 n.8.

137. *Id.* at 403.

138. *Id.* at 404, *quoting* 8 J. WIGMORE, EVIDENCE § 2307 (McNaughton rev. ed. 1961) (emphasis in original).

139. 322 F.2d 460 (9th Cir. 1963).

140. 306 F.2d 633 (2d Cir. 1962).

141. Wigmore explicitly states that "the courts . . . frequently permit counsel for the witness to call the witness' attention to the [fifth amendment] privilege or to *plead it in his behalf*." 8 J. WIGMORE, EVIDENCE § 2270, at 416 (McNaughton rev. ed. 1961) (emphasis added).

Judge Jertberg, writing in *Judson*, also clearly indicated that the attorney *could* assert the client's fifth amendment privilege and that "the privilege must then be respected if the client himself could have successfully raised it." *United States v. Judson*, 322 F.2d at 467. For further discussion of this case, see text following note 142 *infra*.

The *Colton* court likewise took this approach, stating that "if a proper showing is made, [attorney] Colton will be able to raise the [client's] privilege against self-incrimination." *Colton v. United States*, 306 F.2d at 639.

While the authorities cited by Justice White considered factual situations comparable to the one before the Court in *Fisher*, they arrived at a very different and much more defensible solution. The common problem faced in these authorities, and in *Fisher*, was how to treat data that was *not protected by the attorney-client privilege* because it was produced by clients (or, in *Fisher*, by third persons) *before* the attorney-client relationship had been formed and not for the purpose of communicating with counsel. None of the authorities suggest, as Justice White's citation of them implies, that such data, which otherwise clearly could not qualify for the attorney-client privilege, somehow could be brought within the protective reach of *that* privilege merely because the data would be protected from disclosure by the fifth amendment privilege if it were in the possession of the accused. This "solution," which the *Fisher* Court apparently manufactured for the first time, does great violence to the criteria which in all other circumstances must be satisfied before the attorney-client privilege can be invoked successfully. The authorities cited by Justice White avoided so distorting the theory of the attorney-client privilege by not relying on it at all. Instead, they relied directly and exclusively on the fifth amendment privilege.<sup>142</sup>

The most lucid and carefully reasoned of the opinions cited by Justice White in support of his boot-strap reasoning was written by Judge Jertberg for the Ninth Circuit in *United States v. Judson*.<sup>143</sup> Judge Jertberg, however, resorted to no boot-strapping. After concluding that the attorney-client privilege could not protect the documents in question

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142. See 8 J. WIGMORE, EVIDENCE § 2307, at 591-92 (McNaughton rev. ed. 1962). See also *Colton v. United States*, 306 F.2d 633 (2d Cir. 1961); *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963).

It is important to appreciate that Justice White was *not* focusing here on any 'communications' from client to attorney that might be implicit in the *act* of delivering the documents to counsel. That act, for example, might be said to implicitly communicate that the client had possessed the documents and/or that he authenticated them. While it is arguable that such tacit communications could be protected by the attorney-client privilege, that is *not* the argument Justice White was making in this portion of his opinion. Instead he focused on the information that would be communicated by the contents of the documents. Thus, in Justice White's view it was the documents themselves that could have been protected by the attorney-client privilege if the fifth amendment privilege would have been available if the client had retained the papers and been the direct target of the government's compulsion. In a *subsequent* section of his opinion Justice White discussed the possibility that producing documents in response to a *subpoena* might have "communicative" implications—but that discussion focused exclusively on the *fifth amendment* privilege. 425 U.S. at 410-14. Justice White never acknowledged that the act of delivering documents to counsel might involve implicit "communications" or that such communications might qualify for protection by the *attorney-client* privilege. Nor did he discuss the argument that in order to protect communications that might be implicit in the art of delivering documents to counsel it might be necessary to protect from disclosure the documents themselves.

143. 322 F.2d 460 (9th Cir. 1963).

(which predated the attorney-client relationship) and that the fifth amendment privilege would have prevented the government from compelling the taxpayers themselves to produce the documents if the taxpayers had retained possession of them, Judge Jertberg proceeded to consider the primary issue: whether the attorney could use his clients' fifth amendment privilege to justify refusing to deliver the documents to the government. After carefully evaluating conflicting precedents, Judge Jertberg offered the following rationale for his conclusion:

Clearly, if the taxpayer . . . had been subpoenaed and directed to produce the documents in question, he could have properly refused. The government concedes this. But instead of cloaking himself with his myriad tax data drawn up around him, the taxpayer retained counsel. Quite predictably, in the course of the ensuing attorney-client relationship the pertinent records were turned over to the attorney. The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less.<sup>144</sup>

. . . .

The thrust of the Fifth Amendment is that "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law."<sup>145</sup>

. . . .

The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of *A*'s guilt from *B*. But this argument ignores the realities of the relationship existing where *B* is *A*'s attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.<sup>146</sup>

How Justice White could cite this opinion by Judge Jertberg as authority for the proposition that counsel seeking to protect his client's incriminating documents from disclosure could not invoke the fifth amendment privilege, but instead would have to rely on the attorney-client privilege, remains a mystery.

144. *Id.* at 466.

145. *Id.* (quoting *United States v. White*, 322 U.S. 694, 698 (1943) (citation omitted)).

146. *Id.* at 467.

A major question the *Fisher* Court leaves unasked and unanswered is *why* the fact that material could qualify in different circumstances for protection by a different privilege should enable it to qualify automatically for protection by the attorney-client privilege, even though that material undeniably fails to satisfy the otherwise universally applied requirements of the latter privilege. The *Fisher* Court's failure to come to terms with this telling conceptual difficulty bodes ill for the longevity of its analytical approach. That fact suggests the advisability of not relying exclusively on Justice White's reasoning in attempting to determine what role the fifth amendment privilege should play in the situation contemplated in Disciplinary Rule 7-102(B)(1). Because it represents the Supreme Court's most treatment of related questions, however, Justice White's approach cannot be ignored. It seems wise, therefore, to evaluate the role of the fifth amendment privilege in situations where counsel believes his client has committed fraud or perjury on the basis of two different analytical models: the one provided by the *Fisher* Court and the other provided by the authorities which the *Fisher* Court misread.

Even under the *Fisher* Court's theory, the fifth amendment privilege should have a substantial impact on an attorney's thinking about how to proceed after concluding that his client has perjured himself. It seems indisputable that a client could invoke the fifth amendment privilege to justify refusing to reveal his own fraud or perjury if Disciplinary Rule 7-102(B)(1) attempted to impose an obligation to do so directly on him.<sup>147</sup> Justice White's reasoning in *Fisher* suggests that in this situation a rule of law that required an attorney to disclose information his client could have protected if he had not communicated it in confidence to counsel would jeopardize the primary purpose of the attorney-client privilege. It would follow in Justice White's view that when the client clearly could have used his fifth amendment privilege as grounds for refusing to reveal his fraud or perjury, his attorney may rely on the attorney-client privilege in refusing to disclose that alleged misconduct.<sup>148</sup> Moreover, where an attorney is empowered to invoke the attorney-client privilege on behalf of clients he *must* do so unless otherwise directed by the holders of the privilege.<sup>149</sup> Under the *Fisher* Court's reasoning, then, an attorney whose client had not consented to disclosure of his misconduct could not comply with the directive of Missouri's version of Disciplinary Rule 7-102(B)(1) without violating the

147. UNIFORM RULES OF EVIDENCE rule 25 (1953); MODEL CODE OF EVIDENCE RULE 203 and Comment thereto (1942).

148. See *Fisher v. United States*, 425 U.S. 391, 402-05 (1976). The fact that in *Fisher* the potentially self-incriminating information was reduced to writing before the attorney-client relationship commenced, whereas the communications from client to attorney which "reveal" the client's fraud or perjury could be oral or written and will occur after the formation of the professional relationship, would not appear to affect the structure of the *Fisher* analysis.

149. See, e.g., CALIF. EVID. CODE § 935 (West 1966); J. WIGMORE, EVIDENCE § 2307 (McNaughton rev. ed. 1961).

obligation the law of evidence imposes upon him to preserve the confidentiality of communications that are protected by the attorney-client privilege.

For counsel who is convinced his client has committed fraud or perjury, Judge Jertberg's approach would create a much more direct confrontation between the client's fifth amendment privilege and the directives of Missouri's 7-102(B)(1). Absent a free and knowing waiver by his client, an attorney who revealed a client's fraud or perjury to a court would be violating that client's fifth amendment right not to incriminate himself. Moreover, attorneys making such revelations would be violating simultaneously a client's rights under the attorney-client privilege if they learned about the fraud or perjury through confidential communications.

Although a literal reading of *Fisher* and *Andresen* might seem to indicate that none of the values or policies that support the fifth amendment privilege against self-incrimination would be implicated if an attorney complied with the Missouri version of Disciplinary Rule 7-102(B)(1) and revealed his client's fraud or perjury to a judge or prosecutor, this view would seem difficult to sustain. In *Murphy v. Waterfront Commission*,<sup>150</sup> a 1964 Supreme Court opinion cited with approval in *Couch*,<sup>151</sup> *Andresen*,<sup>152</sup> and *Fisher*,<sup>153</sup> the Court declared that:

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . . and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."<sup>154</sup>

The obligations Disciplinary Rule 7-102(B)(1) imposes on Missouri attorneys, and the pressures it imposes through them on clients, threaten some of these "fundamental values." Our system of justice is so complex that a client must turn openly and without fear to his attorney or be left vulnerable and alienated. It is this fact that makes attorney and client, especially in defense of a criminal charge, so psychologically and functionally interdependent that in a very real sense they become "one person" before the law. Since it is our adversarial legal system that compels this

150. 378 U.S. 52 (1964).

151. 409 U.S. at 328.

152. 427 U.S. at 476.

153. 427 U.S. at 399.

154. 378 U.S. at 55.

identification, it is indeed, in Judge Jertberg's phrase, "mere sophistry" to argue that the client is not being compelled to incriminate himself when the state forces the professional representative without whom he could not survive in the legal system to reveal his confidences.

Despite these considerations, the Missouri version of Disciplinary Rule 7-102(B)(1) would convert counsel into a conduit for self-incrimination. To so convert the client's professional ally seems especially inconsistent with "our sense of fair play" because it forces clients to choose between two unacceptable alternatives: (1) attempt to do something for which they are wholly unequipped (*i.e.*, to second guess their lawyer and the law and then to manipulate carefully the flow of information to counsel) or, (2) open up fully to their representative and take the risk that he will conclude that they have committed fraud or perjury and pressure them to make self-incriminating admissions, or if he is not satisfied, turn on them by disclosing his view of the facts to "the affected person or tribunal."<sup>155</sup>

In effect, Missouri's version of the Disciplinary Rule would turn private lawyers into agents of the state for three purposes. It would compel counsel (1) to monitor and to pass judgment on the conduct of his client, (2) to pressure his client to reveal any conduct which, in counsel's judgment, constituted fraud and (3) to inform the affected tribunal or person whenever his client refused to respond to that pressure. To convert private counsel into agents of the prosecution for these purposes seems patently inconsistent with "requiring the government in its contest with the individual to shoulder the entire load."<sup>156</sup>

## V. PROPOSALS FOR MISSOURI COURTS AND COUNSEL

It seems reasonable to assume that before deciding *Fisher* and *Andresen*, the United States Supreme Court considered, and rejected, arguments of the kind made above. If the Burger majority remains both unmoved by such considerations and committed to its narrow, literalistic interpretation of the fifth amendment privilege, it is highly unlikely that the Court would rule that compliance by counsel with Missouri's version of Disciplinary Rule 7-102(B)(1) would violate a client's right under the Constitution of the United States not to "be compelled in any criminal case to be a witness against himself."<sup>157</sup> If the Court followed its reasoning in *Fisher*, however, it probably would hold that compelling an attorney to reveal fraud or perjury which, because of the fifth amendment the client could not be directly compelled to disclose, would violate the client's rights under the law of attorney-client privilege.

Even if such predictions about how the United States Supreme Court would rule on these issues were reliable, however, they would not

155. MO. SUP. CT. R. 4, DR 7-102(B)(1).

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156. *Murphy v. Waterfront Comm'n*, 378 U.S. at 55.

157. U.S. CONST. amend. V.



necessarily determine the legal status in Missouri of its version of Disciplinary Rule 7-102(B)(1). While the Supreme Court has analyzed these questions on the basis of its own view of the common law<sup>158</sup> and the Constitution of the United States, Missouri courts also must consider Missouri authority. The Missouri Constitution<sup>159</sup> and Mo. Rev. Stat. section 491.040<sup>160</sup> are independent sources of a privilege against self-incrimination which Missouri courts are free to construe to provide protections which the United States Supreme Court declines to find in the fifth amendment. Similarly, the right to the effective assistance of counsel has independent sources in state law<sup>161</sup> that Missouri courts might find incompatible with the directives of Disciplinary Rule 7-102(B)(1). Moreover, as Missouri's highest court reaffirmed recently in *State ex rel. Great American Insurance Co. v. Smith*, the attorney-client privilege is a product of the common law,<sup>162</sup> a law whose boundaries in any one state can be defined and modified by the courts of that state.<sup>163</sup> It follows that Missouri

158. *Fisher v. United States*, 425 U.S. 391, 402 n.8 (1976).

159. MO. CONST. art. I, § 19.

160. RSMO § 491.040 (1978).

161. The Missouri Constitution provides that "in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." MO. CONST., art. I, § 18(a). In addition, RSMO § 545.820 (1978) states:

If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two. . . .

The Missouri Supreme Court has expanded even further upon the right to effective counsel in its rules, stating:

In every criminal prosecution in any court in this State, the accused shall have the right to appear and defend the same in person and by counsel. If any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If the defendant so requests, and if it appears from a showing of indigency that he is unable to employ counsel, it shall be the duty of the court to appoint counsel to represent him. If, after being informed as to his rights, the defendant indicates his desire to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to counsel, the court shall have no duty to appoint counsel unless it appears to the court that . . . the failure to appoint counsel may result in injustice to the defendant. Counsel so appointed shall be allowed a reasonable time in which to prepare the defense.

MO. SUP. CT. R. 29.01(a). See also *State v. Johnstone*, 335 S.W.2d 199 (Mo. 1960), cert. denied, 364 U.S. 842, rehearing denied, 364 U.S. 906 (1960); *Ex parte Stone*, 255 S.W.2d 155 (Spr. Mo. App. 1953).

162. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d at 382.

163. See, e.g., *Morgenthaler v. First Atl. Nat'l Bank*, 80 So.2d 446, 452-53 (Fla. 1955) (courts are not bound to adhere to a common law concept which is contrary to a just result); *Woods v. Lancet*, 303 N.Y. 349, 354, 102 N.E.2d 691, 694 (1951) (it is duty of the court to re-examine the common law and adapt it to current conditions as justice demands); *State v. Esser*, 16 Wis. 2d 567, 572, 115

courts are not bound, for example, by the interpretation in *Fisher* of the attorney-client privilege.<sup>164</sup>

Because the values and policies implicated by the Rule 4 version of Disciplinary Rule 7-102(B)(1) are so fundamental, Missouri courts should conduct an independent, open evaluation of this disciplinary rule. While they should attend carefully to relevant opinions by the United States Supreme Court, they should not feel bound by its reasoning or the conclusions it has reached.

#### A. *Arguments for Amending or Abandoning DR 7-102(B)*

In any thorough examination of Disciplinary Rule 7-102(B)(1), the values which the current form of the rule in Missouri is designed to promote should be accorded substantial weight. Those values relate to preserving the integrity of the judicial process, improving the reliability of the information upon which settlements are based and judgments are rendered, and discouraging testimonial misrepresentations.<sup>165</sup> The importance in the abstract of these societal interests is obvious. It is far less obvious, however, that the disciplinary rule in its current form in Missouri significantly helps to secure these ends. Before reaching any conclusions about the wisdom or constitutionality of Disciplinary Rule 7-102(B)(1), Missouri courts should examine the possibility that its net overall effect on the administration of justice is negative. It is conceivable, for example, that the obligation to reveal misconduct that the rule imposes on attorneys makes clients more afraid and distrustful of their lawyers than they otherwise would be, and encourages clients to conceal information from or lie to their counsel from the outset of the professional relationship.<sup>166</sup> The duty to disclose also may encourage lawyers to warn their clients not to

N.W.2d 505, 512-13 (1962) (courts may adapt and develop the common law as part of the judicial power).

164. See *Krug v. Reissig*, 488 P.2d 150, 152 (Wyo. 1971) (judicial decisions of other jurisdictions are merely interpretations of the common law, and the courts of a state are at liberty to adopt the interpretation they think best).

165. In fact, it has been persuasively argued that the deterioration of these values would undermine the very basis of the adversary system by reducing the social acceptability of judicial decisions. See *Wolfram*, *supra* note 1, at 833 & n.91. Cf. *McKissick v. United States*, 379 F.2d 754, 761 (5th Cir. 1967) (attorney's disclosure to the court of his client's admission of perjury was essential to public interest); *People v. Beattie*, 137 Ill. 553, 574 (1891) (attorney owes duty of good faith to the court so that it may do justice); *In re King*, 7 Utah 2d 258, 262, 322 P.2d 1095, 1097-98 (1958) (attorney, as an officer of the court, has a primary duty to disclose known perjury). See also H. DRINKER, *LEGAL ETHICS* 74-78 (1953).

166. See generally M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* ch. 3 (1975). Professor Freedman notes that "the inevitable result of the hard-line position [against use of perjured testimony] . . . would be to caution the client not to be completely candid with the attorney." *Id.* at 38.

volunteer information and not to make incriminating admissions.<sup>167</sup> Similarly, that duty could discourage defense counsel from conducting the kind of aggressive, wide-open investigations that are essential to quality representation. If the disciplinary rule provokes such responses, its net effect may be to promote irrational settlements and plea bargains, to decrease the reliability of evidentiary records, and to expand the scope of testimonial misrepresentations. Moreover, it is not unlikely that the rule generates far too few benefits to compensate for such costs. If Disciplinary Rule 7-102(B)(1) has moved a significant number of Missouri lawyers to disclose fraud or perjury committed by their clients, that fact is a well-guarded secret.<sup>168</sup>

Regardless of the outcome of this kind of an evaluation of how well the rule in its present form serves the values it is said to reflect, it is likely that complying with the disclosure commandment of Disciplinary Rule 7-102(B)(1) would do severe damage both to the values and policies which support the privilege against self-incrimination, and to the rights of clients that are supposed to be secured by the attorney-client privilege and by the sixth amendment to the United States Constitution. This likelihood, coupled with a strong suspicion that the disciplinary rule contributes little to the advancement of the interests it was intended to promote, supports a recommendation that the Missouri Supreme Court at least amend Disciplinary Rule 7-102(B)(1) by removing the duty to disclose it now imposes.

It is not at all clear that adopting the ABA's version of Disciplinary Rule 7-102(B)(1) would remove all of the threats to the rights of clients that are now created by Missouri's version of that Rule. In Formal Opinion 341, the ABA's Committee on Ethics and Professional Responsibility interpreted the 1974 amendment to Disciplinary Rule 7-102(B)(1) as protecting against disclosure not only communications which satisfy the requirements of the attorney-client privilege, but also all "secrets," which Disciplinary Rule 4-101(A) expansively defines as including "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."<sup>169</sup> This broad interpretation of the 1974 amendments offers the values that support the attorney-client privilege considerable protection from Disciplinary Rule 7-102(B)(1). Even under this broad interpretation, however, the ABA's version of the Rule could

167. *Id.* See also A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY chs. 3 & 4 (1976).

168. It appears that no attorneys in Missouri have been disciplined for failure to reveal their client's testimonial fraud or perjury under the present DR 7-102(B)(1) since it took effect in 1970. Telephone conversation with Harold Barrick, General Chairman, The Advisory Committee, Missouri Bar Administration, August 6, 1979.

169. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-101(A). See Wolfram, *supra* note 1, at 836-37 & nn.106-07.

threaten, in some situations, the values that underlie the fifth amendment privilege against self-incrimination. This follows because Disciplinary Rule 7-102(B)(1), as amended, and Disciplinary Rule 4-101(A) offer protection only to information "gained in the professional relationship."<sup>170</sup> This limitation might lead attorneys whose belief that their client had committed perjury was based on information acquired *before* the professional relationship was formed to feel compelled to disclose the misconduct.<sup>171</sup>

A perhaps more significant reason for declining to follow the ABA's lead with respect to Disciplinary Rule 7-102(B) is the "serious anomaly"<sup>172</sup> that has resulted from the ABA's failure to amend Disciplinary Rule 7-102(B)(2) when it amended Disciplinary Rule 7-102(B)(1). Both the Missouri and ABA version of Disciplinary Rule 7-102(B)(2) require "[a] lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal [to] . . . promptly reveal the fraud to the tribunal." As Professor Wolfram has pointed out,<sup>173</sup> this rule appears to impose a duty on counsel to reveal testimonial fraud by non-clients, even if in so doing the attorney must both (1) disclose information from his *client* that is protected by the attorney-client privilege, and (2) incriminate his client, for example, for suborning the perjury of the non-client or as a fellow perjurer for testifying to the same false story as the non-client. Thus, this version of Disciplinary Rule 7-102(B)(2) poses a threat to the rights of clients under both the evidentiary and fifth amendment privileges. Given these short-comings, Missouri courts might be well advised to abandon Disciplinary Rule 7-102(B) entirely.

#### B. *A Compromise Course of Conduct for Missouri Attorneys*

Assuming that Missouri courts are unlikely to reevaluate and to change this Disciplinary Rule immediately, Missouri attorneys should consider adopting a course of professional conduct that would do as little violence as possible to the values that collide in the situation contemplated by the Disciplinary Rule. Like Judge Hufstедler of the United States Court of Appeals for the Ninth Circuit,<sup>174</sup> this author believes that an advocate should place his clients' rights and interests above his own desire to avoid

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170. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-101(A).

171. This situation probably would occur very rarely. It is difficult to imagine circumstances in which at least some of the information on which counsel would rely in concluding that his client had lied was not "gained in the professional relationship."

172. Wolfram, *supra* note 1, at 864 n.214.

173. *Id.*

professional sanctions.<sup>175</sup> A Missouri attorney who subscribes to that view and who takes seriously the directive of Ethical Consideration 7-3 to "resolve in favor of his client doubts as to the bounds of the law"<sup>176</sup> should not feel bound by the duty to disclose that Disciplinary Rule 7-102(B)(1) seeks to impose.<sup>177</sup> Instead, counsel should consider adopting the following procedures.

At an appropriate time very early in the professional relationship, the attorney should discuss with his client the current status of the law of attorney-client privilege, self-incrimination and perjury.<sup>178</sup> In this discussion, the lawyer should encourage his client to respond openly to inquiries by his counsel and should energetically discourage his client from resorting to perjury. The attorney also should explain the tactical difficulties perjury can generate and inform his client about the sanctions that can accompany being convicted of that crime.<sup>179</sup>

175. *But see* McKissick v. United States, 379 F.2d 754, 761-62 & n.2 (5th Cir. 1967).

176. MO. SUP. CT. R. 4, EC 7-3.

177. A Missouri attorney who decides to follow DR 7-102(B)(1) should feel that full compliance with it requires disclosure only of his *belief* that his client has committed fraud or perjury. The Disciplinary Rule commands counsel to reveal only "the fraud," not the basis for the attorney's belief. If a court were to press counsel to detail the basis for his conclusion, the attorney should ask the court to formally order him to make these disclosures. Such an order presumably would satisfy the requirements of DR 4-101(C)(2), which states: "A lawyer may reveal [c]onfidences or secrets when . . . required by law or court order."

There is authority for a court accepting counsel's representations about conclusions that require counsel to withdraw. *See* Uhl v. Municipal Court, 37 Cal. App. 3d 526, 112 Cal. Rptr. 478 (1974) (involving court's acceptance of counsel's representation that a conflict of interest required withdrawal from representation of a criminal defendant). *But see* Thornton v. United States, 357 A.2d 429, 434-35 (D.C. 1976) and notes 1-9 *supra*.

178. This, of course, is an application of the general duty of a lawyer "to form and tell his client his real opinion as to everything the client should know, and to advise him to do what he honestly believes to be in his best interest." H. DRINKER, LEGAL ETHICS 102-03 (1953). *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 ("In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions of his own. But otherwise the authority to make decisions is exclusively that of the client . . ."); ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."). *See also* Cihlar, *Client Self-Determination: Intervention or Interference?* 14 ST. LOUIS U.L.J. 604 (1970).

179. In Missouri, perjury is always a felony, but may fall within any one of four classifications, depending upon the circumstances:

6. Perjury committed in any proceeding not involving a felony charge is a class D felony.

7. Perjury committed in any proceeding involving a felony charge is a class C felony unless:

(1) it is committed during a criminal trial for the purpose of securing the conviction of an accused for

If counsel subsequently receives information that leaves him absolutely convinced that his client has committed fraud or perjury during the course of the representation, both the loyalty that Canons 7 and 4<sup>180</sup> give a client the right to expect and common notions of decency dictate that the attorney's first response should be to discuss the matter with his client. In this discussion counsel should examine the support for his conclusion and should give his client an opportunity to challenge it.

If this discussion does not dislodge counsel's conviction that fraud or perjury has occurred, he should attempt to persuade his client to rectify the fraud. It is important to acknowledge frankly that even if rectification seems to be in the client's best interests, an attorney who attempts to persuade his client to rectify his fraud is pressuring his client to make potentially self-incriminatory admissions and is doing so at least in part as an officer of the court.<sup>181</sup> That kind of pressure from a representative of the government threatens values which the fifth amendment privilege is intended to help protect. Counsel's responsibility to help preserve the integrity of the judicial process,<sup>182</sup> however, justifies the creation of that threat, especially since its size can be minimized by the manner in which the attorney attempts the persuasion and, frequently, by the availability of a statutory defense to a prosecution for perjury. A Missouri attorney who is encouraging his client to rectify alleged perjury always should discuss the potential applicability of paragraph four of Mo. Rev. Stat. section 575.040.<sup>183</sup> If the client's perjury has not already been exposed, and if the proceeding in which it occurred has not been terminated, this subsection of section 575.040 makes retraction of the "false statement" a defense to a perjury charge. The availability of this defense obviously could have a

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- murder, in which case it is a class A felony; or
- (2) It is committed during a criminal trial for the purpose of securing the conviction of an accused for any felony except murder, in which case it is a class B felony.

RSMo §§ 575.040.6, .7 (1978).

The basic sentences of imprisonment for each class of felony are described in RSMo § 558.011.1 (1978), which states in pertinent part:

- (1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;
- (2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;
- (3) For a class C felony, a term of not to exceed five years [sic];
- (4) For a class D felony, a term of years not to exceed five years . . .

See also Wolfram, *supra* note 1, at 812-19, for a discussion of the risks posed to a perjurer and to his attorney.

180. MO. SUP. CT. R. 4, Canons 7 & 4.

181. *McKissick v. United States*, 379 F.2d 754, 761-62 (5th Cir. 1967).

182. See, e.g., MO. SUP. CT. R. 8.11, which sets forth the oath required for Missouri attorneys on admission to the bar. The oath includes the following affirmation: "That I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law . . ."

183. RSMo § 575.040.4 (1978). See note 76 and accompanying text *supra*.

substantial impact on a client's decision about whether or not to rectify his perjury.

At the same time he is encouraging his client to retract the false testimony, counsel also should explain how he would respond if the fraud were left unrectified. Specifically, the attorney should advise his client that his Oath<sup>184</sup> and the Code of Professional Responsibility prohibit a lawyer from engaging in conduct that is dishonest, deceitful, or prejudicial to the administration of justice,<sup>185</sup> as well as from knowingly using false evidence, making a false statement of fact, or assisting a client in conduct the lawyer knows to be illegal or fraudulent.<sup>186</sup> Counsel should make it clear that he views the combined effect of these rules as prohibiting him from arguing the perjured testimony to the trier of fact or in any other way attempting to use it to the client's advantage.<sup>187</sup>

184. See MO. SUP. CT. R. 8.11, *supra* note 181.

185. MO. SUP. CT. R. 4, DR 1-102(A)(4), (5).

186. MO. SUP. CT. R. 4, DR 7-102(A)(4), (5) & (7).

187. See ABA Project on Standards for Criminal Justice, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION [hereinafter cited as DEFENSE FUNCTION STANDARDS], Defense Function § 7.7 (Approved Draft 1971). It states:

Testimony by the defendant.

(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.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, it is unprofessional conduct for the lawyer to lend his aid to the perjury or the use of 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 must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; *the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.*

*Id.* at 167, 274-75, and Supp. 17-18 (emphasis added). However, the drafting committee has clearly indicated that the attorney should *not* reveal his client's conduct to the affected person or tribunal in a criminal case, stating its opinion that: "It should be noted that DR 7-102(B) . . . is construed as not embracing the giving of false testimony in a criminal case." *Id.* at Supp. 18.

See also *Lowery v. Cardwell*, 575 F.2d 727, 730-31 (9th Cir. 1978); Burger, *Standards of Conduct: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12-13 (1966); Wolfgram, *supra* note 1, at 819-27, 862-63.

If the client's alleged fraud or perjury occurs under circumstances in which counsel could withdraw from the representation without unduly prejudicing his client, the attorney also should inform the client that if the fraud remains unrectified the attorney will be compelled to seek permission from the court to withdraw from the case.<sup>188</sup> Counsel should explain that the Code of Professional Responsibility makes withdrawal mandatory when it is obvious that an attorney's "continued employment will result in a violation of a Disciplinary Rule"<sup>189</sup> and that he believes he would violate the disciplinary rule which prohibits counsel from assisting clients in conduct the lawyer knows to be illegal or fraudulent<sup>190</sup> if he helped his client present a case that was based in part on a material misrepresentation.<sup>191</sup>

If the client remains unwilling to rectify his alleged fraud counsel should evaluate the feasibility of withdrawing from the case. Even though Disciplinary Rule 2-110(B)(2)<sup>192</sup> would appear to make withdrawal mandatory in this situation, counsel's continuing obligation to avoid

188. See, e.g., *Grievance Comm'n v. Malloy*, 248 N.W.2d 43, 45-46 (N.D. 1976); *In re A*, 276 Or. 225, 236-40, 554 P.2d 479, 485-87 (1976) (citing OREGON STATE BAR COMMITTEE ON LEGAL ETHICS, OPINION 277 (1972)); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS No. 287 (1953).

189. MO. SUP. CT. R. 4, DR 2-110(B) provides in part:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

....

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

190. MO. SUP. CT. R. 4, DR 7-102(A)(7).

191. See Wolfram, *supra* note 1, at 854-63, for a discussion of the arguments for and against mandatory withdrawal in such a case. As Professor Wolfram notes, there is some question whether the attorney's continuation in the case would violate a Disciplinary Rule and thus bring DR 2-110(B)(2)'s mandatory withdrawal requirement into play in this situation. *Id.* at 855. However, he also observes that a mandatory withdrawal requirement would probably serve effectively to reduce the incidence of uncorrected perjury, because "the specter of mandatory withdrawal in most instances will give attorneys the additional leverage that is required to [cause] . . . a recalcitrant client [to recant]." *Id.* at 857.

For similar problems arising in civil cases, *cf.* *Hinds v. State Bar*, 19 Cal. 2d 87, 119 P.2d 134 (1941) (attorney could have withdrawn after client's fraud); *Committee on Professional Ethics v. Crary*, 245 N.W.2d 298 (Iowa 1976) (no duty to the client exists after the client has perjured himself); *In re Malloy*, 248 N.W.2d 43 (N.D. 1976) (if client commits perjury and refuses to recant, lawyer must remain silent and withdraw from the case); *In re A*, 276 Or. 225, 554 P.2d 479 (1976) (attorney should withdraw if client refuses to recant).

For the problems unique to criminal cases in such matters, *cf.* *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977) (substitute counsel should have been appointed before court allowed defense counsel to withdraw); *State v. Lowery*, 111 Ariz. 26, 523 P.2d 54 (1974) (court indicated there was no mandate that attorney withdraw after client's perjury in murder case).



intentionally damaging his client<sup>193</sup> prohibits a withdrawal that would significantly prejudice a client's rights or interests.<sup>194</sup> While counsel should analyze several different factors when evaluating the propriety of attempting to withdraw,<sup>195</sup> the two most important considerations probably are: (1) the juncture in the proceedings at which the alleged fraud was

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193. See MO. SUP. CT. R. 4, DR 7-101(A)(3), providing that: "A lawyer shall not intentionally . . . [p]rejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B)."

See also MO. SUP. CT. R. 4, EC 7-9, which provides:

In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client to forego such action.

194. See MO. SUP. CT. R. 4, DR 2-110(A)(2), which states:

In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

MO. SUP. CT. R. 4, EC 2-32, states:

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to this client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client. . . .

However, Professor Wolfram indicates that withdrawal by the attorney may be necessary at *any* stage of a civil proceeding, "[e]ven if the perjury occurs in the midst of a deposition or a trial hearing." Wolfram, *supra* note 1, at 860 & n.196.

Further, Missouri cases indicate that although an attorney is charged with a duty to his client, the attorney must nevertheless withdraw from the case if his professional integrity will be compromised. See *State v. Bersch*, 276 Mo. 397, 406, 207 S.W. 809, 817 (1918) (arson case in which counsel withdrew after possible jury tampering by client); *Harms v. Simkin*, 322 S.W.2d 930, 933 (St. L. Mo. App. 1959).

195. A useful analogy may be found in the situation of a lawyer who discovers in the course of the proceedings that it will be necessary for him to testify in behalf of his client. In the past, the venerable Canon 19 indicated that "a lawyer should avoid testifying in behalf of his client," ABA CANONS OF PROFESSIONAL AND JUDICIAL ETHICS, Canon 19, and today's Disciplinary Rules continue to discourage the practice. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101, DR 5-102, EC 5-9, EC 5-10.

However, it has been persuasively argued that the attorney "need not (and indeed may not) withdraw upon becoming a witness if under the circumstances the withdrawal is so late as to endanger unreasonably the client's case." Sutton, *The Testifying Advocate*, 41 TEX. L. REV. 477, 485 & n.29 (1963). More recent authority suggests that a real hardship to the client in retaining other counsel or a long and extensive professional relationship with a client may outweigh the considerations opposed to the attorney testifying without withdrawing. ABA FORMAL OPINION 339 (1974).

perpetrated, and (2) if the matter has reached the trial stage, whether the trier of fact is a judge or a jury. If the alleged misconduct by the client occurs well before trial is to commence (*e.g.*, at an early discovery deposition) the probability will be much greater that new counsel can be substituted without significantly damaging the client's interests. By contrast, if the client commits the alleged fraud on the stand during trial, withdrawal thereafter by counsel might well cause a mistrial,<sup>196</sup> and clearly would impose significant delays and time burdens on the client. Moreover, courts are far less likely to grant permission to withdraw after the commencement of trial than early in the pre-trial proceedings, at least in criminal cases.<sup>197</sup>

If trial has begun and a judge is serving as trier of fact it may be virtually impossible for counsel to seek permission to withdraw without severely damaging fundamental rights of his client. As the United States Court of Appeals for the Ninth Circuit recently pointed out in *Lowery v. Cardwell*,<sup>198</sup> an unexplained motion to withdraw that is presented shortly after a client has testified is likely to communicate to the court the lawyer's belief that his client has misrepresented the facts. According to the *Lowery* opinion, an attorney who thus communicated his belief to the judge in a bench trial would have effectively "disabled the fact finder from judging the merits of the defendant's defense" and would have "openly placed himself in opposition to his client upon her defense."<sup>199</sup> The *Lowery* court concluded that such conduct by counsel would "deprive the defendant of a fair trial" and thereby violate his right under the fifth amendment to due process of law.<sup>200</sup> Specially concurring, Judge Hufstedler added that in her view such conduct by counsel also would violate the defendant's sixth amendment right to the effective assistance of counsel.<sup>201</sup> It also might be arguable that an infelicitously timed or phrased motion to withdraw whose obvious effect was to communicate to the trier of fact the attorney's belief that his client had perjured himself would violate some of the values and policies which underlie the constitutional and statutory privilege against self-incrimination.

Considerations such as these should make attorneys extremely reluctant to request permission to withdraw in court-tried matters. In those rare bench trials where a motion to withdraw would be appropriate, counsel should present the motion in a discreet form and at an inconspicuous juncture—not immediately after his client has testified. Counsel also should studiously avoid detailing the grounds upon which his request is based.

196. See, *e.g.*, *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967).

197. See *Wolfram, supra* note 1, at 860-61. See also, *e.g.*, *State v. Lowery*, 111 Ariz. 26, 523 P.2d 54 (1974); *People v. Glover*, 270 Cal. App. 2d 255, 75 Cal. Rptr. 629 (1969); *Lamb v. State*, 488 P.2d 1295 (Okla. Crim. App. 1971) (folly to allow withdrawal of counsel at late state of trial).

198. 575 F.2d 727 (9th Cir. 1978).

199. *Id.* at 730.

200. *Id.*

201. *Id.* at 732 (Hufstedler, J., specially concurring).

Realistically, it is unlikely that trial judges to whom such motions are presented will respond favorably. In addition to the obvious concerns they will have about wasting the limited resources of the judicial system, such judges also must try to identify and frustrate intentional (and bad faith) efforts by counsel to abort trials that their clients appear to be losing.<sup>202</sup>

When a motion to withdraw would be inappropriate or has been denied, an attorney who believes his client has testified falsely must continue the representation. In so doing, he must navigate a narrow course between depriving his client of due process and effective assistance of counsel, on the one hand, and, on the other, actively helping his client capitalize on the alleged fraud or perjury. While it would violate fundamental rights of the client for counsel to retreat, after the fraudulent testimony, into a patently unprofessional and passive role, it would do great violence to the integrity of the judicial process for counsel to aggressively "argue [his client's] known false version of the facts to the jury as worthy of belief" or to "recite or rely upon the false testimony in his closing argument."<sup>203</sup> Obviously some form of uneasy compromise will have to be made. While doing his best to avoid referring to or reinforcing the perjured testimony, counsel should introduce, and argue vigorously to the trier of fact, all the evidence which he has concluded is not fraudulent.

The "solution" proposed here should leave no one fully satisfied. Because of the inescapable conflict between basic values that is created when a lawyer firmly believes his client has testified falsely, a solution that completely secured one set of interests could be achieved only at the cost of wholesale abandonment of others. It is the hallmark of a civilized system of justice that it is unwilling to pay that high a cost.

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202. *Id.* at 731 n.6.

203. DEFENSE FUNCTION STANDARDS § 7.7(c). *See id.* at 275-77 for the drafting committee's Commentary on this section. *See also* Wolfram, *supra* note 1, at 824-27.