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# Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues

Carol T. Rieger\*

## INTRODUCTION

No one has yet proposed a fully satisfactory solution to the dilemma faced by a lawyer confronted with client perjury in a criminal case. Case law varies widely,<sup>1</sup> and the rules of professional responsibility<sup>2</sup> furnish little, if any, guidance. Courts have added to the confusion by praising the ethical standards of lawyers who prevented their clients from giving false testimony, while simultaneously reversing the clients' convictions for violation of their constitutional rights to testify, to effective assistance of counsel, or to due process.<sup>3</sup>

The issue of client perjury cries out for guidance from the

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1. *Compare* Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984) (counsel's actions preventing defendant from testifying falsely deprived defendant of due process and effective assistance of counsel), *cert. granted sub nom.* Nix v. Whiteside, 105 S. Ct. 2016 (1985) *with* United States v. Curtis, 742 F.2d 1070, 1075 (7th Cir. 1984) (defense counsel's refusal to put defendant on the witness stand did not violate defendant's constitutional rights, because it was apparent that defendant would have given false testimony).

2. Most states have adopted, with some modifications, the American Bar Association MODEL CODE OF PROFESSIONAL RESPONSIBILITY (adopted 1969, amended through 1981) [hereinafter cited as MODEL CODE]. In 1983, the American Bar Association promulgated a new set of ethical rules for lawyers, the MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as MODEL RULES], which has been adopted or is being considered for adoption in most states. For a discussion of the rules relating to client perjury, see *infra* notes 9-26 and accompanying text.

3. *See, e.g.,* Whiteside v. Scurr, 744 F.2d 1323, 1327-28 (8th Cir. 1984) (commending counsel for "conscientiously attempting to address the problem of client perjury in a manner consistent with professional responsibility," but holding that "counsel's action deprived appellant of due process and effective assistance of counsel"), *cert. granted sub nom.* Nix v. Whiteside, 105 S. Ct. 2016 (1985); Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978) (holding that counsel's actions deprived defendant of due process, but adding that "[t]rial counsel is to be commended for his attention to professional responsibility").

Supreme Court, and some direction may be forthcoming. The Court has agreed to review an Eighth Circuit case granting relief to a criminal defendant prevented by his lawyer from giving false testimony.<sup>4</sup> Although the case may not be the ideal vehicle for settling this highly controversial issue,<sup>5</sup> it should nonetheless provide some guidance to lawyers faced with client perjury.

This Article examines the constitutional and ethical issues raised by client perjury and proposes a solution that is consistent with the basic principles of our criminal justice system. Part I describes the ethical dilemma confronting a lawyer who believes his or her client intends to commit perjury and the failure of existing ethical rules and standards to adequately resolve that dilemma. The constitutional issues are discussed in Part II. Part II(A) addresses the question whether the defendant has a constitutional right to testify in criminal cases and whether that right includes the right to give false testimony. Part II(B) assumes a constitutional right to testify, even falsely, and examines whether there is a constitutional right to assistance of counsel when the defendant intends to commit perjury. Part III then suggests specific procedures for dealing with the problem of client perjury, taking into account the constitutional considerations, the values underlying the attorney-client privilege, and the fundamental purposes of our criminal justice system.

## I. THE ETHICAL DILEMMA

An attorney who becomes convinced that a client intends to commit perjury is caught between two conflicting obligations. As an officer of the court, the attorney has a duty not to offer false testimony,<sup>6</sup> but the attorney also has a duty to the client to preserve the confidentiality of their communications.<sup>7</sup>

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4. *Nix v. Whiteside*, 105 S. Ct. 2016 (1985), *granting cert. to Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984). For a discussion of *Whiteside*, see *infra* notes 75-80 and accompanying text.

5. See *infra* note 80.

6. See *infra* notes 129-132 and accompanying text.

7. The obligation to maintain the confidentiality of client communications derives from two related bodies of law, the confidentiality rules established in professional ethics and the attorney-client privilege in the law of evidence. See MODEL CODE, *supra* note 2, DR 4-101; MODEL RULES, *supra* note 2, Rule 1.6 and comment. The attorney-client privilege is more limited than the ethical obligation, see, e.g., MODEL CODE, *supra* note 2, EC 4-4, and is based on common law and state statutes, see, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privi-

If the attorney says nothing to the court and offers testimony in the usual manner, he or she will have participated in a fraud upon the court. If, on the other hand, the attorney informs the court of his client's intention, either directly, by requesting permission to withdraw, or indirectly, by refusing to question the defendant in the usual manner or to use the false testimony in closing argument, he may have disclosed confidential communications.<sup>8</sup>

American Bar Association (ABA) ethical rules and standards provide little guidance to a lawyer attempting in good faith to meet his obligations to a client and to the criminal justice system in a situation involving client perjury. The ABA Model Code of Professional Responsibility states that it is unprofessional conduct for a lawyer to "knowingly use perjured testimony or false evidence,"<sup>9</sup> but it does not say what a lawyer should do when he or she believes a client intends to commit perjury. The Model Code only tells a lawyer what to do upon receipt of information "clearly establishing" that the client *has* "perpetrated a fraud" upon the court: "A lawyer . . . 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 a privileged communication.*"<sup>10</sup> This directive provides little practical guidance, however. In most cases, at least

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leges for confidential communications known to the common law"). See generally E. CLEARY, MCCORMICK ON EVIDENCE § 87 (3d ed. 1984) (discussing the origins of and policies behind the attorney-client privilege).

8. As one commentator has noted, the conscientious attorney is in fact faced "with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." Freedman, *Perjury: The Lawyer's Trilemma*, LITIGATION, Winter 1975, at 26. Other law review articles dealing with the issue of client perjury include Brazil, *Unanticipated Client Perjury and the Collision of the Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75 (1981); 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); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Robinson, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545 (1978); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

9. MODEL CODE, *supra* note 2, DR 7-102(A)(4).

10. *Id.* DR 7-102(B)(1) (emphasis added).

part of the information leading the lawyer to suspect perjury will have come from the client and, as information regarding a past crime, will be a privileged communication.<sup>11</sup>

The American Bar Association promulgated a new code of ethics in 1983.<sup>12</sup> The new ABA Model Rules of Professional Conduct state that a lawyer shall not offer evidence which the lawyer knows to be false.<sup>13</sup> In addition, a lawyer *may* refuse to offer evidence that the lawyer "reasonably believes" is false.<sup>14</sup> If a lawyer discovers that he has offered false material evidence, the lawyer must take "reasonable remedial measures."<sup>15</sup> The rule explicitly states that the lawyer has a duty to take such measures even if they require disclosure of information otherwise protected by the confidentiality rule.<sup>16</sup> Thus the new rule on client perjury eliminates the gap between the client fraud and confidentiality rules in the old code; however, the official comment to the new rule introduces new areas of uncertainty regarding its application in criminal trials.

The comment states that a lawyer should seek to dissuade his client from testifying falsely, and, in considerable understatement, adds that there has been "dispute" concerning the lawyer's duty if the client cannot be persuaded to tell the truth.<sup>17</sup> The comment observes that if the confrontation with the client occurs before trial, the lawyer "ordinarily can withdraw."<sup>18</sup> The comment acknowledges, however, that withdrawal may not be feasible because trial may be imminent, because the confrontation may not take place until after the trial has started, or because no other counsel is available.<sup>19</sup> The comment notes that three "resolutions" of this dilemma have been proposed. One solution is to permit the defendant to tes-

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11. *See id.* DR 4-101(A).

12. *See supra* note 2.

13. MODEL RULES, *supra* note 2, Rule 3.3(a)(4).

14. *Id.* Rule 3.3(c).

15. *Id.* Rule 3.3(a)(4).

16. *Id.* Rule 3.3(b).

17. *Id.* Rule 3.3 comment. Of course, there is also disagreement over the methods which may be used to "persuade" a client to refrain from testifying falsely. *See, e.g., Whiteside v. Scurr*, 744 F.2d 1323, 1329-31 (8th Cir. 1984), *cert. granted sub nom. Nix v. Whiteside*, 105 S. Ct. 2016 (1985).

18. MODEL RULES, *supra* note 2, Rule 3.3 comment.

19. *Id.* Withdrawal shortly before or during trial is not likely to be allowed. *See, e.g., Lowery v. Cardwell*, 575 F.2d 727, 729 (9th Cir. 1978); *State v. Henderson*, 205 Kan. 231, 234, 468 P.2d 136, 139 (1970); *Maddox v. State*, 613 S.W.2d 275, 277 (Tex. Crim. App. 1981). *But see State v. Trapp*, 52 Ohio App. 2d 189, 191-96, 368 N.E.2d 1278, 1281-82 (1977) (holding that denial of counsel's motion to withdraw was error).

tify in a narrative, without the guidance of counsel's questions; another is to excuse the lawyer from any duty to reveal client perjury; the third is to require the lawyer to reveal the client's perjury if doing so is necessary to rectify the situation.<sup>20</sup> The comment endorses the third solution, suggesting that if withdrawal is impossible or will not remedy the situation, the advocate should make disclosure to the court. It will then be for the court to determine what should be done.<sup>21</sup>

Having thus apparently solved the lawyer's ethical problem, the comment adds that the rule requiring a lawyer to disclose the existence of client perjury with respect to a material fact may be qualified "by constitutional provisions for due process and the right to counsel in criminal cases."<sup>22</sup> In some jurisdictions, the comment explains, "these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false."<sup>23</sup> Similarly, in these jurisdictions, the lawyer may be denied the authority to refuse to offer testimony that the lawyer believes will be untrustworthy "by constitu-

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20. MODEL RULES, *supra* note 2, Rule 3.3 comment. The comment notes the drawbacks of each of these resolutions. The first solution, allowing the client to testify in narrative form, "exempts the lawyer from the duty to disclose false evidence but subjects the client to implicit disclosure of information imparted to counsel." *Id.* The second solution, excusing counsel from any duty to reveal perjury, "makes the advocate a knowing instrument of perjury." *Id.* The third option, requiring disclosure, raises questions regarding an accused's rights to counsel, to testify on his own behalf, and to confidential communications with counsel. The comment endorses the third approach, however, stating that "an accused should not have the right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence." *Id.*

21. *Id.* The drafters note, however, that the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If a dispute arises, the drafters state that the lawyer cannot represent the client in the resolution of the issue and a mistrial may be unavoidable. Recognizing that an unscrupulous client might seek to produce a series of mistrials and thereby avoid prosecution, the drafters suggest that "a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation." *Id.* They do not say, however, what should be done at that point about the defendant's expressed intention to testify.

22. *Id.* Interestingly, earlier drafts of Rule 3.3 included the constitutional caveat in the rule itself, but it was later deleted and placed in the comment. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (Discussion Draft, June 30, 1982); see also Note, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487, 506-07 (1983) (noting that constitutional caveat was deleted in current draft and placed in comment).

23. MODEL RULES, *supra* note 2, Rule 3.3 comment.

tional requirements governing the right to counsel."<sup>24</sup> The comment states that the obligation of the advocate under the Model Rules is subordinate to the constitutional requirements.<sup>25</sup>

The comment to the new rule illustrates the impossible position in which practicing lawyers find themselves when faced with client perjury. The rule unequivocally states that lawyers may not ethically present perjurious testimony, but the comment explaining the rule states that the constitution may require lawyers to do so. The comment offers no practical advice to the practicing attorney, who must decide for himself whether the constitution permits him to comply with the rules of professional conduct. Although it was not the province of the drafters of the Model Rules to decide questions of constitutional law, an ambivalent provision such as the client perjury rule simply adds to the already widespread confusion in this area.<sup>26</sup>

Like the Model Code and the Model Rules, the ABA Defense Standards<sup>27</sup> do not provide a satisfactory solution to the ethical problem confronting a lawyer whose client intends to commit perjury. Although it has never been approved by the ABA House of Delegates,<sup>28</sup> Proposed Standard 4-7.7 is often cited as a model for presentation of client testimony that the

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24. *Id.*

25. *Id.*

26. The American Lawyer's Code of Conduct also adds to the bewilderment of a lawyer conscientiously attempting to deal with the problem of client perjury. See AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe Pound-American Trial Lawyers Foundation, Revised Draft 1982) [hereinafter cited as CODE OF CONDUCT]. Illustrative Case 1(j) to Chapter 1 sets forth the following problem and proposed solution:

A lawyer learns from a client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer reasonably believes that a request for leave to withdraw would be denied and/or would be understood by the judge or opposing counsel as an indication that the testimony is false. The lawyer does not seek leave to withdraw, presents the client's testimony in the ordinary manner, and refers to it in summation as evidence in the case. The lawyer has not committed a disciplinary violation.

*Id.* Illustrative Case 1(j).

27. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION (2d ed. 1980) [hereinafter cited as DEFENSE STANDARDS].

28. Proposed Standard 4-7.7 was approved by the ABA Standing Committee on Association Standards for Criminal Justice but was withdrawn before the proposed defense standards were submitted to the ABA House of Delegates. Resolution of the problem addressed in the proposed standard was de-

lawyer believes is false.<sup>29</sup> The standard suggests that counsel strongly discourage the defendant from testifying perjurally. If unsuccessful, the lawyer should seek to withdraw without advising the court of the reason. If withdrawal is not feasible or permitted, the standard states that it is "unprofessional conduct for the lawyer to lend aid to perjury or use the perjured testimony."<sup>30</sup> In "some appropriate manner without revealing the fact to the court," the lawyer should make a record of the fact that the client is testifying against counsel's advice.<sup>31</sup> When the client testifies, the lawyer may identify the witness as the defendant and ask "appropriate questions . . . when it is believed that the defendant's answers will not be perjurious."<sup>32</sup> As to matters for which the lawyer believes the client will offer false testimony "the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts."<sup>33</sup> Finally, the standard states that a lawyer may not argue the defendant's "known false version of the facts" to the jury or rely on this testimony in closing argument.<sup>34</sup>

Proposed Standard 4-7.7 does not solve the lawyer's ethical dilemma. Withdrawal is not a solution, because it simply pushes the problem down the line until the client learns to lie successfully to his lawyer or finds an attorney who is willing to allow the client to testify falsely. The second suggestion, that the lawyer invite the defendant to tell his story in narrative form, combines the worst of both worlds. By asking general instead of specific questions, counsel is both participating in the perjury and, at the same time, telling the judge, opposing counsel, and probably many jurors that the lawyer does not believe the client's story. Thus, none of the existing ethical rules and standards adequately resolve the ethical dilemma faced by a lawyer who believes his client will commit perjury.

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ferred pending the final report of the ABA Special Commission on Evaluation of Professional Standards. *Id.* Proposed Standard 4-7.7, editorial note.

29. *See, e.g.,* United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980); State v. Lowery, 111 Ariz. 26, 28-29, 523 P.2d 54, 56-57 (1974); Thornton v. United States, 357 A.2d 429, 432 (D.C.), *cert. denied*, 429 U.S. 1024 (1976); *In re Goodwin*, 279 S.C. 274, 277, 305 S.E.2d 578, 580 (1983); Maddox v. State, 613 S.W.2d 275, 280-83 (Tex. Crim. App. 1981).

30. DEFENSE STANDARDS, *supra* note 27, Proposed Standard 4-7.7(c).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*



## II. THE CONSTITUTIONAL DIMENSIONS OF THE CLIENT PERJURY DILEMMA

As the comments to the Model Rules indicate,<sup>35</sup> the attorney's ethical dilemma is complicated by constitutional considerations. Preventing the client from testifying may infringe a defendant's constitutional right to testify, even though the client has indicated an intention to commit perjury. Furthermore, if there is an unfettered constitutional right to testify, then the constitutional right to effective assistance of counsel may require that the attorney assist the defendant in presenting his testimony whether or not the attorney believes it is false. Thus, any attempt to resolve the client perjury dilemma must address the constitutional aspects of the problem.

### A. THE RIGHT TO TESTIFY

Despite the tendency of lower courts to cite Supreme Court cases as authority for their recognition of a constitutional right to testify,<sup>36</sup> the Supreme Court has never squarely held that a criminal defendant has a constitutional right to testify on his own behalf.<sup>37</sup> The Court has, however, referred to such a right in dicta and, in one such case, specifically recognized it as

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35. See MODEL RULES, *supra* note 2, Rule 3.3 comment. For a detailed discussion of the comment to Rule 3.3, see *supra* notes 17-26 and accompanying text.

36. See, e.g., *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *Alicea v. Gagnon*, 675 F.2d 913, 920-23 (7th Cir. 1982); *Wright v. Estelle*, 572 F.2d 1071, 1075-77 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 439 U.S. 1004 (1978); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 118-19 (3d Cir. 1977).

37. One reason for the dearth of cases explicitly recognizing a constitutional right to testify has been the existence of federal and state competency statutes. For the federal statute, see 18 U.S.C. § 3481 (1982). A list of the general competency statutes of every state except Georgia and the dates they were enacted appears in *Ferguson v. Georgia*, 365 U.S. 570, 596-98 (1961). Georgia's competency statute, enacted after *Ferguson*, is found at GA. CODE ANN. § 17-7-28 (1982).

The competency statutes have frequently made it unnecessary for courts to reach the constitutional issue. The question whether the defendant's right to testify is constitutionally based or granted by statute must be addressed, however, when that right becomes intertwined with the constitutional right to counsel, as in client perjury cases. If there is no constitutional right to testify, then a lawyer who refuses to present perjured testimony is not depriving his client of a constitutional right. In such cases, the specific statutory grant of a right to testify will be balanced against the relevant statutes or court rules prohibiting an attorney from presenting perjured testimony. Although a conflict may still exist, the presumption that a constitutional right prevails is absent. In state cases, the question would be decided under state law. Federal

an element of due process.<sup>38</sup>

Early Supreme Court cases refer to a defendant's "right to be heard" rather than to a right to testify. In an 1873 civil case,<sup>39</sup> for example, the Court said:

It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.<sup>40</sup>

In another civil case,<sup>41</sup> in 1876, the Court spoke broadly of the right to be heard:

Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. . . . A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.<sup>42</sup>

At the time these cases were decided, many states did not allow defendants to testify in criminal cases. The first general competency statute for criminal defendants was enacted in Maine in 1864.<sup>43</sup> Within twenty years, most of the states followed suit,<sup>44</sup> and a federal statute making defendants competent to

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habeas review would be inappropriate and the state resolution would be final. See 28 U.S.C. §§ 2241(c)(3), 2254(a) (1982).

For articles discussing the right to testify, see Hammerman, *A Criminal Defendant's Constitutional Right to Testify—The Implications of United States ex rel. Wilcox v. Johnson*, 23 VILL. L. REV. 678 (1977); Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U.L.Q. 454 (1962); Note, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right to Testify*, 3 HASTINGS CONST. L.Q. 517 (1976).

38. See *infra* notes 56-62 and accompanying text.

39. *Galpin v. Page*, 85 U.S. (18 Wall.) 350 (1873).

40. *Id.* at 368-69.

41. *Windsor v. McVeigh*, 93 U.S. 274 (1876).

42. *Id.* at 277.

43. See ME. PUB. LAWS, ch. 280 (1864); *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961). See generally Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 740-48 (1976) (describing the legal background against which competency statutes were enacted).

44. See Note, *supra* note 37, at 522 ("Maine then enacted a general competency statute for criminal defendants in 1864, the first such statute in the English-speaking world. By 1884, only twenty years later, a majority of the states and the federal government had followed Maine's example."); see also *Ferguson v. Georgia*, 365 U.S. 570, 577 n.6 (1961) (listing the competency statutes of 49 states and the dates on which they were enacted).

testify was adopted in 1878.<sup>45</sup>

In 1948, in *In re Oliver*,<sup>46</sup> the Court addressed the issue of the right to be heard in the context of a criminal case. Overturning a criminal contempt conviction on the ground that the secrecy of the trial and the failure to afford a reasonable opportunity to defend against the charge denied the defendant due process of law, the Court delineated the basic components of the right to defend:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.<sup>47</sup>

The Court had the opportunity to decide whether there is a constitutional right to testify in 1961 in *Ferguson v. Georgia*.<sup>48</sup> *Ferguson* involved two statutes, one that prohibited criminal defendants from giving sworn testimony, and another that permitted them to make unsworn statements.<sup>49</sup> The Court discussed at length the history of incompetency statutes, but declined to decide the constitutionality of Georgia's incompetency statute.<sup>50</sup> The Court held only that, under the fourteenth amendment, Georgia could not deny a defendant the aid of counsel in eliciting the statutorily authorized unsworn statement.<sup>51</sup>

In a separate opinion for reversal, Justice Frankfurter criticized the majority for refusing to address the interrelated question of the right to give sworn testimony, stating flatly,

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45. Act of March 16, 1878, ch. 37, 20 Stat. 30 (codified as amended at 18 U.S.C. § 3481 (1978)).

46. 333 U.S. 257 (1948).

47. *Id.* at 273 (footnote omitted). The Court also said that, except for a narrowly limited category of contempts, due process of law requires that the person charged "be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." *Id.* at 275.

48. 365 U.S. 570 (1961).

49. *Id.* at 570-71. Although the defendant was granted permission to make an unsworn statement, the trial court would not allow the defense attorney to question the defendant on the stand. *Id.* at 571.

50. The only issue considered on review was whether the trial court's application of the statute allowing an unsworn statement denied the defendant "the guiding hand of counsel at every step in the proceedings against him," in violation of due process. *Id.* at 572-73 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

51. *Ferguson*, 365 U.S. at 596.

"This is not a right-to-counsel case."<sup>52</sup> Similarly, in a concurring opinion, Justice Clark took the position that the two statutes "must be allowed to stand or fall together, as a single unitary concept . . . ."<sup>53</sup> In his view, the incompetency statute did not meet the requirements of due process and should have been struck down.<sup>54</sup> He added that until the Georgia legislature could fill the void created by his proposed rejection of the statutes, state trial judges "would have to recognize, as secured by the Fourteenth Amendment, the right of a criminal defendant to choose between silence and testifying in his own behalf."<sup>55</sup>

Since *Ferguson*, the Supreme Court has acknowledged the existence of a constitutional right to testify in a number of cases, but always in dicta. In 1971, in *Harris v. New York*,<sup>56</sup> the Court stated in dictum and without elaboration that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so."<sup>57</sup> One year later, the Supreme Court again alluded to a constitutional right to testify in *Brooks v. Tennessee*,<sup>58</sup> but based its holding instead on an accused's constitutional right to remain silent.<sup>59</sup> In 1975, in dictum in *Faretta v. California*,<sup>60</sup> the Court indicated that the right to testify is an element of due process. Noting that where essential to due process it has often recognized the constitutional stature of rights not literally expressed in the Constitution, the Court continued: "It is now accepted, for example, that an accused has a right . . . to testify on his own behalf . . . ."<sup>61</sup> In support of this proposition, the Court cited, without discussion, *Ferguson*, *Har-*

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52. *Id.* at 599-600 (Frankfurter, J., separate opinion for reversal).

53. *Id.* at 602 (Clark, J., concurring).

54. *Id.*

55. *Id.*

56. 401 U.S. 222 (1971).

57. *Id.* at 225. In *Harris*, the issue was whether a statement which was inadmissible in the state's case-in-chief could be used to impeach a testifying defendant. *Id.* at 222. In holding that it could be used for that purpose, the Court stated that the "privilege" to testify did not include the right to commit perjury. *Id.* at 225.

58. 406 U.S. 605 (1972).

59. *Id.* at 611-12. In *Brooks*, the Court held that Tennessee's statutory requirement that a criminal defendant who desired to testify must do so before any other testimony for the defense violated the defendant's privilege against self-incrimination. In discussing the right to testify, the Court said that "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Id.*

60. 422 U.S. 806 (1975). In *Faretta*, the Court held that a defendant has a constitutional right to conduct his own defense, if he so chooses. *Id.* at 836.

61. *Id.* at 819 n.15 (citations omitted).

ris, and Brooks.<sup>62</sup>

Similarly, most of the circuit courts of appeal either have noted a constitutional right to testify or have assumed its existence.<sup>63</sup> However, only the Second, Seventh, and Eighth Circuits have specifically analyzed the issue and concluded that a defendant has a constitutional right to testify.<sup>64</sup>

In 1983, in *United States v. Bifield*,<sup>65</sup> the Second Circuit said defendant Bifield "had a statutory and constitutional right to testify on his own behalf,"<sup>66</sup> but held that the testimony at issue was properly excluded under the Federal Rules of Evidence.<sup>67</sup> In 1982, in *Alicea v. Gagnon*,<sup>68</sup> the Seventh Circuit concluded that "a criminal defendant has a constitutional right to testify in his own behalf under the fifth, sixth, and fourteenth amendments,"<sup>69</sup> but held that on the facts of that case,

62. *Id.*

63. See, e.g., *Hollenbeck v. Estelle*, 672 F.2d 451, 452-53 (5th Cir.), *cert. denied*, 459 U.S. 1019 (1982); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 119-20 (3d Cir. 1977). See also *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) (denial of due process not to grant defendant's request to address sentencing court), *cert. denied*, 441 U.S. 996 (1979).

64. See *Whiteside v. Scurr*, 744 F.2d 1323, 1329-30 (8th Cir. 1984), *cert. granted sub nom. Nix v. Whiteside*, 105 S. Ct. 2016 (1985); *United States v. Bifield*, 702 F.2d 342, 347-49 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *Alicea v. Gagnon*, 675 F.2d 913, 920-23 (7th Cir. 1982).

65. 702 F.2d 342 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983).

66. *Id.* at 349. The court said: "[W]e conclude that the centuries-old right granted an accused to be present and to be heard in person at a federal criminal trial may not be denied without violating the accused's Fifth and Sixth Amendment rights." *Id.* The court held that certain testimony of the defendant relating to a duress defense was properly excluded under the Federal Rules of Evidence, and did not deprive defendant of his constitutional right to testify as to other matters which could properly be received under the evidence rules. *Id.* at 350.

67. *Id.* at 350.

68. 675 F.2d 913 (7th Cir. 1982).

69. *Id.* at 923. The court partially overruled its decision in *Sims v. Lane*, 411 F.2d 661 (7th Cir.), *cert. denied*, 396 U.S. 943 (1969). *Alicea*, 675 F.2d at 923. The court said that *Sims* "was wrongly decided to the extent it failed to acknowledge a federal constitutional basis for a defendant's right to testify in his own behalf." *Id.* at 922. The court based its conclusion on the Supreme Court's observations regarding a constitutional right to testify and on state and federal court decisions indicating recognition of that right. See *id.* at 920-23. The court found Judge Godbold's dissent in *Wright v. Estelle* particularly persuasive. *Id.* at 922 (citing *Wright v. Estelle*, 572 F.2d 1071, 1075-77 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 439 U.S. 1004 (1978)). In his dissent, Judge Godbold traced the origins of the right to testify to the fifth amendment due process requirement of a fair trial and the sixth amendment guarantee of the right to present witnesses. *Wright v. Estelle*, 572 F.2d 1071, 1075-77 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 439 U.S. 1004 (1978). The Seventh Circuit noted that Justice Clark's concurrence in *Ferguson*, discussed *supra*

denial of the defendant's constitutional right to testify was harmless error.<sup>70</sup> Two years later, in *United States v. Curtis*,<sup>71</sup> the Seventh Circuit reaffirmed the existence of a constitutional right to testify,<sup>72</sup> but held that defense counsel's refusal to put the defendant on the witness stand could not be said to have violated the defendant's constitutional rights "because it seems apparent that [the defendant] would have testified perjurally."<sup>73</sup> The Seventh Circuit thus restricted a criminal defendant's right to testify to truthful testimony.<sup>74</sup>

In 1984, in *Whiteside v. Scurr*,<sup>75</sup> the Eighth Circuit became the first circuit to hold that a criminal defendant has a constitutional right to testify<sup>76</sup> and to reverse a defendant's conviction for violation of that right.<sup>77</sup> Although it commended the attor-

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notes 53-55 and accompanying text, supported the fifth amendment ground. *Alicea*, 675 F.2d at 923 (citing *Ferguson v. Georgia*, 365 U.S. 570, 601-03 (1961) (Clark, J., concurring)). The Seventh Circuit cited Justice Stewart's dissent in *United States v. Grayson* as support for the sixth amendment ground. *Alicea*, 675 F.2d at 923 (citing *United States v. Grayson*, 438 U.S. 41, 56 n.2 (1978) (Stewart, J., dissenting)). Justice Stewart addressed the issue in a short footnote in his dissent in *Grayson*, citing Justice Clark's concurring opinion in *Ferguson* and the Court's opinion in *Faretta*. Noting that an accused has an absolute statutory right to testify, Justice Stewart said: "I cannot believe that [this right] is not also a constitutional right, for the right of a defendant under the Sixth and Fourteenth Amendments 'to make his defense,' . . . surely must encompass the right to testify in his own behalf." *United States v. Grayson*, 438 U.S. 41, 56 n.2 (1978) (Stewart, J., dissenting) (quoting *Faretta v. California*, 422 U.S. 806, 819 (1975)).

70. *Alicea v. Gagnon*, 675 F.2d at 925.

71. 742 F.2d 1070 (7th Cir. 1984).

72. *Id.* at 1075-76.

73. *Id.* at 1076 (footnote omitted). The court's finding that it was "apparent" that Curtis would have testified perjurally was based on testimony at a post-conviction hearing at which Curtis and his attorney testified. *Id.* at 1072.

74. *Id.* at 1076. The court cited no authority for its determination that the constitutional right to testify does not include the right to testify perjurally. The court's reasoning is discussed *infra* notes 135-136 and accompanying text.

75. 744 F.2d 1323 (8th Cir. 1984), *cert. granted sub nom.* *Nix v. Whiteside*, 105 S. Ct. 2016 (1985).

76. *Id.* at 1329-30. The court said:

We hold that criminal defendants have the constitutional right to testify which, although not specifically expressed in the Constitution or the Bill of Rights, is implicit in the fifth and fourteenth amendments' due process guarantee of a fair adversarial process and in the sixth amendment's guarantee of the right to meet and confront accusations, to be present and to present evidence and witnesses on one's behalf, including the right to present oneself as a witness.

*Id.*

77. *Id.* at 1328. When defendant Whiteside was first questioned by defense counsel, he said he had acted in self-defense, claiming that his victim had been reaching for a gun when he stabbed him. Whiteside admitted, however, that he had not seen a gun. The eyewitnesses to the killing also denied having

ney for "conscientiously attempting to address the problem of client perjury in a manner consistent with professional responsibility,"<sup>78</sup> the Eighth Circuit found that the attorney's threat to withdraw, inform the judge, and testify against the defendant if he proceeded to testify in a manner counsel believed was perjurious deprived the defendant of his constitutional rights to effective assistance of counsel and due process.<sup>79</sup> The decision in *Whiteside* is of particular interest because the Supreme Court has granted certiorari.<sup>80</sup>

### 1. Constitutional Bases for a Right to Testify

Courts have found support for a constitutional right to testify in the confrontation and compulsory process clauses of the sixth amendment<sup>81</sup> and in the due process clauses of the fifth<sup>82</sup>

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seen a gun, and no gun was ever found. *Id.* at 1325. Shortly before trial, Whiteside told his counsel that he had seen something "metallic" in the victim's hand just before the stabbing. *Id.* at 1326. Counsel did not believe the new story and told Whiteside that if he insisted on testifying that he had seen a gun, counsel would be forced to withdraw, inform the trial judge that the testimony was perjurious, and testify against him. *Id.* Apparently this warning persuaded Whiteside to adhere to his original story at trial, where he was convicted of second-degree murder. *Id.* Whiteside appealed, alleging that his lawyer's conduct prevented him from presenting his defense and thus denied him a fair trial. *Id.* The Iowa Supreme Court affirmed the conviction, praising the lawyer "for the high ethical manner" in which he handled the case. *Id.* (quoting *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978)).

For the purpose of its analysis, the Eighth Circuit assumed that the defendant would have given false testimony. *Id.* at 1328. Although the court recognized that the defendant's right to testify did not include the right to commit perjury, it said that this did not mean that the defendant had waived his right to a fair trial, due process, or effective assistance of counsel. Rather, the court said, the remedy for defendant's perjury is prosecution for perjury. *Id.*

78. *Id.* at 1327-28.

79. *Id.* at 1328.

80. *Nix v. Whiteside*, 105 S. Ct. 2016 (1985), *granting cert. to Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984). Although the Supreme Court has granted certiorari, the case is not an ideal vehicle for resolving the problem of client perjury because the Eighth Circuit expressly limited the basis for its holding to the lawyer's threat to testify against his client. *Id.* at 1331. Much of the opinion, however, is painted with a broad brush, often referring to "counsel's actions," without specific limitation. For example, the court stated that "[c]ounsel's actions . . . impermissibly compromised [the defendant's] right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon [defendant's] restricted testimony." *Id.* at 1329. Thus, despite the narrowness of the precise holding, the court leaves the impression that the result would have been the same even if the lawyer had only threatened to withdraw and inform the judge that the client intended to commit perjury.

81. The sixth amendment provides: "In all criminal prosecutions, the ac-

and fourteenth<sup>83</sup> amendments. Although the arguments based on the sixth amendment do not withstand analysis, the due process clauses of the fifth and fourteenth amendments provide substantial support for recognition of a constitutional right to testify.<sup>84</sup>

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cused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The sixth amendment is applicable to the states through the fourteenth amendment. *See* *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968); *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 339-42 (1963). Some courts finding a right to testify under the sixth amendment have relied on both the confrontation clause and the compulsory process clause. *See, e.g., Whiteside v. Scurr*, 744 F.2d 1323, 1329-30 (8th Cir. 1984) (a constitutional right to testify is implicit in "the sixth amendment's guarantee of the right to meet and confront accusations, to be present and to present evidence and witnesses on one's behalf, including the right to present oneself as a witness."), *cert. granted sub nom. Nix v. Whiteside*, 105 S. Ct. 2016 (1985); *see also Wright v. Estelle*, 572 F.2d 1071, 1076 (5th Cir.) (Godbold, J., dissenting) ("The right to testify also may be considered as included in the sixth amendment's guarantees of the defendant's right to meet and deny the accusations against him, his right to present evidence, and his right to present witnesses on his behalf.") (citations omitted), *cert. denied*, 439 U.S. 1004 (1978). Other courts have based the sixth amendment right to testify solely on the compulsory process clause. *See, e.g., United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983).

82. The fifth amendment provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

83. The fourteenth amendment provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

84. The Second Circuit has also cited the ninth amendment as support for a constitutional right to testify:

That this unmentioned right is a constitutional one is further fortified by the rule of construction contained in the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The full scope of the specific guarantees is not limited by the text, but embraces their purpose to provide broad freedom from all "arbitrary impositions and purposeless restraints."

*United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)), *cert. denied*, 461 U.S. 931 (1983).

Although it is not sufficient alone to establish a right to testify, the ninth amendment does respond to the issue raised by the absence of any express provision in the Constitution for a right to testify. In 1789, criminal defend-



a. *The Sixth Amendment*

Despite the sweeping statements of some courts,<sup>85</sup> neither the confrontation clause nor the compulsory process clause provides an adequate basis for recognizing a constitutional right to testify. The confrontation clause affords the defendant the right to meet and cross-examine the prosecution's witnesses face to face. It strains the plain language of the clause, however, to claim that it creates an independent right to rebut the testimony of prosecution witnesses by presenting oneself and others as witnesses, particularly in light of the specific language of the compulsory process clause found in the same amendment. Therefore, if the sixth amendment gives criminal defendants the constitutional right to testify, the right must be derived from the compulsory process clause.

The compulsory process clause provides a method for compelling the appearance of witnesses who may give testimony favorable to the defendant. The Supreme Court has held, moreover, that the compulsory process clause guarantees more than the appearance of witnesses. In *Washington v. Texas*,<sup>86</sup> the Supreme Court held that a state may not arbitrarily deny the defendant the right to put witnesses on the stand.<sup>87</sup> The Court said: "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to se-

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ants had no right to testify on their own behalf at trial. However, some rights that were not contemplated at the time the amendments to the Constitution were enacted have been read into the Constitution, particularly rights relating to due process. See, e.g., *Faretta v. California*, 422 U.S. 806, 819 n.15 (1974). In *Faretta*, the Supreme Court said:

This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, *Snyder v. Massachusetts*, 291 U.S. 97; to testify on his own behalf, see *Harris v. New York*, 401 U.S. 222, 225; *Brooks v. Tennessee*, 406 U.S. 605, 612; cf. *Ferguson v. Georgia*, 365 U.S. 570; and to be convicted only if his guilt is proved beyond a reasonable doubt, *In re Winship*, 397 U.S. 358; *Mullaney v. Wilbur*, 421 U.S. 684.

*Id.* See also *Washington v. Texas*, 388 U.S. 14, 21-22 (1967) (construction of the sixth amendment requires "taking note of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in the case'") (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918)).

85. See *supra* notes 65-80 and accompanying text.

86. 388 U.S. 14 (1967).

87. *Id.* at 23. The court expressly stated, however, that its opinion should not be construed as disapproving testimonial privileges or nonarbitrary competency rules. *Id.* at 23 n.21.

cure the attendance of witnesses whose testimony he had no right to use.”<sup>88</sup> Taking it one step further, the Second Circuit has stated that “[l]ogically included within the right to call any witness is the accused’s right to testify himself should he possess evidence in favor of the defense.”<sup>89</sup> This statement does not withstand scrutiny, however, because the defendant is the one witness to whom the compulsory process clause would not apply, since it is not necessary for the defendant to subpoena himself. Furthermore, since criminal defendants were incompetent to give sworn testimony on their own behalf at the time the sixth amendment was enacted, it is clear that defendants were not intended to be included under the compulsory process clause.<sup>90</sup> Although rights which were not anticipated at the time of enactment have been read into the Constitution, this process of reinterpretation has mainly occurred in the evolving area of due process.<sup>91</sup> Finally, Congress’s enactment of a specific statute making defendants competent to testify demonstrates that legislators one hundred years ago did not believe the sixth amendment provided this right.<sup>92</sup> Thus, the compulsory process clause provides little support for the right to testify.

b. *The Due Process Clauses of the Fifth and Fourteenth Amendments*

The due process clauses of the fifth and fourteenth amendments provide greater support for recognition of a constitutional right to testify. The fifth amendment provides that no person may be deprived of life, liberty, or property without due process of law.<sup>93</sup> The fourteenth amendment provides that no state may deprive any person of life, liberty, or property without due process of law.<sup>94</sup> The specific rights protected by the due process clauses have expanded over time, as the concept of what constitutes “due process” has evolved.<sup>95</sup> As Justice

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88. *Id.* at 23.

89. *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983).

90. *See supra* note 43 and accompanying text.

91. *See infra* note 95 and accompanying text.

92. *See supra* note 45 and accompanying text.

93. U.S. CONST. amend. V.

94. U.S. CONST. amend. XIV, § 1.

95. In *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856), the Supreme Court stated that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*.” *Id.* at 276. To determine whether

Frankfurter said in *Wolf v. Colorado*:<sup>96</sup>

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free soci-

a process is "due process of law" within the meaning of the fifth amendment, the Court said it

must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

*Id.* at 277.

The Court has indicated that a flexible approach to defining due process will enable it to mold that important concept to the needs of the time. In *Hurtado v. California*, 110 U.S. 516 (1884), the Court stated:

There is nothing in Magna Charta . . . which ought to exclude the best ideas of all systems and of every age . . . . On the contrary, we should expect that the new and various experiences of our own situation and system will mould [sic] and shape it into new and not less useful forms.

*Id.* at 531. The Court continued: "[A]ny legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves . . . principles of liberty and justice, must be held to be due process of law." *Id.* at 537.

In *Rochin v. California*, 342 U.S. 165 (1952), the Court again noted the evolving nature of the due process clause:

[T]he concept of due process is not final and fixed . . . .

. . . .  
 . . . To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges . . . .

. . . .  
 . . . Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

*Id.* at 170-71, 173.

The evolution of the due process clause has allowed the Court to recognize rights that may not have been recognized in the past. For example, English law at the time the Constitution was ratified did not require defendants to be represented by counsel in capital cases. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932). Nonetheless, the Supreme Court held in *Powell* that due process requires counsel in such cases. *Id.* at 71. Later cases extended the right to all felony cases, *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963), and then to all cases in which the defendant faces possible imprisonment, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). For a list of rights that have been read into the due process clause see *Faretta v. California*, 422 U.S. 806, 819 n.15 (1974), quoted *infra* note 84.

96. 338 U.S. 25 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

ety. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.<sup>97</sup>

It is well established that in the context of a criminal trial, due process includes the "right to be heard" in one's own defense.<sup>98</sup> However, as discussed above,<sup>99</sup> the right to be heard has not always been equated with the right to testify; when the Supreme Court first referred to the "right to be heard," most states did not allow testimony by criminal defendants.<sup>100</sup> Today, the right to be heard is considered fundamental, both at trial and in sentencing hearings.<sup>101</sup> The right to testify is provided by statute in all fifty states and in federal court.<sup>102</sup> Given the evolving nature of the due process clause, the existence of competency statutes passed, for the most part, nearly a century ago does not foreclose the possibility that our current notions of due process include the right to testify. On the contrary, the fact of their enactment demonstrates that the legislatures of this country regard the right to testify as essential to a fair

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97. *Id.* at 27. Justice Frankfurter later described due process as "perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances." *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

98. *Hovey v. Elliot*, 167 U.S. 409, 418-19 (1897).

99. *See supra* notes 39-45 and accompanying text.

100. *See Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 747-49 (1976). The "right to be heard" cases begin in 1870 with *McVeigh v. United States*, 78 U.S. (11 Wall) 259, 267 (1870), followed by *Galpin v. Page*, 85 U.S. (18 Wall) 350, 368-69 (1873) and *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Meanwhile, the states were enacting statutes to remove incompetency provisions beginning with Maine in 1864, followed by Massachusetts in 1866, Connecticut in 1867, New York and New Hampshire in 1869, and New Jersey in 1871. *See Clinton, supra*, at 740 n.138 (citing 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 575, at 701 n.2 (3d ed. 1940)). *See supra* notes 39-45 and accompanying text.

101. *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948); *Whiteside v. Scurr*, 744 F.2d 1323, 1329-30 (8th Cir. 1984), *cert. granted sub nom. Nix v. Whiteside*, 105 S. Ct. 2016 (1985); *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *Alicea v. Gagnon*, 675 F.2d 913, 922-23 (7th Cir. 1982); *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979); *Poe v. United States*, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965); *State v. Rosillo*, 281 N.W.2d 877, 878-79 (Minn. 1979).

102. *See supra* note 37.

trial. As noted above,<sup>103</sup> the Supreme Court itself recognized a criminal defendant's right to testify as an element of due process in dictum in *Faretta*.<sup>104</sup> The Court said:

This Court has recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right . . . to testify on his own behalf . . . .<sup>105</sup>

A due process requirement that a criminal defendant be a competent witness in his own trial serves two purposes. First, it advances society's interest in accurately determining guilt or innocence. This purpose is served by allowing the defendant to present any witness with relevant testimony, including himself. As the Supreme Court stated in *Washington v. Texas*:<sup>106</sup>

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.<sup>107</sup>

Courts have recognized that the accused in a criminal case may be the only person who can explain what happened or what was in his or her mind.<sup>108</sup> Thus, allowing a criminal defendant to testify in his own defense is fundamental to a fair presentation of the defendant's case.<sup>109</sup>

Another purpose served by a criminal defendant's due process right to testify on his own behalf is that of furnishing the defendant the opportunity to participate personally in the process by which important decisions about his liberty—and possibly his life—will be made.<sup>110</sup> In his dissent in *Wright v.*

103. See *infra* notes 60-62 and accompanying text.

104. *Faretta v. California*, 422 U.S. 806, 819 n.15 (1974).

105. *Id.* (citations omitted).

106. 388 U.S. 14 (1967).

107. *Id.* at 19.

108. See, e.g., *United States v. Edwards*, 458 F.2d 875, 884 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972); *People v. Curtis*, 681 P.2d 504, 513 (Colo. 1984).

109. See *People v. Robles*, 2 Cal. 3d 205, 215, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970) (the right to testify is so fundamental it can not be denied if the demand is made in a timely fashion), *aff'd in relevant part, modified in part*, 8 Cal. 3d 908, 506 P.2d 211, 106 Cal. Rptr. 387 (1973).

110. See, e.g., *Wright v. Estelle*, 572 F.2d 1071, 1078-79 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 439 U.S. 1004 (1978); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 502-03 (1978) (stating that the right to be heard "represents a valued human interaction in which the affected person ex-

*Estelle*,<sup>111</sup> Justice Godbold said: "To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice."<sup>112</sup> The maintenance of confidence in our system of justice and in the verdicts rendered by judges and juries requires that a defendant have the opportunity to speak.<sup>113</sup> As the Colorado supreme court said in *People v. Curtis*:<sup>114</sup>

The defendant's opportunity to place himself and his viewpoint before the finder of fact is necessary to legitimate the outcome of the trial. He has the right to know, as he suffers whatever consequences there may be, that it was the claim that he put forward that was considered and rejected. . . . If criminal trials are to be perceived as fair by the community, it is important that the public know that persons accused of crimes have not been silenced at trial by undue influence, mistaken impressions, or ignorance.<sup>115</sup>

The Supreme Court has also recognized the importance of allowing the defendant to speak for himself. In *Faretta*, the Court held that a criminal defendant has the right to represent himself at trial, if he so chooses, "for it is he who suffers the consequences if the defense fails."<sup>116</sup> A final indication of the fundamental nature of the right to testify is the recognition in the rules of professional ethics and by many courts that the decision whether to testify is a personal one that is to be made by

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periences at least the satisfaction of participating in the decision that vitally concerns her . . . "); Note, *supra* note 37, at 535-36 ("The underlying rationale for permitting the accused to make the final decisions as to fundamental matters of trial strategy is respect for the individual and his right to make those decisions that critically affect his life and liberty.").

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held in a civil context that due process requires that a recipient of statutory welfare benefits be afforded a pre-termination evidentiary hearing at which he can confront adverse witnesses and present his own arguments and evidence before being deprived of welfare benefits. *Id.* at 261. Noting that "the fundamental requisite of due process of law is the opportunity to be heard," *id.* at 267 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)), the Court said that a recipient must be allowed to state his position orally, not just by written submission, *id.* at 269.

111. 572 F.2d 1071 (5th Cir.), *cert. denied*, 439 U.S. 1004 (1978).

112. *Id.* at 1078 (Godbold, J., dissenting).

113. *Id.* at 1079 (Godbold, J., dissenting) ("[T]he defendant's right to testify is fundamental to the dignity and fairness of the judicial process."). See also *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.").

114. 681 P.2d 504 (Colo. 1984).

115. *Id.* at 513-14.

116. *Faretta*, 422 U.S. at 820.

the defendant, rather than by counsel.<sup>117</sup>

A defendant's right to be heard in his own defense has thus become so fundamental that today a trial would not be considered fair if the defendant were refused the opportunity to tell his side of the story. The consequences of a determination that a criminal defendant has no constitutional right to testify would reach far beyond cases involving client perjury. However, a separate question must be addressed in client perjury cases—whether the defendant has a right to give false testimony.

## 2. Limits on the Constitutional Right to Testify

The Seventh Circuit, although recognizing a constitutional right to testify, has held that the right to testify does not include the right to give false testimony.<sup>118</sup> This conclusion is

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117. The Model Code offers little guidance on this issue. See MODEL CODE, *supra* note 2, DR 7-101(A),(B), EC 7-7. The Model Rules expressly designate which decisions are for the lawyer and which must be left to the client. See MODEL RULES, *supra* note 2, Rule 1.2 and comment. Rule 1.2(a) states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." *Id.* Rule 1.2(a). The Rule specifically provides, however, that "[i]n criminal cases, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify." *Id.* The Defense Standards prescribe a similar division of responsibilities. Standard 4-5.2(a) states that the decisions to be made by the accused, after consultation with the lawyer, include "whether to testify on his or her own behalf." DEFENSE STANDARDS, *supra* note 27, Standard 4-5.2(a). On the other hand, "the decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer, after consultation with the client." *Id.* Standard 4-5.2(b). This Defense Standard has been cited with approval by numerous courts. See, e.g., *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981); *Butler v. United States*, 414 A.2d 844, 850 (D.C. 1980) (*en banc*); *In re Goodwin*, 279 S.C. 274, 277, 305 S.E.2d 578, 580 (1983). Concurring in *Wainwright v. Sykes*, 433 U.S. 72 (1977), Chief Justice Burger acknowledged that defense attorneys have considerable discretion in criminal cases but, citing the Defense Standard quoted above, said that the decision to testify is one of the decisions to be made by the accused himself. *Id.* at 93 n.1 (Burger, C.J., concurring). Similarly, in *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984), the Seventh Circuit concluded that the right to testify is so fundamental it is deemed personal to a defendant and, unlike other matters of trial strategy, it may not be waived by counsel for tactical reasons. *Id.* at 1076. Various state courts have reached the same conclusion. See, e.g., *People v. Freeman*, 76 Cal. App. 3d 302, 310, 142 Cal. Rptr. 806, 810-11 (1977); *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980); *Commonwealth v. Lincoln*, 270 Pa. Super. 489, 494, 411 A.2d 824, 827 (1979).

118. See *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984). In *Curtis*, the Seventh Circuit said that the constitutional right to testify is personal to the defendant and may not be waived by counsel as a matter of trial strat-

consistent with the first purpose served by allowing a criminal defendant to testify on his own behalf—the accurate determination of guilt or innocence in criminal cases.<sup>119</sup> It does not take into account, however, the important human dignity value served by allowing the testimony, nor the importance of the right to testify in maintaining public confidence in the fairness of the judicial process.<sup>120</sup>

If a criminal defendant has a constitutional right to be heard—to tell his story—it does not make sense to say he may only tell a story that conforms to someone else's view of the truth. Under our system of justice, the factfinder makes credibility determinations. If the defendant has a constitutional right to tell his or her story, that right is to tell it to the jury, so that it may make the ultimate credibility determination.

Thus, if a defendant has a constitutional right to be heard, it cannot be predicated on counsel's determination that what the jury will hear is the truth. The right to be heard is a personal, fundamental right of the accused, and the lawyer has no right to prevent a client from exercising it. But this does not necessarily mean that the lawyer must participate in presenting evidence which he reasonably believes is false. A correlative question, however, is whether the right to testify is meaningless unless there is also a right to assistance of counsel in giving that testimony.

#### B. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Although there is no definitive word on the existence of a constitutional right to testify, there is no doubt that a criminal defendant facing imprisonment has a right under the sixth amendment to assistance of counsel at trial.<sup>121</sup> The Supreme Court has held that the sixth amendment's guarantee of the

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egy. *Id.* at 1075-76. The court concluded, however, that the lawyer's refusal to permit the defendant to testify was justified under the circumstances: "Because it seems apparent that Curtis would have testified perjurally, counsel's refusal to put him on the witness stand cannot be said to have violated Curtis' constitutional rights." *Id.* at 1072. See *infra* notes 135-37 and accompanying text.

119. See *supra* notes 106-109 and accompanying text.

120. See *supra* notes 110-115 and accompanying text.

121. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Although criminal defendants are entitled to be represented by counsel, they are also constitutionally entitled, under the sixth and fourteenth amendments, to represent themselves if they so choose. *Faretta v. California*, 422 U.S. 806, 807 (1975).



right to counsel applies to all criminal defendants faced with potential loss of liberty.<sup>122</sup> The Court has also recognized that "the right to counsel is the right to the *effective* assistance of counsel."<sup>123</sup> In *Strickland v. Washington*,<sup>124</sup> the Court said the purpose of the sixth amendment guarantee of effective assistance of counsel is to protect a defendant's fundamental right to a fair trial.<sup>125</sup> Therefore, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>126</sup>

Under the due process clause, the government has the burden of proving a criminal defendant guilty beyond a reasonable doubt.<sup>127</sup> If the defendant chooses to have a trial, his lawyer is required to put the government to its proof.<sup>128</sup> Although counsel may and should argue any failure of the government to carry its burden, counsel is not entitled to undermine the criminal justice system by deliberately presenting perjured testimony. The professional responsibility rules state that lawyers may not knowingly present false evidence.<sup>129</sup> A lawyer who

122. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The right to counsel clause is applicable to the states through the fourteenth amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

123. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (citing *Reece v. Georgia*, 350 U.S. 85, 90 (1955) (emphasis added)).

124. 104 S. Ct. 2052 (1984).

125. *Id.* at 2064, 2065, 2069.

126. *Id.* at 2064. A defendant's challenge to a conviction on grounds of ineffective assistance of counsel must overcome a strong presumption that, under the particular facts of the case, the challenged action fell within the "wide range" of reasonable professional assistance. *Id.* at 2066. Additionally, even if counsel's assistance is deemed inadequate, a defendant must show prejudice in order to prevail on his claim. *Id.* at 2067. To succeed on a claim of prejudice a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068.

127. *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

128. See MODEL CODE, *supra* note 2, EC 7-1, EC 7-19, DR 7-101; MODEL RULES, *supra* note 2, Rule 1.3 and comment, Rule 3.1.

129. See MODEL CODE, *supra* note 2, DR 7-102(A)(4); MODEL RULES, *supra* note 2, Rules 3.3(a)(4), 3.3(c); DEFENSE STANDARDS, *supra* note 27, Standard 4-7.5(a); CODE OF CONDUCT, *supra* note 26, Rule 3.7. The rules of professional responsibility also state that a person has no right to the assistance of counsel in committing a crime or perpetrating a fraud on the court. See MODEL CODE, *supra* note 2, DR 7-102(A)(4)-(8), DR 7-102(B); MODEL RULES, *supra* note 2,

knowingly aids a client in presenting false testimony may be guilty of suborning perjury<sup>130</sup> and could be disbarred.<sup>131</sup> Our adversarial system, which is premised on the notion that a lawyer is an officer of the court as well as an advocate, would be seriously undermined if the knowing presentation of perjurious testimony were allowed.<sup>132</sup>

It is well established that when a criminal defendant takes advantage of his right to counsel, he relinquishes control over most decisions relating to trial strategy.<sup>133</sup> The defendant's right to testify may not be waived by counsel, however, because

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Rules 1.2(d), 1.16(a)(1), 3.3(a)(2),(4). The case law is in accord. *See, e.g.*, *People v. Schultheis*, 638 P.2d 8, 12 (Colo. 1981); *People v. Lewis*, 75 Ill. App. 3d 560, 566, 393 N.E.2d 1380, 1384 (1979).

130. *See, e.g.*, *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981); *Herbert v. United States*, 340 A.2d 802, 804 (D.C. 1975).

131. *See, e.g.*, *Board of Overseers of the Bar v. Dineen*, 481 A.2d 499, 503-04 (Me. 1984).

132. *See Mitchell v. United States*, 259 F.2d 787, 792 (D.C. Cir.) ("A lawyer, employed or appointed, is under obligation to defend with all his skill and energy, but he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession. . . . His obligation is to achieve a fair trial, not to see that his client is acquitted regardless of the merits."), *cert. denied*, 358 U.S. 850 (1958); *Thornton v. United States*, 357 A.2d 429, 437-38 (D.C.) ("The ethical strictures under which an attorney acts forbid him to tender evidence or make statements which he knows to be false as a matter of fact. His activities on behalf of his client are circumscribed by the principles and traditions of the profession and may not include advancing known false testimony in an effort to win his client's cause.") (citations omitted), *cert. denied*, 429 U.S. 1024 (1976); *Herbert v. United States*, 340 A.2d 802, 804 (D.C. 1975) (although counsel is obligated to defend his client with skill and energy, as an officer of the court, counsel also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession, which preclude counsel from knowingly using perjured testimony); *People v. Brown*, 31 Ill. 2d 415, 418, 201 N.E.2d 409, 411 (1964) (defense counsel's duty is to ensure fair determination of client's competency and not try simply to obtain a finding of incompetency); *State v. Henderson*, 205 Kan. 231, 236-37, 468 P.2d 136, 141 (1970) ("The high ethical standards demanded of counsel in no way mollify the fair, full and loyal representation to which an accused is entitled as a part of due process. They are entirely consistent with the objective of our legal system—to ascertain an accused's guilt or innocence in accordance with established rules of evidence and procedure designed to develop the facts truthfully and fairly. Counsel, of course, must protect the interest of his client and defend with all his skill and energy, but he must do so in an ethical manner."); *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 289, 275 N.W. 265, 268 (1937) ("An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course."); *In re King*, 7 Utah 2d 258, 261-62, 322 P.2d 1095, 1097 (1958) (counsel's duty to disclose perjury to court is higher than his duty of nondisclosure of client confidences).

133. For example, although a defendant has sixth amendment rights to

of its fundamental nature and its importance not only to actual fairness but also to the appearance of fairness in the criminal justice system.<sup>134</sup> In *United States v. Curtis*,<sup>135</sup> the Seventh Circuit held that even though a defendant's right to testify could not be waived by counsel under the rubric of trial strategy, counsel's refusal to put the defendant on the witness stand did not violate the defendant's constitutional rights because it was apparent that the defendant would have testified perjurotiously.<sup>136</sup> The court thus distinguished between keeping the defendant off the stand for tactical reasons and doing so because of the lawyer's belief that the defendant will commit perjury. As discussed above,<sup>137</sup> this approach, for which the court cites no authority, deprives the defendant of the right to have the jury determine whether his testimony is credible, and also undermines the important dignity and societal values advanced by allowing a defendant facing loss of life or liberty to tell his story. This is not to say, however, that there is no remedy for a criminal defendant's perjury.

As the Eighth Circuit recognized in *Whiteside v. Scurr*,<sup>138</sup> the remedy for perjury is prosecution for perjury.<sup>139</sup> In addition, the Supreme Court has held that a judge may take a defendant's perjury into account in setting his sentence, on the theory that it is indicative of the accused's rehabilitation prospects.<sup>140</sup> Further, in deciding to testify, a criminal defendant opens himself to cross-examination<sup>141</sup> and to the possible admission of his criminal record<sup>142</sup> or evidence of other crimes, if placed in issue by his testimony.<sup>143</sup> Although all of these prospects place a burden on a defendant's right to testify, none actually prevents his testimony. Rather, they are consequences which may flow from the exercise of this constitutional right.

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cross-examine witnesses against him and to present witnesses on his own behalf, these rights may be waived by counsel. See *supra* note 117.

134. See *supra* note 117.

135. 742 F.2d 1070, 1076 (7th Cir. 1984).

136. *Id.* at 1076.

137. See *supra* notes 118-120 and accompanying text.

138. 744 F.2d 1323 (8th Cir. 1984), *cert. granted sub nom.* *Nix v. Whiteside*, 105 S. Ct. 2016 (1985).

139. *Id.* at 1328. For a discussion of the decision in *Whiteside*, see *supra* notes 75-80 and accompanying text.

140. *United States v. Grayson*, 438 U.S. 41, 54-55 (1978).

141. See, e.g., *United States v. Panza*, 612 F.2d 432, 438 (9th Cir. 1979), *cert. denied*, 447 U.S. 925 (1980).

142. See, e.g., *United States v. McCord*, 420 F.2d 255, 257 (D.C. Cir. 1969).

143. See, e.g., *United States v. Kovic*, 684 F.2d 512, 515-16 (7th Cir.), *cert. denied*, 459 U.S. 972 (1982).

This is an important distinction. The Supreme Court has made it clear that there is no constitutional right to commit perjury,<sup>144</sup> but the remedy should come after the perjury and not in the form of a prior restraint. In accordance with the principles of human dignity and fundamental fairness, the defendant should have the right to present his story and should suffer whatever consequences may flow from it.

An additional concern lends support to this view. In *Whiteside*, the Eighth Circuit accepted the state court's finding that counsel had good cause to believe the defendant would have testified falsely; however, the court indicated its concern about lawyers making this determination.<sup>145</sup> The court stated that "mere suspicion or inconsistent statements by the defendant alone are insufficient to establish that the defendant's testimony would have been false."<sup>146</sup> Noting the need for a "firm factual basis" for believing a defendant intends to testify falsely before a lawyer takes action,<sup>147</sup> the court concluded that "[i]t will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury."<sup>148</sup>

A criminal defendant's right to tell his or her story and the right to assistance of counsel in doing so are not coextensive, however. The dignity value advanced by allowing the defendant to address the trier of fact personally does not require the assistance of counsel. A clear intent to commit perjury should therefore be deemed a waiver of the right to assistance of counsel in presenting the testimony. All defendants facing imprisonment have the right to counsel,<sup>149</sup> but a defendant may knowingly and intelligently waive that right.<sup>150</sup> Also, a defendant may waive fundamental rights by his conduct.<sup>151</sup> If the in-

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144. See, e.g., *United States v. Wong*, 431 U.S. 174, 178, 180 (1977); *United States v. Mandujano*, 425 U.S. 564, 576 (1976).

145. *Whiteside*, 744 F.2d at 1328.

146. *Id.*

147. *Id.* (quoting *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977)).

148. *Id.*

149. See *supra* notes 121-122 and accompanying text.

150. *Faretta v. California*, 422 U.S. 806, 807 (1975). *But cf.* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . .") (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

151. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 346 (1970) (holding that it was within the trial judge's discretion to remove defendant from his own trial because defendant's behavior was disruptive); *Foster v. Wainwright*, 686 F.2d

tent to commit perjury did not waive the right to assistance of counsel, lawyers would be required to assist their clients in committing perjury. Doing so would violate the rules of professional responsibility and undermine our system of justice. A defendant's right to assistance of counsel is an important ingredient of our criminal justice system, but it cannot completely override counsel's obligations to the court and the judicial process.

There are no easy or perfect solutions to the problem of client perjury. Although some proposals contain good ideas,<sup>152</sup> most fail to take into account all aspects of the problem. What is needed is a framework for dealing with the entire issue. Based on the conclusions set out above—that a criminal defendant has a constitutional right to be heard in his own defense and that he is not entitled to the assistance of counsel in presenting perjurious testimony—the final section of this Article proposes a procedure for resolving this troublesome issue.

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1382, 1389 (11th Cir. 1982), *cert. denied*, 459 U.S. 1213 (1983) (same); *see also* United States v. Ives, 504 F.2d 935, 940-41 (9th Cir. 1974) (holding that defendant waived the opportunity to testify by his contumacious conduct), *partially vacated on other grounds*, 421 U.S. 944 (1975). Generally, however, a criminal defendant cannot be forced to waive one constitutional right in order to exercise another. *See, e.g.*, Simmons v. United States, 390 U.S. 377, 394 (1968). *But cf.* Harris v. New York, 401 U.S. 222, 226 (1971) (holding that a statement inadmissible against an accused in the prosecution's case-in-chief due to failure to satisfy the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), may, if its trustworthiness "satisfies legal standards," be used for impeachment purposes to attack the credibility of defendant's trial testimony).

152. A number of articles have been written in the past twenty years dealing with various aspects of client perjury. *See, e.g.*, Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75 (1981); 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); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Polster, *The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance*, 28 CASE W. RES. 3 (1977); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Note, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487 (1983).

### III. A SUGGESTED APPROACH FOR DEALING WITH THE PROBLEM OF CLIENT PERJURY

The first question in dealing with client perjury is the degree to which the lawyer must be convinced that a client indeed intends to commit perjury before he or she decides not to present the testimony. The Model Rules set forth two standards relating to presentation of false evidence. The first is mandatory: A lawyer "shall not knowingly" offer false evidence.<sup>153</sup> The second is optional: A lawyer "may" refuse to offer evidence that the lawyer "reasonably believes" is false.<sup>154</sup> The first standard is almost impossible to meet. As the Eighth Circuit pointed out in *Whiteside v. Scurr*,<sup>155</sup> it will be a rare case in which a lawyer "knows" that the client intends to commit perjury.<sup>156</sup> Indeed, one could argue that a lawyer can never know for certain that the client will testify falsely, no matter what the client has said. Thus, actual knowledge is not an appropriate standard. Nor is the second standard acceptable, because it offers insufficient protection to criminal defendants. This Article proposes a third standard, one which requires that the attorney be convinced beyond a reasonable doubt that the client's testimony will be perjurious. Jurors are expected to understand and apply this standard, so it is reasonable to ask the same of lawyers. Moreover, this standard gives the defendant the benefit of the doubt, as is appropriate in criminal cases.<sup>157</sup>

The next question is what a lawyer should do when convinced beyond a reasonable doubt that a client who insists on testifying will commit perjury. For the reasons discussed above,<sup>158</sup> withdrawal generally is not an acceptable solution<sup>159</sup>

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153. MODEL RULES, *supra* note 2, Rule 3.3(a)(4).

154. *Id.* Rule 3.3(c).

155. 744 F.2d 1323 (8th Cir. 1984), *cert. granted sub nom.* Nix v. Whiteside, 105 S. Ct. 2016 (1985).

156. *Id.* at 1328. The Eighth Circuit's discussion of this issue is summarized *supra* notes 145-148 and accompanying text.

157. Attorneys may be expected to apply the "beyond a reasonable doubt" standard in making other ethical decisions. For example, the duty not to make false assertions of fact requires that an attorney disclose client confidences if "the facts in the attorney's possession indicate *beyond a reasonable doubt* that a crime will be committed." ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (emphasis added).

158. *See supra* text accompanying notes 27-34.

159. *But see* Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 88-91 (1981). Erickson suggests that a council of lawyers be established to make ethical decisions. A defense lawyer who believed that his client intended to commit perjury would submit documentation to the

and, because a criminal defendant has a constitutional right to be heard in his own defense, the lawyer cannot prevent the client from testifying.<sup>160</sup> If the client *does* intend to commit perjury, however, the client is not entitled to the lawyer's assistance in presenting his testimony. Yet because the right to counsel is such an important right, the lawyer should not make this determination alone. If there is a conflict between the lawyer and client on this issue, the decision should be made by a judge before trial.

*Anders v. California*<sup>161</sup> furnishes precedent for involving the judiciary after a lawyer has made a good faith decision adverse to his client. In *Anders*, the Supreme Court held that when appointed counsel determines an appeal is without merit, the "constitutional requirement of substantial equality and fair process" requires the following procedure:

[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.<sup>162</sup>

The principles advanced in *Anders* are equally relevant here. A defendant's right to assistance of counsel should not be determined solely by his attorney, especially since many client perjury cases involve appointed counsel.<sup>163</sup>

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council. If the council reached the same conclusion, it would recommend to the court that the lawyer be allowed to withdraw. If the defendant took the stand, the council's files would be opened and made available for impeachment. Erickson's proposal is unsatisfactory for several reasons. It would result in delay of trials and would require the lawyer to divulge client confidences to a group of lawyers not associated with the case and to testify against the defendant at a later trial if the client testified falsely after obtaining new counsel. The last requirement would be devastating to the establishment of a relationship of trust between attorney and client. See *infra* notes 180-184 and accompanying text.

160. See *supra* notes 117-120 and accompanying text.

161. 386 U.S. 738 (1967).

162. *Id.* at 744.

163. See, e.g., *Wright v. Estelle*, 572 F.2d 1071, 1073-74 (5th Cir.), cert. denied, 439 U.S. 1004 (1978); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 116 (3d Cir. 1977); *People v. Schultheis*, 638 P.2d 8, 10 (Colo. 1981); *State v. Henderson*, 205 Kan. 231, 233, 468 P.2d 136, 138 (1970).

If the decision were left to the lawyer alone and if the defendant were convicted, the defendant would probably request a post-conviction hearing. At that point, however, it would be difficult for the defendant to secure relief, even if the lawyer's determination of the perjury issue were incorrect. For a

#### A. PROCEDURE WHEN A DISPUTE OVER TESTIMONY ARISES BEFORE TRIAL

In every criminal case, before commencement of trial, the defendant and counsel should discuss whether the defendant will testify and what he or she will say. This conference should be required under the rules of professional conduct and the rules of the federal and state courts. If the defendant wishes to testify, but the lawyer is convinced beyond a reasonable doubt that the proposed testimony is false, the lawyer and the defendant should resolve the matter by appearing as soon as possible before a judge who will not preside over the trial.<sup>164</sup> The hearing should be held *in camera* and only the judge, the defense counsel, the defendant, and a court reporter should be present. Since the matter relates to the presentation of the defense at trial, the prosecutor should not be allowed to attend.<sup>165</sup> The court reporter should, however, make a record of the hearing. The record should then be sealed and not used for any purpose other than review on appeal, if the defendant's position is re-

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discussion of standards for granting relief in habeas corpus cases, see *United States v. Frady*, 456 U.S. 152, 164-65 (1982); *Engle v. Isaac*, 456 U.S. 107, 126-27, 134-35 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977); *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976). Moreover, if the defendant were granted relief, there would have to be a new trial. Postponing resolution of the conflict could thus result in unfairness and inefficiency.

164. One judge could be permanently assigned this duty. It would be a logical assignment for a judge who has been assigned to hear motions. Alternatively, the lawyer and the defendant could appear before the chief judge, who could hear the matter himself or refer it to another judge on an ad hoc basis.

165. There is precedent for *ex parte* motions and appearances on matters relating to presentation of the defendant's case. For example, under the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1)(1982), defense counsel may make an *ex parte* request for funds to hire an investigator or expert to help prepare the case or testify at trial. Even though the expenditure of public funds is involved, the prosecutor has no legitimate interest in being informed of matters that relate directly to the presentation of the defendant's case. Similarly, prosecutors have no right to be involved in the settlement of disputes between defendants and their counsel. *Cf. State v. Trapp*, 52 Ohio App. 2d 189, 194 n.4, 368 N.E.2d 1278, 1282 n.4 (1977). In *Trapp*, the appeals court stated that the record was not sufficiently complete to decide a number of questions regarding the dispute between the lawyer and client over the client's testimony. After listing the issues which were unclear, the court noted that "[s]uch additional information could conceivably be preserved for review on appeal by use of *in camera* examinations of counsel or defendant or both, with or without the presence of the prosecution, as the situation might dictate." *Id.* There is also precedent for *ex parte* proceedings relating to matters of privilege, and courts have held that *in camera ex parte* proceedings do not violate due process. See *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 57 (7th Cir. 1980).



jected and he is subsequently convicted.<sup>166</sup>

This hearing would afford an extra layer of protection to the defendant, who would not be bound simply by trial counsel's determination that the defendant intends to lie. It would be a kind of pre-judgment habeas corpus hearing, which would allow a mistake of counsel to be remedied in advance.<sup>167</sup> The hearing need not be extensive, and generally should consist of a statement by the attorney describing his reasons for believing that the defendant intends to present perjured testimony. The defendant could also make a statement if he wished. Statements by either the lawyer or the defendant should not be used against the defendant for any other purpose. Finally, the attorney should not be permitted to testify against the defendant at any subsequent proceeding.<sup>168</sup>

At the hearing, the judge should use the reasonable doubt standard in deciding whether the defendant intends to commit perjury.<sup>169</sup> If the judge decides beyond a reasonable doubt that the defendant will commit perjury, the lawyer should be instructed to furnish no assistance in presenting the client's testimony, including calling the defendant to the witness stand.<sup>170</sup> If the judge does not find it clear beyond a reasonable doubt that the client will lie on the witness stand, then the lawyer should be instructed to present the client's testimony in the normal manner at trial. The trier of fact would never know there was a dispute between lawyer and client.

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166. There is precedent for not allowing evidence submitted in an *in camera* hearing to be used for any other purpose. See, e.g., *United States v. Goodwin*, 625 F.2d 693, 702 (5th Cir. 1980).

167. See *supra* note 163.

168. See *infra* notes 180-182 and accompanying text.

169. See *supra* note 157 and accompanying text.

170. Some proposals for dealing with client perjury suggest that a lawyer question the client in the normal manner about matters the lawyer believes to be true and then ask general questions to allow the defendant to give testimony the lawyer believes to be false. These proposals do not, however, address the concerns that the lawyer, by asking a general question he knows will elicit a false answer, still would be participating in presenting perjured testimony and that much of the preliminary testimony is presented simply for the purpose of setting up the subsequent false testimony. In addition, when a lawyer stops asking specific questions and suggests the defendant give whatever additional testimony he desires, the lawyer raises a red flag for the judge, the prosecutor, and probably many jurors, pointing out the specific testimony that he believes is untrue, in violation of his obligation of confidentiality to the client. For these reasons, when the attorney and the judge conducting the pre-trial hearing are both convinced beyond a reasonable doubt that an important part of the defendant's testimony will be false, the lawyer should be relieved of all responsibility to present the client's testimony.

Of course, the defendant could decide to waive the hearing. He then would be bound by his lawyer's decision, however, and could not challenge it on appeal or in a habeas corpus proceeding. At some point during the trial, before the defense rests and outside the presence of the jury, the trial judge should, as a matter of course, inform the defendant of his right to testify and ask him whether he wishes to exercise it. If the defendant declines the opportunity to testify after being informed of his right, he should not later be able to claim he was denied the right to testify.

#### B. PROCEDURE WHEN A DISPUTE OVER TESTIMONY ARISES DURING TRIAL

The procedure outlined above should reduce considerably the number of cases in which a dispute over the defendant's testimony arises during trial by requiring the attorney and the defendant to discuss the defendant's testimony before trial. Nevertheless, there will be times when the conflict does not arise until after the trial has begun. When this happens, defense counsel should request a brief recess. As a practical matter, a judge is unlikely to grant a recess in the middle of trial unless counsel justifies the request. Thus, counsel will probably have to tell the judge the recess is necessary to resolve a dispute over presentation of the defense. On such a representation, the trial judge should grant a short recess. This should not alert the jury, if there is one, because brief recesses are frequently granted during trials to accommodate parties, attorneys, and witnesses. Although the trial judge and the prosecutor will know there has been a dispute, they will not know its exact nature.<sup>171</sup>

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171. Even if there is a jury, the judge ultimately may determine the sentence if the defendant is convicted. Therefore, the judge should know as little as possible about the dispute between lawyer and client. If the judge is sitting as trier of fact, it would be far preferable that he or she not be aware that defense counsel believes defendant will lie. *See, e.g., Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978) (defense counsel's actions amounted to an unequivocal announcement to the judge, who was sitting as trier of fact, that defense counsel believed defendant had falsely denied shooting the deceased, thereby depriving defendant of due process). However, when the dispute is not resolved before trial, neither forbidding the defendant to testify nor allowing counsel to participate in presenting what he believes is perjured testimony is as acceptable as informing the judge in a general way that there is a dispute relating to the defendant's testimony.

Since this matter should have been settled before trial, and since the trial judge, even if sitting as trier of fact, will not know the specifics of the disagreement, the conflict should not be grounds for a mistrial. If it were, it would

Obviously, when the conflict arises in the middle of trial, it is important to resolve it as expeditiously as possible, consistent with the rights of the defendant and the principles of the criminal justice system.<sup>172</sup> Counsel and the defendant should therefore appear as soon as possible before another judge to settle their dispute.<sup>173</sup> Again, no representative of the prosecution should be present, and no evidence from the hearing should be used against the defendant in any other proceeding.

If the judge finds it is not clear beyond a reasonable doubt that the defendant's proposed testimony will be false, the lawyer should be instructed to present the defendant's testimony in the usual manner and the trier of fact should be told nothing about the hearing. If the judge's finding is against the defendant, then the lawyer should be relieved of any responsibility to put the defendant on the witness stand and, if the defendant chooses to testify without assistance of counsel, the lawyer should not use the testimony in closing argument.<sup>174</sup>

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allow defendants to abort trials that were not going well and would frustrate the legitimate goal of judicial efficiency. Furthermore, if a mistrial were the remedy for a conflict arising during trial, some lawyers and defendants would have less incentive to resolve the issue of client testimony before trial.

172. Judicial efficiency is a valid consideration in criminal cases. For example, in deciding a motion for continuance to allow a defendant counsel of his choice, a judge should balance society's interest in the "prompt and efficient administration of justice" against a defendant's constitutional right to counsel. *Morris v. Slappy*, 461 U.S. 1, 17 (1983) (Brennan, J., concurring in the result) (quoting *Slappy v. Morris*, 649 F.2d 718, 721 (9th Cir. 1981)). See also 461 U.S. at 11-12 ("Trial judges necessarily require a great deal of latitude in scheduling trials. . . . Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.") (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

173. If an inordinate delay would result from having a different judge decide the matter, and if the trial judge is not sitting as trier of fact, the trial judge might, in the exercise of his or her discretion, hold the *in camera* hearing, since he or she will already be aware that there is a dispute over the client's testimony. If the judge is sitting as trier of fact, another judge should hold the hearing. Although judges are presumed able to put aside matters which they should not consider, in bench trials, considerations of judicial economy are not as great, and there is therefore less justification for exposing the judge to a detailed description of the dispute.

174. The situation in which it will be most obvious to the jury that there is a dispute between the defendant and his lawyer is that in which the disagreement arises during the defendant's testimony. The same procedure should apply, however. Counsel should request a recess and appear before another judge for resolution of the disagreement. If the defendant decides to continue the testimony, he must do so without the aid of counsel. This is an unfortunate situation, but the client will have caused it by telling a different story on

### C. CONFIDENTIALITY OF CLIENT COMMUNICATIONS

Holding a judicial hearing to determine whether a defendant has waived his right to assistance of counsel in presenting his testimony raises several concerns. First, it will probably be necessary for counsel to divulge to the judge some information learned from the client. Second, there is the question whether statements made by counsel or the defendant during the hearing could be used against the defendant. Finally, there is the interrelated question whether the hearing, with its attendant concerns, would have a deleterious effect on the attorney-client relationship, which would be expected to continue after the hearing.

In virtually all hearings under this procedure, it will be necessary for the lawyer to disclose to the judge some information learned from the client. Even informing the judge that there has been a disagreement reveals a client communication. This should not pose a serious problem, however. The disclosure of information will be very limited because it will be revealed only to the judge conducting the hearing. Moreover, the attorney-client privilege does not ordinarily apply to communications relating to a client's plan to commit a crime. This exception is reflected in the professional responsibility rules,<sup>175</sup> and in numerous federal and state evidentiary decisions.<sup>176</sup> Although the privilege belongs to the client, the decision whether the exception applies usually is made by the lawyer or

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the witness stand from the one he earlier told his counsel. Any other resolution would involve counsel in presenting perjured testimony and reward sophisticated defendants who wait until they are on the stand to change their stories.

175. See, e.g., MODEL CODE, *supra* note 2, DR 4-101(C)(3); MODEL RULES, *supra* note 2, Rule 3.3(b).

176. See, e.g., *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975) ("It is beyond dispute that the attorney-client privilege does not extend to communications regarding an intended crime."); *Gebhardt v. United Rys.*, 220 S.W. 677, 679 (Mo. 1920) ("The law does not make a law office a nest of vipers in which to hatch out frauds and perjuries."). As the Eighth Circuit explained in *In re Murphy*:

The purpose of the attorney-client privilege is to encourage clients to make a full disclosure of all favorable and unfavorable facts to their legal counsel. . . . But the client, who is the direct beneficiary of the attorney-client privilege, . . . can not be permitted to abuse the privilege. The reasons for the privilege "all cease to operate at a certain point, namely where the desired [legal] advice refers *not to prior wrongdoing*, but to *future wrongdoing*."

*In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977) (quoting 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2298, at 573 (McNaughton Rev. 1969) (emphasis in original)) (other citations omitted).

by a judge who has been apprised of the facts.<sup>177</sup> Judges often rule on questions of privilege on the basis of *in camera* submissions of privileged materials or testimony.<sup>178</sup> This qualified review of privileged information is not deemed a general waiver of the privilege.<sup>179</sup> Thus, there is precedent for an *ex parte in camera* proceeding to determine whether a client intends to commit perjury and has therefore waived his right to assistance of counsel in testifying.

Finally, as indicated above, the purpose of the proposed hearing is to provide extra protection for a criminal defendant whose lawyer does not believe his proposed testimony. If the defendant does not want his lawyer to reveal any communications to the judge in this limited setting, the defendant may waive the hearing, although he will then be bound by his law-

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177. See, e.g., *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Brown v. United States*, 276 U.S. 134, 144-45 (1928).

178. The Supreme Court has recognized the usefulness of *in camera* proceedings to determine matters of privilege. In *Brown v. United States*, 276 U.S. 134 (1928), the Court reviewed a criminal contempt finding based on the defendant's refusal to testify before a grand jury on the ground of self-incrimination. Noting that it was unclear whether the defendant had produced the papers in question, the Court said:

In any event it was Brown's duty to produce the papers in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena.

*Id.* at 144.

Similarly, in *United States v. Nixon*, 418 U.S. 683 (1974), although the Court acknowledged the President's need for confidentiality in the communications of his office, it upheld the district court's order of an *in camera* examination of subpoenaed material which the President claimed was privileged, concluding that an *in camera* inspection was the best method for guarding secrecy while at the same time determining whether production of the material was essential to fairness in the pending criminal case. *Id.* at 713-14. See also *Kerr v. U.S. District Court for the N. Dist. of Calif.*, 426 U.S. 394, 405-06 (1976) (stating generally that *in camera* review is highly appropriate to deal with claims of governmental privilege). *But cf.* *Dennis v. United States*, 384 U.S. 855, 868-69 (1966) (reversible error to grant *in camera* inspection of grand jury documents to verify consistency of trial testimony).

Courts of Appeals have frequently affirmed *in camera* examinations to resolve claims of privilege. See, e.g., *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 58 (7th Cir. 1980). *But cf.* *In re Taylor*, 567 F.2d 1183, 1188 (2d Cir. 1977) (*in camera* proceedings violate due process and use to determine government claim of privilege is only justified when government interest outweighs private interest). Some of these proceedings have included testimony as well as review of documents. See, e.g., *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

179. See, e.g., *In re John Doe Corp.*, 675 F.2d 482, 489-90 (2d Cir. 1982); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 57-58 (7th Cir. 1980).

yer's decision about whether to assist him in presenting his testimony.

The second issue concerns the subsequent use of the transcript from the hearing. If statements made by counsel or by the client could later be used against the client, few criminal defendants would proceed with a hearing. A defendant should not be put in a position of relinquishing his privilege against self-incrimination in order to have a judge determine his right to assistance of counsel in testifying. Similarly, statements of counsel made at the hearing should not later be used against the client. If the testimony of either the lawyer or the client could be used against the client, not only would it have a chilling effect on the client's right to have the dispute between himself and his lawyer determined by a judge, but it also would seriously damage the relationship between the client and his attorney. There is authority for the proposition that any statement which might reveal perjury should not be protected.<sup>180</sup> In view of the importance of the rights at issue and the critical role of the attorney-client relationship in the proper functioning of the adversary system, however, testimony given at the suggested hearings should be governed by the privilege cases, which hold that a limited disclosure of information *in camera* is not deemed a general waiver of the privilege against self-incrimination or the attorney-client privilege, and the transcript should not be available for any purpose other than review on appeal.<sup>181</sup>

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180. See, e.g., *Harris v. New York*, 401 U.S. 222, 226 (1971). In *Harris*, the Supreme Court held that statements that were inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), could be used to impeach the defendant's trial testimony. *Id.* The Court said "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* Cf. *United States v. Wong*, 431 U.S. 174, 177-78 (1977) (holding that a perjurious statement made to a grand jury is admissible as evidence at a trial for perjury even though the defendant was not informed of the fifth amendment privilege against self-incrimination before giving the untruthful testimony); *United States v. Mandujano*, 425 U.S. 564, 584 (1976) (same).

181. In cases involving material protected by the fifth amendment or a statutory or common law privilege, the fact that the contested information would reveal perjury or some other crime does not alter its protected status. When materials are examined *in camera* to determine whether they are subject to a privilege and therefore should not be produced, the purpose is to allow review of the information without disclosure to anyone other than the court. See, e.g., *United States v. Goodwin*, 625 F.2d 693, 702 (5th Cir. 1980) (stating that "[b]etter results can be obtained if a trial judge conducts a hearing out of the jury's presence. . . . This record could be sealed and opened only for appellate review, if necessary."); *In re Taylor*, 567 F.2d 1183, 1188 (2d

To the extent possible, a relationship of trust and confidence between the attorney and his client should be maintained. For this reason, the hearing to determine whether the client is entitled to the assistance of counsel in telling his story should not be an adversarial proceeding. It should simply be a means for a neutral party to resolve a dispute between lawyer and client. Although the hearing might nonetheless strain the attorney-client relationship, the damage would be much less than if the attorney were required to join forces publicly with the other side.<sup>182</sup> The strain on the attorney-client relationship caused by the hearing ordinarily should not be grounds for withdrawal,<sup>183</sup> although if extreme hostility were apparent to

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Cir. 1977) ("In these circumstances, *in camera* proceedings serve to resolve, without disclosure, the conflict between the threatened deprivation of a party's constitutional rights and the Government's claim of privilege based on the needs of public security.").

182. See, e.g., *Whiteside v. Scurr*, 744 F.2d 1323, 1329 (8th Cir. 1984) ("Counsel's actions, in particular the threat to testify against appellant, indicate that a conflict of interest had developed between counsel and appellant . . . . At this point counsel had become a potential adversary . . . ."), *cert. granted sub nom. Nix v. Whiteside*, 105 S. Ct. 2016 (1985).

183. The Supreme Court has upheld trial courts' insistence that defendants proceed to trial with counsel whom the defendants did not want. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). Reversing the decision of the Ninth Circuit in a case in which an indigent defendant complained about representation by a substitute public defender after original appointed counsel became ill, the Supreme Court said:

The Court of Appeals decision that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a *meaningful attorney-client relationship*," is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.

*Id.* (emphasis in original). Similarly, in *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978), although reversing for failure to grant a continuance when original counsel was unable to try the case and substitute counsel was completely unprepared, the Fifth Circuit noted that not all aspects of the due process right to counsel are absolute:

Indeed, it is a settled principle that the right to counsel of one's choice is not absolute as is the right to the assistance of counsel. . . . The right to choose counsel may not be subverted to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. It is a right and a proper tool of the defendant; it cannot be used merely as a manipulative monkey wrench. A defendant cannot assume that the right to choose counsel affords "the right to obtain delay at his whim and caprice, or to obtain a reversal because he was unable to frustrate justice. . . ." Rather, the proper exercise of the

the judge conducting the hearing, and if there were time for another attorney to prepare, the judge could recommend that counsel do so.<sup>184</sup>

#### D. REPRESENTATION AT THE HEARING

Criminal defendants are entitled to the assistance of counsel at critical stages after adversarial judicial proceedings have been initiated against them.<sup>185</sup> The hearing to determine whether the defendant is entitled to assistance of counsel in presenting his testimony should not be adversarial in nature because the prosecutor is not involved and because the transcript cannot be used against the defendant in any other proceeding. Thus, the defendant does not have the same need for counsel at this hearing as he does at stages when the prosecutor is present.

In cases where attorneys have filed motions to withdraw because of disputes with defendants regarding the presentation of the defense, courts have not suggested that the defendant is entitled to be represented by counsel in connection with the motion.<sup>186</sup> Similarly, a convicted defendant who later challenges his conviction in a habeas corpus proceeding is not entitled to appointment of counsel, even though the proceeding may relate to the same issue that would be determined in the pre-trial hearing suggested here.<sup>187</sup> Furthermore, since the is-

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trial court's discretion requires a delicate balance between the defendant's due process right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice.

*Id.* at 1323 (quoting *United States v. Grow*, 394 F.2d 182, 210 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968)) (citations omitted). *But see Morris*, 461 U.S. at 25 (Brennan, J., dissenting) ("In light of the importance of a defendant's relationship with his attorney to his Sixth Amendment right to counsel, recognizing a qualified right to continue that relationship is eminently sensible."); *see also Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981) (reversing judgment where defendant was denied retained counsel of his choice by trial court's refusal to grant continuance, and defendant was forced to go to trial with other counsel who did not have adequate time to prepare), *cert. denied*, 454 U.S. 1162 (1982); *Gandy v. Alabama*, 569 F.2d 1318, 1327 (5th Cir. 1978) (same).

184. Withdrawal should only be permitted on the rarest of occasions. One problem with appointing new counsel is that it would be necessary to give the new attorney a copy of the transcript of the hearing in order to avoid a second hearing. If the transcript were no longer under court seal, it would be more difficult to prevent its use for other purposes.

185. *See United States v. Ash*, 413 U.S. 300, 309-12 (1973); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

186. *See, e.g., Thornton v. United States*, 357 A.2d 429 (D.C. 1976).

187. Habeas corpus proceedings are civil cases. Although they are claiming



sue is whether the defendant is entitled to counsel in presenting testimony, it would defy common sense to appoint another lawyer to help the defendant present to the judge the story that his first lawyer has decided is false beyond a reasonable doubt.

As indicated above, the *in camera* hearing suggested here should not be a full-scale adversarial proceeding. Rather, it should be an opportunity for the defendant to have a judge, rather than the lawyer, resolve an important dispute between the defendant and the lawyer. Allowing the defendant to be represented by independent counsel at this hearing would unnecessarily accentuate the conflict and make further representation by the original lawyer difficult. For all of these reasons, the defendant should not be allowed independent counsel for this hearing.

#### E. EXERCISE BY DEFENDANT OF THE RIGHT TO BE HEARD

As discussed above,<sup>188</sup> if the hearing judge's finding is against the defendant, the lawyer should not present the defendant's testimony. Although the defendant will thus be deprived of the right to testify in the usual manner—by responding to questions from counsel—he will still have the right to be heard and to have the jury make the final determination regarding the credibility of his story. Counsel should therefore inform the defendant that he will not be called as a witness, but that he has a right to testify nonetheless. As indicated above,<sup>189</sup> before the end of the trial and outside the presence of the jury, the trial judge should inform the defendant of his right to testify and ask him whether he wishes to exercise it. If the defendant declines the opportunity to testify after being informed of his right, he should not later be able to claim he has been denied the right to testify.

The defendant has two choices. He may decide not to testify, reasoning that if neither the lawyer nor the judge who

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a violation of constitutional rights in a criminal case, convicted defendants have no right to be furnished with counsel in habeas corpus proceedings, which often include hearings involving testimony of the convicted defendants. Cf. *Bounds v. Smith*, 430 U.S. 817 (1977) (upholding prisoner's constitutional right to legal assistance in the form of access to law libraries or persons trained in the law); *Ross v. Muffitt*, 417 U.S. 600 (1974) (holding that the right of an indigent state defendant to the assistance of counsel in a first appeal as of right does not extend to discretionary appeals or to requests for review by the Supreme Court).

188. See *supra* notes 170, 174 and accompanying text.

189. See *supra* text accompanying notes 165-171.

held the *in camera* hearing believed his proposed testimony, the jury will not believe it either, or he may decide to testify without the assistance of counsel. If the adverse finding is made before trial, the defendant could, if he preferred, represent himself at trial, or he could avail himself of the assistance of counsel for all purposes except the presentation of his own testimony.

Although unusual, testimony by a criminal defendant without the aid of a lawyer is by no means unprecedented. In cases where defendants, for whatever reason, choose to exercise their constitutional right to represent themselves, any testimony they give is without the aid of counsel.<sup>190</sup> Also, in some civil matters, including, for example, prisoners' rights cases and habeas corpus hearings, plaintiffs have represented themselves and thus have presented their own testimony.<sup>191</sup> Finally, courts have upheld convictions in cases in which the lawyer followed Proposed Defense Standard 4-7.7(c)<sup>192</sup> and the defendant gave the suspect portion of his testimony in narrative form.<sup>193</sup>

Trial judges do have discretion to allow a defendant to give testimony in narrative rather than question and answer form.<sup>194</sup> If objectionable material is presented in the narrative, it may be stricken. If an objection to offering testimony in narrative form is sustained, the defendant representing himself may present testimony by asking himself questions and then answering them.<sup>195</sup> Although this method of testimony is not the preferred form, it is preferable to either refusing to allow the defendant's testimony at all or allowing counsel to aid in its presentation.

Unfortunately, there is no way around the fact that both the trial judge and the prosecutor will be alerted that there has

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190. Criminal defendants have a constitutional right to waive counsel and represent themselves. *Faretta v. California*, 422 U.S. 806, 836 (1975).

191. See *supra* note 187 and accompanying text.

192. See DEFENSE STANDARDS, *supra* note 27, Proposed Standard 4-7.7(c).

193. See, e.g., *Thornton v. United States*, 357 A.2d 429, 431, 437-38 (D.C. 1976).

194. See, e.g., *Northern Pac. Ry. v. Charless*, 51 F. 562, 570 (9th Cir. 1892), *rev'd on other grounds*, 162 U.S. 359 (1896); *People v. Belcher*, 189 Cal. App. 2d 404, 407, 11 Cal. Rptr. 175, 177 (1961); *Temple v. State*, 245 Ind. 21, 28, 195 N.E.2d 850, 853 (1964); E. CLEARY, MCCORMICK ON EVIDENCE § 5, at 10 (3d ed. 1984); cf. FED. R. EVID. 611(a) (giving the court the right to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence").

195. See *Hutler N. Trust v. Door County Chamber of Commerce*, 467 F.2d 1075, 1078 (7th Cir. 1972) (after request to testify in narrative form was denied, plaintiff testified by answering questions he asked himself).

been a finding against the defendant in relation to some aspect of his testimony if, in a trial at which he is otherwise represented by counsel, he testifies without assistance. Neither, however, will know the specifics of the dispute. If the judge is sitting as trier of fact, or will later sentence the defendant, it would be preferable if he or she were unaware of the conflict, but judges are presumed able to ignore evidence that should not be considered. Some members of the jury may also realize what is happening, but the defendant will, nonetheless, have the opportunity to present his story so that the jury can make the final credibility determination.<sup>196</sup>

### CONCLUSION

The proposal set forth above attempts to deal with all of the major problems encompassed by the client perjury issue. It is not a perfect solution to the problem of client perjury. There is none. Under the circumstances, this proposal attempts to accommodate as fully as possible the interests of the criminal justice system and the due process rights of criminal defendants.

The case currently before the Supreme Court provides a vehicle for some direction from the Court on this controversial issue. Lawyers should not be left without guidance in an area where they may have to choose between violating the rules of ethics or violating their clients' constitutional rights. Moreover, it is unfair to subject criminal defendants to widely varying decisions by counsel and courts. A uniform standard should be established by the Court. It is ludicrous to have decisions praising lawyers for their attention to professional ethics while at the same time condemning them for violating their clients' constitutional rights. The key to resolving the lawyers' ethical dilemma, then, is a definitive ruling on the constitutional issues. Once these have been decided, it will be much easier to deal with the procedural and ethical issues that remain.

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196. In order to minimize the impact on the jury of the defendant presenting testimony without assistance of counsel, perhaps the defense attorney, without endorsing the testimony, could make a brief statement to the jury explaining that a defendant has the right to testify and to tell his story without questioning by counsel. Because it is impossible to gauge the effect on a jury of a defendant's presentation of testimony without questioning by counsel, if an appellate court determines that an unsuccessful defendant should have prevailed at the pre-trial hearing on the issue of assistance of counsel in testifying, the incorrect ruling should not be deemed harmless error.