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# CRIMINAL LAW

## THE PERJURIOUS CLIENT QUESTION: PUTTING CRIMINAL DEFENSE LAWYERS BETWEEN A ROCK AND A HARD PLACE

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### I. INTRODUCTION

When criminal defense attorneys attend dinner parties, they invariably are asked the question: "How can you defend criminals you know are guilty?" The lawyers have a multitude of ready, sometimes facile, sometimes heartfelt, and sometimes accurate answers to that public question.<sup>1</sup> By contrast, an oft asked professional question, but one which few, if any, criminal defense lawyers know how to answer is: "Would you put your client on the stand if you know he is going to lie?" No question has been more widely debated in legal literature,<sup>2</sup> yet left undecided. The real crime is,

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<sup>1</sup> Lawyers respond to the question, "How can you defend criminals you know are guilty?" in a variety of ways, such as by saying: every accused person has a right to a defense; the lawyer is not supposed to be the judge; no one is guilty unless and until the prosecution proves guilt beyond a reasonable doubt; lawyers only defend innocent people, because all defendants are presumed innocent. Actually, the best and most accurate, if not entirely understood, response explains that guilty and not guilty (not innocent) are for us legal and not moral terms.

<sup>2</sup> Federal and state decisions on client perjury often catalogue the multitude of articles—written from varying perspectives—on the client perjury problem in the criminal case. The list generally dates back nearly twenty years to the seminal article by Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). See, e.g., *Whiteside v. Scurr*, 744 F.2d 1323, 1327 (8th Cir.), *reh'g en banc denied*, 750 F.2d 713 (8th Cir. 1984), *cert. granted sub nom.* *Nix v. Whiteside*, 105 S. Ct. 2318 (1985) ("This issue . . . has been extensively debated, but

though, that the practitioners — the lawyers who actually represent criminal defendants in criminal cases — are afraid to confront the perjurious client question.<sup>3</sup> Were they to do so, they would have to look at the client sitting before them, who is entitled to their zealous representation and to their effective assistance, and then divert their eyes to their own license on the wall. Worst of all, were they to face the question, they would be unable to find any real guidance from those who draft and interpret ethical standards or from court opinions. The sorry fact is that, to date, there is no acceptable answer to this most troubling of questions for the criminal defense attorney.

The difficult nature of the perjurious client question is, first, that it requires criminal defense lawyers to seek to harmonize a number of seemingly inconsistent aspects of the problem. These aspects include: (1) the lawyers' ethical obligations to their clients and to the courts;<sup>4</sup> (2) their clients' constitutional rights to due process of law, effective assistance of counsel, and to testify in their own behalf;<sup>5</sup> and (3) the lawyers' own personal interest in avoiding on the one hand potential disciplinary difficulties from the bench and

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by no means resolved, by several courts and many commentators.") (citations omitted); *Maddox v. State*, 613 S.W.2d 275, 279-80 (Tex. Crim. App. 1981) ("[T]he problem of the perjurious defendant is one that has attracted the attention of a small army of courts and commentators.") (citations omitted). Law review articles also continue, to date, to list the cavalcade of legal periodicals covering the topic. See, e.g., Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455, 455-56 n.2 (1984) [hereinafter referred to as Rotunda, *Blowing the Whistle*].

<sup>3</sup> This Article is, in fact, about the perjurious client in the criminal case. It is not about a mere suspicion or conjecture concerning the falsity of a client's testimony. Professional ethics requirements in this area relate only to the lawyer's *knowledge* of a client's perjurious intentions or testimony. See *Whiteside*, 744 F.2d at 1328 and authorities cited therein.

This Article also is not about perjury by witnesses other than criminal defendants. The defendant in a criminal case holds a constitutional right to testify in his own behalf. See *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring); *Whiteside*, 744 F.2d at 1329-30 and cases cited therein. By contrast, because the lawyer is responsible for tactical decisions in the case, including which witnesses to call or refuse to call to the stand, no collision occurs between the Constitution and the profession's ethical requirements when non-client perjury is proposed.

The fact remains that practitioners are afraid to confront the perjurious client question. At a recent training session at The National College for Criminal Defense Lawyers, the professional question inadvertently was raised before a group of approximately fifteen exceptionally experienced attorneys who were serving on the faculty. Only two lawyers would look up, let alone suggest an answer; those two lawyers answered the question—but their answers were diametrically opposed.

<sup>4</sup> See *infra* text accompanying notes 11-57, discussing professional standards and ethics opinions on the client perjury question.

<sup>5</sup> See *infra* text accompanying notes 58-140, discussing federal and state decisions on the client perjury question.

bar, and on the other hand, malpractice suits by dissatisfied clients.<sup>6</sup> The second troubling problem in attempting this herculean task is that criminal defense lawyers cannot possibly follow any of the current, and indeed conflicting, "solutions"<sup>7</sup> to the criminal client perjury dilemma<sup>8</sup> without incurring the ire of their clients, the courts, their consciences, and/or their colleagues.

Unfortunately, the question of why the client perjury problem is so difficult for the criminal defense attorney to resolve can be answered. The problem is difficult to resolve because most of those who have attempted to divine the solutions, and there are many, have failed to appreciate that there are major differences between a criminal defendant and any other witness in any other case, civil or criminal.<sup>9</sup>

The civil trial lawyers allow that they have no problems with the proscription against putting a perjurious witness on the stand. They have a simple solution: simply do not call that witness to testify. As a matter of fact, even criminal defense lawyers have no problem with perjurious witnesses, *except for the defendant*. Like their civil counterparts, criminal lawyers simply do not call perjurious witnesses to testify. But the defendant in a criminal case is different, and here lies the problem. The criminal defendant, unlike all other witnesses, has a constitutional right to testify even over his or her attorney's strong objection.<sup>10</sup>

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<sup>6</sup> See *infra*, *passim*, regarding the consequences to the lawyers of the client perjury dilemma.

<sup>7</sup> See *infra* text and accompanying notes 11-57.

<sup>8</sup> A decade ago, Monroe Freedman labelled perjury the criminal defense lawyer's "trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 28 (1975) [hereinafter cited as M. FREEDMAN].

<sup>9</sup> See Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 439-40 (1984), in which the author observes: "[T]here has been a tendency to confuse and commingle the ethical problems attendant to criminal litigation with those related to civil litigation . . . . Putting both cats in the same bag has produced a quite unmanageable snarl."

<sup>10</sup> See *supra* note 3; *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); *Whiteside*, 744 F.2d at 1329-30; *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, 923 (7th Cir. 1982). *Cf.* *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (defendant has constitutional right to testify truthfully in his own behalf, and counsel must accede to defendant's exercise of that right). The Supreme Court has ruled that defendants must testify truthfully or suffer the consequences. *United States v. Havens*, 446 U.S. 620, 626 (1980) (defendant's testimony on cross-examination may be impeached by government through use of illegally obtained evidence). The contemplated consequences in *Havens* were a perjury prosecution and evidentiary impeachment of the untruthful testimony, *id.* at 627, not the forfeiture of any and all constitutional rights.

The relevant authorities thus have been grossly unfair in purporting to "guide" the criminal defense lawyer; and, the much abused criminal defense bar is, concomitantly, most hesitant to do what it is being told to do regarding client perjury, if indeed it can discern what it is being told to do.

This Article documents both the conflict reflected within and among the Model Code of Professional Responsibility, the Model Rules of Professional Conduct, the ABA Standards on Ethics and Professional Responsibility and the inconsistent interpretations of those sources by the bar associations and courts. Finally, the authors propose a resolution that would give criminal lawyers the power to confront the client perjury problem in a manner truly consistent with the interests of all concerned.

## II. DISCUSSION

### A. THE CONTRADICTIONS AMONG AND DEFICIENCIES OF THE SOURCES OF THE ETHICAL DILEMMA

Tensions exist both within and among the various ethics approaches to the professional question of client perjury, particularly with regard to the criminal case. To complicate the issue further, the status in and among our many jurisdictions of the various sources — the Model Code,<sup>11</sup> the Model Rules,<sup>12</sup> and the ABA Standards on client perjury<sup>13</sup> — is neither uniform nor always clear.<sup>14</sup> A

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<sup>11</sup> The ABA adopted the Model Code in August, 1969. The Model Code has been amended over the years, most recently in 1980. The Code includes the Canons ("axiomatic norms"), Ethical Considerations ("aspirational in character"), and Disciplinary Rules ("mandatory"). MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) preliminary statement [hereinafter referred to as MODEL CODE]. The Model Code has been adopted by local rules of federal courts, *see, e.g., In re Gopman*, 531 F.2d 262, 265 (5th Cir.), *reh'g denied*, 542 F.2d 575 (5th Cir. 1976) and in various forms by the states, *see* codes of professional responsibility, state by state.

<sup>12</sup> In August, 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct. The Rules and corresponding Comments were approved and adopted by the ABA House of Delegates. The Rules and Comments, and certain proposed revisions of them, have been adopted in eight states (New Jersey, Arizona, Missouri, Delaware, Washington, Montana, Minnesota, and North Carolina) and are under consideration for adoption in other states at the present time. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter referred to as MODEL RULES].

<sup>13</sup> STANDARDS RELATING TO THE DEFENSE FUNCTION [hereinafter referred to as ABA STANDARDS] § 7.7 regarding defense counsel's obligation in the face of client perjury in the criminal case, was approved by the ABA House of Delegates in 1971. Standard 7.7 was deleted from the approved draft in February, 1979. A revised version of the standard, ABA Project on STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION [hereinafter referred to as ABA PROJECT, THE DEFENSE FUNCTION], Proposed Standard 4-7.7 (2d ed. 1980) was proposed to make explicit the prohibition against advising the court of the lawyer's reason for seeking to withdraw. *Id.* at 95. The Proposed Standard, however, was withdrawn and was never formally submitted to the House of Delegates.

brief review of each source, by no means an exhaustive or historical coverage, illustrates the puzzling state of the so-called solutions to the paramount ethical dilemma facing criminal defense attorneys.

### 1. *The Model Code of Professional Responsibility*

A number of Canons, Disciplinary Rules (DR) and Ethical Considerations (EC) speak or allude to the perjury problem. Canon 4 reads: "A Lawyer Should Preserve the Confidences and Secrets of a Client."<sup>15</sup> A corresponding Disciplinary Rule provides, in relevant part: "Except when permitted under DR 4-101(C)<sup>16</sup> a lawyer shall not knowingly: 1. Reveal a confidence or secret of his client. 2. Use a confidence or secret of his client to the disadvantage of his client."<sup>17</sup>

Canon 7 states that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."<sup>18</sup> DR 7-101(A)(3) prohibits the lawyer from intentionally prejudicing or damaging his client, except as required under DR 7-102(B). DR 7-102(B) requires a lawyer who "receives information clearly establishing that: (1) His client has . . . perpetrated a fraud upon a tribunal . . ." to call upon the client to rectify the fraud and, failing the client's rectification, to "reveal the fraud to the affected . . . tribunal, *except when the information is protected as a privileged communication.*" (emphasis added).<sup>19</sup> DR 7-102(A)(4),(6) and (7), respectively, prohibit a lawyer from "[k]nowingly us[ing] perjured testimony . . .," "[p]articipat[ing] in the creation or preservation of evidence when he knows or it is obvious that the evidence is false," and "[c]ounsel[ing] or assist[ing] his client in conduct that the lawyer knows to be illegal or fraudulent."

Two Ethical Considerations of Canon 7 also should be highlighted: EC 7-5 permits a lawyer to continue to represent a client who wishes to proceed in a manner contrary to the lawyer's advice if the lawyer "does not thereby knowingly assist the client to engage in

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There is, thus, no ABA Criminal Justice Standard on this question, nor has there been since early 1979.

<sup>14</sup> See *supra* notes 10 and 11.

<sup>15</sup> MODEL CODE Canon 4 (1980).

<sup>16</sup> In pertinent part, DR 4-101(C) permits a lawyer to reveal: "(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. . . ." MODEL CODE DR 4-101(C)(2)(3).

<sup>17</sup> *Id.* at DR 4-101(B). See, e.g., *infra*, text and accompanying notes 114-16, discussing one such disadvantage to the client of attorney revelation of the defendant's perjury in the criminal case.

<sup>18</sup> MODEL CODE Canon 7.

<sup>19</sup> The underscored language was added by amendment in February, 1974.

illegal conduct . . . ." EC 7-26 states that the law and the Disciplinary Rules prohibit perjured testimony and that "[a] lawyer who knowingly participates in introduction of such testimony . . . is subject to discipline."

Thus, "the Model Code of Professional Responsibility is thoroughly confused on this issue."<sup>20</sup> The complication under the Code is that if a lawyer learns of his client's intended perjury from his client, the lawyer cannot reveal the information, but he also cannot participate in the presentation of perjured testimony. The Code gives no guidance to the practitioner as to how to proceed. The Code thereby leaves us with yet another question: To whom do lawyers owe paramount loyalty? Their clients, in seeking to maintain a confidence? The tribunal, in seeking to prevent fraudulent conduct? Themselves, in seeking to avoid discipline? The Code encapsulates the inherent difficulty in resolving the client perjury question in the criminal case. A recent commentator concluded, "The result is a logical circle; but the end result is that client confidences must be maintained, even though the lawyer's silence permits a client to commit perjury with impunity."<sup>21</sup>

## 2. *The Model Rules of Professional Conduct*

As if to compound the controversy, the more recently adopted Model Rules favor disclosure of client perjury, yet the pertinent Commentary questions the constitutional validity of such disclosure in the criminal case. Importantly, the Commentary to the Model Rules, unlike, for example, the Comments to the Standards, was specifically adopted and approved by the ABA. A number of Rules and Comments bear on the perjury question. For example, Rule 1.2, "Scope of Representation," requires a lawyer to abide by the client's decision as to whether the client will testify, but prohibits that lawyer from assisting a client in conduct "the lawyer knows is criminal or fraudulent."<sup>22</sup> Rule 1.6,<sup>23</sup> "Confidentiality of Informa-

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<sup>20</sup> Rotunda, *Blowing The Whistle*, *supra* note 2, at 456.

<sup>21</sup> Vickrey, *Tell It Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct*, 80 N.D.L. Rev. 261, 269 (1984) [hereinafter cited as Vickrey, *Tell It Only to the Judge*].

<sup>22</sup> See MODEL RULE 1.2(a) and (d). Under Rule 1.2(e) the lawyer is told to "consult with the client regarding the relevant limitations on the lawyer's conduct." This provision has been referred to critically as "a lawyer-client *Miranda* warning." Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A.J. 428, 431 (1982).

<sup>23</sup> MODEL RULE 1.6 on client confidentiality, and particularly Rule 1.6(b) permitting but not requiring attorney disclosure of certain client crimes, has been the subject of wide controversy and modification in the states. See, e.g., *The Nat'l Law J.*, Aug. 5, 1985, at 8, cols. 1-3.

tion," both precludes the revelation of "information relating to representation of a client" and exempts certain information from non-disclosure. The Comment to Rule 1.6, however, indicates that the lawyer's duty under Rule 1.2(d) to refrain from knowingly assisting a client in criminal or fraudulent conduct requires withdrawal from the case under Rule 1.16(a)(1),<sup>24</sup> unless the court orders continued representation. The Comment to Rule 1.6 also brings us to Model Rule 3.3, "Candor Toward the Tribunal," the rule that speaks most directly to the issue of client perjury.<sup>25</sup>

Model Rule 3.3, in pertinent part, forbids a lawyer from knowingly "fail[ing] to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."<sup>26</sup> It also prohibits a lawyer from "offer[ing] evidence that the lawyer knows to be false."<sup>27</sup> It expressly elevates the Model Rule 3.3 duty to disclose perjury above the Model Rule 1.6 protection of client confidences.<sup>28</sup> The import of the language of Model Rule 3.3, the primary Model Rule on perjury, is, then, that there is no attorney-client privilege protecting the perjurious client.

Significantly, and in contrast, is the Comment to Rule 3.3, entitled "Perjury by a Criminal Defendant." The Comment states: "While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty [in a criminal case] when that persuasion fails."<sup>29</sup> The Comment proceeds to refer to counsel's three

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<sup>24</sup> MODEL RULE 1.16(a)(1) and (c) require withdrawal, with court permission, if "the representation will result in violation of the rules of professional conduct or other law." Also note that the Comment to Rule 1.16 distinguishes between a client's demand and a client's suggestion that the lawyer engage in illegal or unethical conduct.

<sup>25</sup> Note also MODEL RULE 8.4, "Misconduct," which condemns: a lawyer's violation of the Model Rules or his knowing assistance to another to do so; the commission of a criminal act that reflects adversely on the lawyer's honesty or fitness; the engagement in dishonest, fraudulent, deceitful conduct, or conduct prejudicial to the administration of justice. MODEL RULE 8.4(a), (b), (c) & (d).

<sup>26</sup> MODEL RULE 3.3(a)(2).

<sup>27</sup> MODEL RULE 3.3(a)(4). The Rule also covers disclosure of falsities in material evidence that a lawyer learns of after the fact and extends the lawyer's duties of disclosure to the "conclusion of the proceeding." MODEL RULE 3.3(a)(4),(b). This rule also permits a lawyer to "refuse to offer evidence that the lawyer reasonably believes is false." MODEL RULE 3.3(c). It does not prescribe the manner in which the lawyer is to disclose client perjury, or how the lawyer is to proceed if the court denies withdrawal from representation.

<sup>28</sup> See MODEL RULE 3.3(b). Accord Comment to Rule 1.6; see *supra* note 23 and accompanying text ("[A] lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct." MODEL RULE 1.6).

<sup>29</sup> MODEL RULE 3.3 comment. The Comment also recognizes that "[w]ithdrawal before trial may not be possible" for a variety of reasons. *Id.*



choices: partial representation (the narrative),<sup>30</sup> continued full representation,<sup>31</sup> and disclosure of the perjury.<sup>32</sup> The Comment favors disclosure, yet in the following paragraph contains a caveat of constitutional proportion entitled "Constitutional Requirements:"

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions 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. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.<sup>33</sup>

In sum, the ABA Model Rules regarding client perjury build more forcefully than does the Code toward requiring disclosure of client perjury. Yet, the Model Rules Commentary to Rule 3.3, which like the Rules themselves were specifically adopted by the ABA, provides a coherent, constitutional basis for excluding the criminal defense attorney from the duty to reveal intended or actual perjury by his own client. The Commentary was and is an important step forward in recognizing the impossible situation that faces criminal defense lawyers.

### 3. *ABA Standards for Criminal Justice: The Defense Function*

Defense Function Standard 4-7.7, "Testimony by the Defendant," proposed an actual plan for dealing with client perjury in the criminal case. To its credit, this was the first unequivocal attempt to deal with the problem and give specific guidance to criminal defense attorneys. The Standard required counsel first to "strongly discourage the defendant against taking the witness stand to testify perjuri-ously."<sup>34</sup> If, prior to trial, the defendant insists he will testify perjuri-ously, the Standard permitted the lawyer to seek to withdraw, if feasible, but stated that "the court should not be advised of the lawyer's reason for seeking to do so."<sup>35</sup> Finally, if the lawyer finds

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<sup>30</sup> For further discussion of the narrative, see *infra* text accompanying notes 34-43, 128-134.

<sup>31</sup> See, e.g., M. FREEDMAN, *supra* note 8, at 31, 40-41.

<sup>32</sup> MODEL RULE 3.3 comment.

<sup>33</sup> *Id.* Note that when Arizona adopted the Model Rules, it deleted the Rule 3.3 Comment, "Constitutional Requirements." By contrast, Washington actually incorporated the constitutional caveat into its version of Rule 3.3.

<sup>34</sup> ABA PROJECT, THE DEFENSE FUNCTION Proposed Standard 4-7.7(a).

<sup>35</sup> ABA PROJECT, THE DEFENSE FUNCTION Proposed Standard 4-7.7(b). It has been noted that "with respect to withdrawal, the Standard ignores the fact that any judge

himself at trial with the perjurious client, the Standard told him "it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony."<sup>36</sup> Accordingly, when that testimony is to be presented, 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 . . ."<sup>37</sup> Thus, the Standard proposed the use of the narrative<sup>38</sup> direct examination of the perjurious client in the criminal case. The Standard further prohibited the lawyer from arguing, reciting, or relying on the false testimony in closing argument.<sup>39</sup>

Though deserving of praise for its willingness to recognize and specifically address this difficult issue, this Standard has been called an "unsuccessful attempt to resolve the ethical issues created by client perjury. . . ."<sup>40</sup> More importantly, several courts, including three federal circuits, have in effect said that an attorney who follows the direction of 7.7 would be rendering ineffective assistance of counsel.<sup>41</sup>

More intriguing than what Standard 7.7 said is the fact that it no longer exists and has not existed in any form since early 1979.<sup>42</sup> Ironically, however, it is still being cited by many attorneys and relied upon by courts and commentators.<sup>43</sup>

In sum, the Model Code, the newer Model Rules, and the ex-

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qualified to sit on the bench will know the reason for the withdrawal." Vickrey, *Tell It Only to the Judge*, *supra* note 21, at 270.

<sup>36</sup> ABA PROJECT, THE DEFENSE FUNCTION Proposed Standard 4-7.7(c). Sub-part (c) also counsels the lawyer to "make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court." *Id.*

<sup>37</sup> *Id.* This procedure has met with criticism: "The lawyer is not permitted to reveal expressly the fraud on the court; yet the lawyer's request to withdraw or his passive role in direct examination are likely to alert the judge and jury that something is amiss." Vickrey, *Tell It Only to the Judge*, *supra* note 21, at 270-71.

<sup>38</sup> The Standard does not suggest what the next course of conduct is to be should the prosecutor object to a narrative by the defendant. See M. FREEDMAN, *supra* note 8, at 37.

<sup>39</sup> ABA STANDARD 7.7(c). For further discussion of the client's right to have his lawyer argue his case fully in closing, see *infra* note 147 and accompanying text.

<sup>40</sup> Vickrey, *Tell It Only to the Judge*, *supra* note 21, at 269.

<sup>41</sup> See discussions *infra* of the *Whiteside*, *Lowery*, and *Wilcox* cases from the Eighth, Ninth and Third Circuits.

<sup>42</sup> See Editorial Note to ABA PROJECT, THE DEFENSE FUNCTION Proposed Standard 4-7.7 explaining the withdrawal of the Standard; see also *supra* note 13.

<sup>43</sup> See, e.g., *United States v. Curtis*, 742 F.2d 1070, 1076-77 n.4 (7th Cir. 1984); *State v. Fosnight*, 235 Kan. 52, 56, 879 P.2d 174, 178 (1984); Comment, *Proposed Client Perjury: A Criminal Defense Attorney's Alternatives*, 12 U. BALT. L. REV. 248, 254 n.47 (1983). Indeed, see *infra* note 129 and accompanying text regarding the recent contempt citation of two lawyers who refused to proceed in a narrative fashion.

tinct ABA Standard 7.7 are replete with references to the question of client perjury in the criminal case. Yet, these sources, which each conflict with the others and with themselves, are of little actual guidance in supplying the criminal defense attorney with a coherent, concrete, workable resolution of the ethical dilemma of client perjury. The confusion comes full circle when the bar associations and, even more importantly, the courts issue their opinions on the subject.

#### 4. *Ethics Opinions*

Two ABA ethics opinions directly address the client perjury question. Not surprisingly, the two opinions conflict.

ABA Informal Opinion 1314 (March 25, 1975) states that when a [criminal] lawyer knows in advance that a client will commit perjury at trial, the lawyer has a duty to advise the client that the lawyer must either withdraw prior to the time the client testifies or report the client's false testimony to the court.<sup>44</sup> Interestingly, the lawyer may uphold the client confidentiality privilege, according to the Informal Opinion, only if the lawyer learns mid-trial of his client's perjury.<sup>45</sup>

ABA Formal Opinion 341 (September 30, 1975), although somewhat unclear, essentially opines that confidences gained by counsel from a client are protected by the attorney-client privilege and may not ethically be revealed.<sup>46</sup>

Note that these ABA opinions, like most of the state ethics opinions, refer and relate to the Model Code of Professional Responsibility rather than the new Model Rules of Professional Conduct.

Ethics opinions<sup>47</sup> across the nation also present a range of re-

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<sup>44</sup> ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975). As a practical matter, if counsel is called upon to inform the court as to the reason for withdrawal, counsel is left with no choice of action as contemplated by the Opinion. The lawyer would have to move to withdraw and report the false testimony.

<sup>45</sup> When counsel becomes aware, mid-trial, of his client's perjury, he is obliged under ABA Informal Opinion 1314 to call upon the client to rectify the fraud and may withdraw if the client refuses. *Accord* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1318. Parenthetically, the suggestion that counsel "may withdraw" is illusory. The only right counsel has is to move to withdraw, a motion which may be and usually is denied by trial judges.

<sup>46</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341.

<sup>47</sup> Citations to these ethics opinions will be by locale, opinion number and date, if any; summaries of the opinions can be found in the ABA/BNA Lawyers' Manual on Professional Conduct in the Ethics Opinion section (801:1001 *et seq.*). The Manual provides information on where each locale's ethics opinions are published.

sponses to the question of how to deal with the perjurious client.<sup>48</sup> Some bar associations require the lawyer to report the proposed perjury;<sup>49</sup> others advise against reporting it if a confidential communication is the source of the lawyer's knowledge<sup>50</sup> or indicate that only non-client perjury must be disclosed.<sup>51</sup> Other opinions prohibit disclosure.<sup>52</sup>

Similarly, some ethics opinions advise lawyers to withdraw without stating the reasons;<sup>53</sup> some say lawyers may, but need not, inform the court (and even the client's new counsel) of the reasons for withdrawal;<sup>54</sup> others say lawyers may withdraw upon notifying the court of the client's intent to commit perjury, but may not disclose the reasons to their successors.<sup>55</sup>

This brief sampling of ethics opinions reveals the lack of unanimity in the profession's interpretation and application of our supposed guiding standards. The courts often indicate that they need not treat or reconcile the ethics precepts,<sup>56</sup> yet they often do employ the Model Code, Model Rules, and the former, proposed ABA Standard 4-7.7 in their analyses.<sup>57</sup> The results in the courts are thus as woefully lacking in clarity and consistency as the above-cited ethics opinions. Indeed, the case law often illustrates the incompatibility of the lawyers' duties to act ethically and yet to afford their clients the constitutional rights and protections they deserve. The state of the law is, at best, confusing and unclear. Yet, for some unexplained reason neither those concerned with lawyer ethics or defendant constitutional rights seem at all concerned with the lack of direction given criminal defense attorneys or with the totally impossible position in which criminal defense lawyers are put.

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<sup>48</sup> Ethics opinions, similar to court decisions, more uniformly sanction the disclosure of perjured testimony by witnesses other than the defendant. *See, e.g.*, San Diego Cty. Bar Assn. Op. 1983-8 (1983); Mich. Op. CI-63 (5/8/81).

<sup>49</sup> *E.g.*, Birmingham, Ala. Bar Assn. Op. 21 (10/8/82).

<sup>50</sup> *E.g.*, Ariz. Op. 80-27 (12/12/80).

<sup>51</sup> San Diego Cty. Op. 1983-8; *see supra* note 48.

<sup>52</sup> Los Angeles Cty. Bar Assn. Formal Op. 386 (undated); State Bar of California Formal Op. 1983-74 (undated) (lawyer has duty to protect client's "secrets," including testimonial perjury, though he may not rely on perjured testimony if his request to withdraw is denied).

<sup>53</sup> N.C. Ethics Comm. Op. 362 (10/17/84); Iowa Op. 80-43 (1/19/81). *See also* opinions cited *supra* note 52.

<sup>54</sup> *E.g.*, Conn. Inf. Op. 82-11 (11/23/81).

<sup>55</sup> *E.g.*, Mich. Op. CI-692 (11/29/81).

<sup>56</sup> *See infra* text accompanying notes 58-113, regarding judicial decisions on client perjury that distinguish between ethical and constitutional considerations.

<sup>57</sup> *Id.*

B. THE CASE LAW — CONFLICT AND CONCERN OF A CONSTITUTIONAL DIMENSION

The preceding discussion reveals the variations in proposals for dealing with client perjury: (1) avoid it but do not reveal a client's confidence or secret; (2) disclose it and withdraw in most cases, but perhaps not in the criminal case; (3) attempt to withdraw, giving no reason for the withdrawal, but if you must proceed, substitute a narrative for direct examination and do not use the perjurious testimony in final argument; (4) continue with full representation and disclose nothing to the court. The only base of agreement is that the lawyer should try to dissuade the perjurious client from so testifying. In view of these profound discrepancies in approach, it is easy to see why criminal defense attorneys do not know how to answer the client perjury question. The desire to be ethical does not provide the solution; one first needs to know what being ethical in this situation requires.

If the lawyers look to their usual source of guidance, the case law, they unfortunately will find the same inadequate guidance that they discovered by trying to work with the professional ethics manuals. The direction of the federal cases, however, seems to be that the deprivation of constitutional rights is an impermissible consequence of a defendant's proposed perjury.

1. *The Whiteside Case*

Most recently, the United States Court of Appeals for the Eighth Circuit decided, in *Whiteside v. Scurr*,<sup>58</sup> that a defense attorney's pre-trial threat to his client to withdraw, to advise the state court judge of his client's perjury<sup>59</sup> and to testify in rebuttal against his client if the client testified falsely at his own trial denied the defendant due process, the right to testify in his own defense, and the effective assistance of counsel.<sup>60</sup> The court began its analysis of the constitutional course a criminal defense attorney may pursue when counsel believes the client intends to testify falsely by observing that:

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<sup>58</sup> *Whiteside*, 744 F.2d 1323 (8th Cir. 1984).

<sup>59</sup> There appears to be some question whether, under the facts, defendant Whiteside was indeed a perjurious client. Briefly, the charge was murder; the theory of defense was self-defense. Originally, the defendant told his lawyer he had seen no gun on the supposed aggressor. Shortly before trial, he told the lawyer he had seen something "metallic" in the victim's hand. The lawyer considered any proposed testimony by the defendant about the metallic object to be perjurious. *Id.* at 1325-26. For the purposes of this Article only, then, the testimony in question will be assumed to be perjurious, as the Eighth Circuit so presumed it would have been. *Id.* at 1328.

<sup>60</sup> *Id.* at 1328-29.

[O]ur analysis does not deal with the ethical problem inherent in appellant's claim. We are concerned only with the constitutional requirements of due process and effective assistance of counsel. As the ABA Model Rule 3.3 comment, appendix B, states, the Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics.<sup>61</sup>

Although the court "commended counsel for conscientiously attempting to address the problem of client perjury in a manner consistent with professional responsibility,"<sup>62</sup> it agreed with the Ninth Circuit<sup>63</sup> that there was "no escape, however, from the conclusion that fundamental requisites of fair trial have been irretrievably lost."<sup>64</sup>

Counsel's basic function in a criminal case is "to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."<sup>65</sup> The *Whiteside* court thus held that counsel's actions in the case before it "were inconsistent with the obligations of confidentiality and zealous advocacy."<sup>66</sup> Finally, the *Whiteside* court ruled, "Counsel's actions improperly forced appellant in effect to choose between two constitutional rights, the right to testify in one's own defense and the right to effective assistance of counsel, and infringed both."<sup>67</sup>

The court in *Whiteside* stressed, and the authors agree, that a court's "task is not at all to determine whether counsel behaved in an ethical fashion,"<sup>68</sup> but instead, to "determine what the Sixth Amendment requires."<sup>69</sup> In doing so, the court considered, as "guidelines and not as governing rules, the views of authorities on legal ethics."<sup>70</sup> The court thus noted that counsel "fell short"<sup>71</sup> under the "strict Freedman approach,"<sup>72</sup> the ABA Defense Function Standard 7.7 and the ABA Model Rules of Professional Conduct.<sup>73</sup>

<sup>61</sup> *Id.* at 1327.

<sup>62</sup> *Id.* at 1327-28.

<sup>63</sup> See *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). See also discussion of the *Lowery* case *infra*, text accompanying notes 90-106.

<sup>64</sup> *Whiteside*, 744 F.2d at 1328 (quoting *Lowery v. Cardwell*, 575 F.2d at 731).

<sup>65</sup> *Whiteside*, 744 F.2d at 1329 (quoting *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984)) (emphasis added in *Whiteside*).

<sup>66</sup> *Id.* The court stressed the need for the defendant to be able "to disclose information fully and in confidence to counsel." *Id.*

<sup>67</sup> *Id.* at 1330 (citing *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120-21 (3d Cir. 1977)). See *infra* text accompanying notes 107-111.

<sup>68</sup> *Whiteside*, 744 F.2d at 1330.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1330-31.

<sup>72</sup> *Id.* See M. FREEDMAN, *supra* note 8, at 31, 40-41.

<sup>73</sup> *Whiteside*, 744 F.2d at 1330.

The court reversed and remanded, limiting its holding to the facts of the case by ruling that a lawyer who threatens to testify against his own client impermissibly becomes an adversary to that client.<sup>74</sup> Rehearing *en banc* was denied by a divided court of nine judges.<sup>75</sup> The case is currently pending before the United States Supreme Court on a grant of certiorari.<sup>76</sup>

The Eighth Circuit in *Whiteside* originally “expressed no view on the Sixth Amendment implications of a lawyer’s simply moving to withdraw, with or without informing the trial court of the reason” when faced with the perjurious client dilemma.<sup>77</sup> In the published order denying rehearing *en banc*, however, the Eighth Circuit held that:

*a lawyer who has a firm factual basis for believing that his or her client is about to commit perjury, because of confidential communications the client has made to the lawyer, may not disclose the content of those confidential communications to the trier of fact, in the present case the jury. The lawyer who discloses confidential communications or who threatens to do so has departed from the role of an advocate and has become an adversary to the interests of his or her client. Such a client has lost the effective assistance of counsel, a right to which even those defendants who may later be accused of perjury are entitled (emphasis added).*<sup>78</sup>

In his concurring opinion, Chief Judge Lay advocated withdrawal by the defense attorney faced with the perjurious client, but stated, “Counsel should not, however, advise the court of his or her reason for seeking withdrawal.”<sup>79</sup>

Four judges dissented, in two separate opinions, from denial of rehearing *en banc* in *Whiteside*. Judge Gibson’s dissenting opinion commendably noted the need to consider counsel’s dilemma, “particularly in view of the conflicting academic discussions of this question”<sup>80</sup> and because “[t]he majority does not discuss the proper course for the lawyer in the position faced by *Whiteside*’s counsel, which presents an extremely complex question.”<sup>81</sup> The other dissent, authored by Judge Fagg, took issue with the Eighth Circuit’s original holding on the constitutional issue itself, ineffective assist-

<sup>74</sup> *Id.*

<sup>75</sup> *Whiteside v. Scurr*, 750 F.2d 713 (8th Cir. 1984).

<sup>76</sup> *Cert. granted sub nom. Nix v. Whiteside*, 105 S. Ct. 2318 (1985).

<sup>77</sup> *Whiteside*, 744 F.2d at 1331.

<sup>78</sup> *Whiteside v. Scurr*, 750 F.2d 713, 714.

<sup>79</sup> *Id.* at 716-17 (Lay, C.J., concurring). Interestingly, the judge cites the withdrawn ABA Proposed Standard 4-7.7. He also “recognize[s] that nonverbal acts may, in some circumstances, inform the court that the client is intending to give false testimony.” *Id.* at 717 n.2 (discussing *Lowery*, 575 F.2d 727 (9th Cir. 1978)). See also *infra* text accompanying notes 90-106.

<sup>80</sup> *Id.* at 716 (Gibson, J., dissenting) (citing the *Whiteside* decision, 744 F.2d at 1327).

<sup>81</sup> *Id.*

ance of counsel.<sup>82</sup> Judge Fagg relied on the Seventh Circuit decision in *United States v. Curtis*<sup>83</sup> in which the court held that the lawyer's refusal to allow his perjurious client to take the stand did not constitute ineffective assistance of counsel.

Interestingly, Chief Judge Lay stated that he wrote his concurrence "specially to address Judge Fagg's dissenting opinion."<sup>84</sup> Chief Judge Lay asserted that Judge Fagg "totally misreads the holding of *Whiteside v. Scurr*,"<sup>85</sup> and charged that "[h]is dissent is certain to leave both lawyers and lay persons confused as to the breadth of the decision in this case."<sup>86</sup>

A reading of the *Whiteside* decisions in and of themselves, let alone the other federal and state cases on the subject of client perjury in the criminal case,<sup>87</sup> leaves the criminal defense lawyer reeling. The decisions left unanswered the basic question of what a lawyer should do if the lawyer's client persists in an intention to commit perjury. If the lawyer chooses to withdraw from the case, he or she could either give reasons for the withdrawal or refuse to give reasons. The very refusal to give reasons, however, might flag the court's attention, essentially informing it that the issue is one of client perjury. If the case is a bench trial, the problems caused by withdrawal may be even greater. If the withdrawal motion is denied, the attorney must choose between (a) continuing with full representation or (b) allowing the client to give the perjurious testimony in narrative form and/or giving an abbreviated closing argument. These issues, which the majority opinion observed were not necessary to the court's determination of the sixth amendment issue before it, remain unanswered by the *Whiteside* case. Unfortunately, the remaining authorities further illuminate, rather than eliminate, the controversial incompatibility of constitutional rights and ethical requirements.

## 2. *Related Federal Authorities: Constitutional Constrictions and Collateral Consequences of Disclosure of Client Perjury in the Criminal Case*

The United States Supreme Court recently observed in *Strickland v. Washington*:

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes

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<sup>82</sup> *Id.* at 717-19 (Fagg, J., dissenting).

<sup>83</sup> *Id.* at 719 (citing *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984)).

<sup>84</sup> *Id.* at 716 (Lay, C.J., concurring).

<sup>85</sup> *Id.* (citing *Whiteside*, 744 F.2d 1323 (8th Cir. 1984)).

<sup>86</sup> *Id.*

<sup>87</sup> See *infra* text accompanying notes 88-140.



the client a duty of loyalty, a duty to avoid conflicts of interest. (citation omitted). From counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause

. . . .<sup>88</sup>

In the *Whiteside* case, the Eighth Circuit applied the *Strickland* standards in its ineffective assistance of counsel analysis and found that counsel's threats were presumptively prejudicial to the defense.<sup>89</sup>

The *Whiteside* case also built upon two federal circuit court cases: *Lowery v. Cardwell*<sup>90</sup> and *United States ex rel. Wilcox v. Johnson*.<sup>91</sup> In *Lowery*, defense counsel formed the belief during a bench trial that his client was testifying perjurally. Counsel requested a recess. At an in-chambers conference, in the defendant's absence,<sup>92</sup> counsel moved to withdraw; the court told counsel to state his reason, but counsel said he could not. The motion to withdraw was denied. The trial resumed, counsel said he had no more questions for the defendant, and counsel refrained from referring to the problematic testimony in closing argument. Obviously counsel attempted to follow the original ABA Standard 7.7.<sup>93</sup> The Ninth Circuit held that the defendant had been denied his due process right to a fair trial.<sup>94</sup> The court condemned "such direct action as we find here — the addressing of the court in pursuit of court order granting leave to withdraw. [T]his conduct affirmatively and emphatically called the attention of the fact finder to the problem counsel was facing."<sup>95</sup> In so doing, counsel "disabled the fact finder from judging the merits of the defendant's defense"<sup>96</sup> and "openly, placed himself in opposition to his client."<sup>97</sup>

The *Lowery* court, like the *Whiteside* court, claimed that "problems of ethics are not before us,"<sup>98</sup> although it did refer in its opinion to the ABA Model Code and Standard 7.7.<sup>99</sup> The court ruled that when counsel is surprised mid-trial by his client's perjury, he "should not act to advance it,"<sup>100</sup> but is not required to with-

<sup>88</sup> *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984).

<sup>89</sup> *Whiteside*, 744 F.2d at 1328-30.

<sup>90</sup> 575 F.2d 727 (9th Cir. 1978).

<sup>91</sup> 555 F.2d 115 (3d Cir. 1977).

<sup>92</sup> The Ninth Circuit found no error in the proceeding in chambers without the defendant present. *Lowery*, 575 F.2d at 729.

<sup>93</sup> See *supra* notes 34-43 and accompanying text.

<sup>94</sup> *Lowery*, 575 F.2d at 730.

<sup>95</sup> *Id.* at 731.

<sup>96</sup> *Id.* at 730.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 731 n.6.

<sup>99</sup> *Id.* at 730-31.

<sup>100</sup> *Id.* at 731.

draw.<sup>101</sup> Instead of "act[ing] in such a fashion as to disclose his quandary to the fact finder,"<sup>102</sup> the court stated he should "passively refuse to lend aid to what is believed to be perjury."<sup>103</sup> ABA Standard 7.7 (suggesting the narrative rendition by the perjurious defendant) was in existence in May, 1978, when the *Lowery* court spoke, but it was deleted from the Standards within months thereafter.<sup>104</sup> Notably, the court failed to explain how one "passively" refuses to "lend aid" and still satisfies sixth amendment obligations to the client.

Judge Hufstедler specially concurred in *Lowery*. She found a denial of defendant's sixth amendment right to effective assistance of counsel when, by moving to withdraw, counsel "ceased to be an active advocate of his client's interests."<sup>105</sup> Her concurrence noted that "no matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense."<sup>106</sup>

The holding in the *Wilcox* case,<sup>107</sup> the other federal case on which the *Whiteside* court heavily relied, did rest on sixth amendment grounds. The trial judge ruled that if defendant testified, counsel would be permitted to withdraw and defendant would have to represent himself; the appellate court held that that ruling infringed upon defendant's rights to testify<sup>108</sup> and to counsel. It appears that counsel in *Wilcox* actually did discuss the matter of client perjury with the judge.<sup>109</sup> The Third Circuit, in dictum, called the disclosure issue "an extremely complex question"<sup>110</sup> and stated that "[w]hen an attorney unnecessarily discloses the confidences of his client, he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation."<sup>111</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* See *supra* notes 35, 37-38 and accompanying text regarding the message that passive representation is likely to send to the judge.

<sup>104</sup> See *supra* note 13 and accompanying text.

<sup>105</sup> *Lowery*, 575 F.2d at 732 (Hufstедler, J., specially concurring).

<sup>106</sup> *Id.*

<sup>107</sup> *United States ex rel Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977).

<sup>108</sup> *But see United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984) (counsel's refusal to put perjurious client on stand not violation of defendant's right to testify truthfully in his own behalf; ethical matter said not to be in issue, but court did cite ABA Proposed Standard 4-7.7 which had been withdrawn for years). *Id.* at 1076-77 n.4. See *supra* note 13.

<sup>109</sup> *Wilcox*, 555 F.2d at 117 n.5.

<sup>110</sup> *Id.* at 122.

<sup>111</sup> *Id.* The court concluded by observing that an attorney "may not volunteer a mere

In sum, *Lowery*, *Wilcox*, and, more recently, *Whiteside* support the conclusion that a criminal lawyer's subtle or direct disclosure of client perjury to the trier of fact is adverse to the interests and constitutional rights of the defendant.<sup>112</sup> Where professional ethics constraints may conflict, they should be tailored to conform to the Constitution.<sup>113</sup> Perhaps these decisions then mean, as suggested by the Comment to Model Rule 3.3, that the criminal lawyer no longer will continue to be faced with the Hobson's choice that caused reversals in *Whiteside*, *Lowery*, and *Wilcox*. If such is the case, it is time to clearly and unequivocally instruct the criminal defense lawyer as to how to constitutionally and ethically handle these problems. Criminal lawyers and the administration of criminal justice have suffered enough at the hands of the client perjury problem.

Finally, although not mentioned in perjury issue court opinions, the impermissible disclosure of client perjury in the criminal case has very real and potentially severe consequences for the defendant, consequences not then apparent or considered by the draftors of Standard 7.7. In 1978, in *United States v. Grayson*,<sup>114</sup> the Supreme Court held that a trial court may consider its belief that a defendant perjured himself at trial in determining, or more specifically, in increasing a defendant's sentence. Under *Grayson*,<sup>115</sup> trial courts do indeed consider defendant perjury at sentencing, and appellate courts accordingly affirm.<sup>116</sup>

The authors have no quarrel with the premise that perjurers, assuming of course a "beyond a reasonable doubt" finding of such perjury, should be punished. We do, however, lament the fact that the attorney be required to disclose confidential information supporting client perjury to the court and thereby likely harm the lawyer's client who is convicted at trial. The lawyer's choice of "either him or me" in the decision whether to disclose a client's perjury

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unsubstantiated opinion that his client's protestations of innocence are perjured," *id.*, as counsel did in *Wilcox*. See *supra* note 3 regarding the definition of perjury.

<sup>112</sup> Cf. *United States v. Campbell*, 616 F.2d 1151 (9th Cir. 1980) (judge should not be told in jury's presence that defendant is testifying against advice of counsel, but effective assistance/fair trial not denied under circumstances of case).

<sup>113</sup> Indeed, the dominance of the dictates of the Constitution over codes of conscience is supported by the Comment to MODEL RULES Rule 3.3; see also *Whiteside*, 744 F.2d at 1327; see *supra* notes 33, 61 and accompanying text.

<sup>114</sup> 438 U.S. 41, 50 (1978).

<sup>115</sup> See, e.g., *United States v. Marshall*, 519 F. Supp. 751, 755 (E.D. Wis. 1981), *aff'd*, 688 F.2d 82 (7th Cir. 1982).

<sup>116</sup> *United States v. Kimball*, 741 F.2d 71, 75 (1st Cir. 1984); *United States v. Terry*, 702 F.2d 299 (2d Cir.), *cert. denied sub nom. Williams v. United States*, 461 U.S. 931 (1983); *Guippone v. United States*, 464 U.S. 992 (1983).

undoubtedly represents a classic conflict of interest. The courts must aid the criminal defense attorneys in fulfilling their duty to their clients, a duty most recently stressed by the Supreme Court in *Strickland*, to avoid conflicts of interest.<sup>117</sup> If lawyers cannot avoid the conflict because of unclear, unfair professional standards and the courts' unwillingness to act decisively upon the incompatibility of those standards with the constitutional rights of the criminal defendant, no solution to the perjurious client dilemma is in sight.

### 3. State Court Cases: Motion to Withdraw Denied; Passive or Full Representation?

Certainly, an attorney can and should make every effort to dissuade the perjurious client from taking the witness stand in his own defense.<sup>118</sup> In this regard, calling attention to the *Grayson* case and its implications should be most helpful. Beyond that point, should the client persist in his perjurious plans, great debate once again arises, this time in state court cases, as to how to proceed.

The first issue centers on the substance of any motion to withdraw.<sup>119</sup> The Arizona and Colorado State Supreme Courts, in 1984 and 1981, respectively, decided that a motion to withdraw is permissible if counsel states no reason other than "irreconcilable conflict" and refers to no provisions of the professional ethics code.<sup>120</sup> A third high court, the Alaska Supreme Court, stated in 1980 that a defense attorney "is not automatically correct" in revealing his cli-

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<sup>117</sup> *Strickland v. Washington*, 104 S. Ct. 2052; see *supra* text accompanying note 88.

<sup>118</sup> See, e.g., *Kirkham v. State*, 632 S.W.2d 682, 685 (Tex. Ct. App. 1982) (not ineffective assistance of counsel for lawyer to discourage client from taking stand to perjure himself).

<sup>119</sup> Although withdrawal has been criticized for a number of tactical reasons, see, e.g., M. FREDMAN, *supra* note 8, at 33-34 (i.e., even assuming the withdrawal motion is granted, and the new attorney is ignorant of the perjury, the trial judge will still have drawn the inference that the client is insisting upon perjuring himself), the authors believe that the lawyer faced with the client perjury dilemma should move to withdraw without stating or alluding by words or acts to the basis for the motion. Criminal defense lawyers move to withdraw for a number of reasons, such as a personality conflict with the defendant, knowledge by an appointed attorney that a defendant does have, but did not admit to, sufficient funds to retain counsel, a conflict of interest, a serious difference of opinion regarding trial strategy, failure of the defendant to pay the attorney's fees, schedule conflicts, etc. See, e.g., *State v. Lee*, 142 Ariz. 210, 220, 689 P.2d 153, 163 (1984) ("irreconcilable conflict" may mean a number of reasons other than conflict regarding perjurious testimony). Therefore, a motion to withdraw, in and of itself, is not necessarily a cry of perjury to the court.

<sup>120</sup> *Lee*, 142 Ariz. at 220, 689 P.2d at 163; *People v. Schultheis*, 638 P.2d 8 (Colo. 1981) (motion to withdraw due to defendant's insistence upon calling perjurious witnesses). See *infra* text accompanying notes 144-45 regarding extension of the "irreconcilable conflict" motion to perjurious client cases.

ent's anticipated perjury to the trial judge.<sup>121</sup> Two years later, the Alaska Appellate Court reversed a conviction, ruling that counsel's reference to "ethical problems" and specific ethics code provisions essentially and impermissibly informed the judge that counsel's client was going to perjure himself.<sup>122</sup>

The nature of the withdrawal motion might be said to depend on who is the trier of fact and the assessor of punishment in a case. Three 1980 cases support this conclusion. In *Butler v. United States*<sup>123</sup> the District of Columbia Court of Appeals said that once defense counsel told the court—the trier of fact in the case—of his client's intention to commit perjury, the proceedings should have been certified to another judge; the failure to do so deprived the defendant of due process.<sup>124</sup> In *Maddox v. State*,<sup>125</sup> a Texas court said that although revelation to the finder of fact that a defendant is testifying falsely "can deny due process," it is not necessarily error to so apprise only the judge in a jury trial at which the jury also has been elected to assess punishment; the attorney's motion to withdraw did not deprive defendant of effective assistance of counsel.<sup>126</sup> In the New York case of *People v. Salquerro*,<sup>127</sup> the court said that one possible solution to the perjurious client problem is that counsel should inform the court, in a jury trial, of a client's intention to commit perjury. But the *Grayson* problem still remains. In sum, lawyers need guidance as to how, in fact, to move to withdraw—more gui-

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<sup>121</sup> *Coleman v. State*, 621 P.2d 869, 881 (Alaska 1980), *cert. denied*, 454 U.S. 1090 (1981).

<sup>122</sup> *Newcomb v. State*, 651 P.2d 1176 (Alaska Ct. App. 1982).

<sup>123</sup> 414 A.2d 844, 853 (D.C. 1980).

<sup>124</sup> *Id.*

<sup>125</sup> 613 S.W.2d 275, 284 (Tex. Crim. App. 1980).

<sup>126</sup> The court, in *Maddox*, succinctly summarized the client perjury problem when it stated:

The problem of representing a defendant who insists on testifying falsely has been called, correctly, one of the hardest questions a criminal defense lawyer faces. The attorney is faced simultaneously with a duty to represent his client effectively, a duty to protect his client's right to testify, a duty not to disclose the confidential communications of his client, a duty to reveal fraud on the court, and a duty not to knowingly use perjured testimony (as well as the possibility of criminal liability for perjury). The difficulty is increased by the defendant's right to put the prosecution to its burden of overcoming the presumption of innocence by proof beyond a reasonable doubt. 'In practice, . . . the duties have come to be in perhaps uncontrollable conflict.' G.HAZARD, *ETHICS IN THE PRACTICE OF LAW* 129 (1978). Experienced and conscientious people can come to different conclusions about the best way to deal with the conflict. (Footnotes, citations omitted).

*Maddox*, 613 S.W.2d at 280. One wonders if the court's decision might have been different in light of *Grayson* if, as is usually the circumstance, the judge and not the jury had the responsibility of imposing sentence.

<sup>127</sup> 107 Misc. 2d 155, 433 N.Y.S.2d 711 (N.Y. Sup. Ct. 1980).

dance than being told what is "not necessarily error" or what is "one possible solution."

The next question is, of course, how should counsel proceed if the motion to withdraw is denied. Certain recent cases continue to advocate the use of a narrative and limited closing argument, relying on the beleaguered, nonexistent ABA Standard 4-7.7.<sup>128</sup> Indeed, two appointed attorneys recently were held in contempt of court for refusing to proceed in that manner.<sup>129</sup> These cases attempt to distinguish themselves from a case like *Lowery v. Cardwell*,<sup>130</sup> or *Butler v. United States*<sup>131</sup> because the judges in them were not the triers of fact.<sup>132</sup> But if these state court "narrative cases" had been bench trials, the use of the narrative device and the abridged closing argument might well have flagged the court's attention, unequivocally signalling the judge that perjury was in progress.<sup>133</sup> Even in a jury trial, the passive representation method may create prejudice. Indeed, the Arizona Supreme Court recently noted in dictum that "a knowledgeable judge or juror, alert to the ethical problems faced by attorneys and the manner in which they traditionally are met might infer that [the defendants'] testimonies were perjurious from trial counsel's failure to refer to them . . . ."<sup>134</sup>

The alternative solution is that of full representation. Commentators have advocated it,<sup>135</sup> and courts have condoned it. For example, in *Coleman v. State*,<sup>136</sup> one of the few cases to recognize the actual nonexistent status of ABA Standard 7.7,<sup>137</sup> the trial judge ordered counsel to proceed with full representation of a defendant whom counsel, in his motion to withdraw, had disclosed to be a perjurious client. Specifically, the judge directed counsel "to allow [the

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<sup>128</sup> See *supra* note 13 regarding deletion of ABA Standard 7.7 and non-submission, non-approval of Proposed ABA Standard 4-7.7. But see, e.g., *Fosnight*, 235 Kan. 52, 679 P.2d 174; *Salquerro*, 107 Misc. 2d 155, 433 N.Y.S.2d 711 (approving of the Standard 7.7 narrative/abbreviated argument).

<sup>129</sup> *Matter of Goodwin*, 279 S.C. 274, 277-78, 305 S.E.2d 578, 580 (1983) (counsel claimed use of narrative procedure would deny defendant effective assistance of counsel and refused to continue with trial; counsel held in contempt of court, but no sanctions were warranted "this being an issue of novel impression").

<sup>130</sup> 575 F.2d 727 (9th Cir. 1978); see *supra* text accompanying notes 90-106.

<sup>131</sup> 414 A.2d 844 (D.C. 1980).

<sup>132</sup> See *Fosnight*, 235 Kan. at 55-56, 679 P.2d at 181; *Salquerro*, 107 Misc. 2d at 160, 433 N.Y.S.2d at 715.

<sup>133</sup> See *supra* notes 35, 37 and accompanying text, regarding criticism of the ABA Proposed Standard for the very reason that its procedures communicate the client's perjury to the trier of fact—judge or jury.

<sup>134</sup> *Lee*, 142 Ariz. at 219, 689 P.2d at 162 n.4.

<sup>135</sup> See, e.g., M. FREEDMAN, *supra* note 8, at 31, 40-41.

<sup>136</sup> 621 P.2d 869, 878, 881-82 (Alaska 1980), *cert. denied*, 454 U.S. 1090 (1981).

<sup>137</sup> *Id.* at 881 n.21.

defendant] to testify, to question him on direct examination, and to argue [his] version of the facts before the jury."<sup>138</sup> The state supreme court decided that no deprivation of a defendant's rights, including the right to effective assistance of counsel, occurs when a lawyer "is required to fully assist his client in presenting suspect testimony."<sup>139</sup>

The review in this Article of the ethics opinions and legal decisions highlights one fact: a lack of consensus plagues the bar associations and the courts concerning how a criminal defense attorney is to deal with client perjury. Unclear, resultingly, is whether, and if so how, the disciplinary boards and the judicial system ought to punish attorneys in this sensitive area.<sup>140</sup>

### III. RESOLUTION

The perjurious client problem is not runaway or rampant in proportion to the total number of cases criminal lawyers handle.<sup>141</sup> It is, however, as this Article has tried to show, a serious and significant problem when it does occur. The ethics requirements and the courts have put criminal defense lawyers between the proverbial rock and the hard place: if they follow one Canon, they violate another; if they seek to protect themselves from disciplinary difficulties, they subject themselves to suits by their clients, render ineffective assistance to defendants who can have their cases reversed, and ultimately undermine the sanctity of the attorney-client relationship.

Again, no dilemma arises with regard to any witness other than the criminal defendant himself. The refusal to place perjurious *non-*

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<sup>138</sup> *Id.* at 878.

<sup>139</sup> *Id.* at 881. Note that the court stated it was not ruling that the trial judge should always order "full representation" in such a situation, *id.* at 881-82, or "adopting this approach generally," *id.* at 883 n.22.

<sup>140</sup> Compare Attorney Grievance Comm'n of Md. v. Sperling, 296 Md. 558, 463 A.2d 868 (1983) (attorney publicly reprimanded for permitting client to give false, although largely irrelevant testimony, in deposition; court emphasized non-criminal nature of the underlying proceedings) with unpublished opinion in Board of Overseers v. Dineen, No. Bar-83-46 (Me. Sup. Jud. Ct. 12/29/82), 1 Law. Man. Prof. Conduct 45, *aff'd*, No. 3594 (Me. Sup. Jud. Ct. 9/5/84), 1 Law. Man. Prof. Conduct 444 (criminal defense lawyer who had previously been suspended for falsifying a record disbarred for knowingly offering client's perjured testimony rather than seeking to dissuade client or moving to withdraw; lawyer so punished even though his knowledge of perjurious nature of the testimony sprang from his client's admission to him that he had committed the crime).

<sup>141</sup> Due to the fact that counsel must act only upon a "firm factual basis" for believing that a client intends to commit perjury, *Wilcox*, 555 F.2d at 122, not upon mere conjecture, suspicion, or inconsistent statements by the defendant, "[i]t will be a rare case in which [the] factual requirement is met." *Whiteside*, 744 F.2d at 1328 and cases cited therein.

*client* witnesses on the stand is the lawyer's tactical right and ethical responsibility.<sup>142</sup> When the criminal defendant, who has a constitutional right to testify, intends to testify falsely, however, then all of the controversy and problems arise. If one is to accept the major premise of this Article, something must and should be done to aid the criminal defense attorney. A few suggestions follow.

First, the ethical pronouncements which unequivocally proscribe attorney-assisted perjury should make an exception where the witness is a criminal defendant. This may well be what the ABA has done in the adoption of the Commentary to Model Rule 3.3. This exception is required not to give the defendant some advantage, for as any experienced trial lawyer knows, perjured testimony almost always hurts rather than helps a case — as well it should. This exception is required to acknowledge a criminal defendant's right to testify and right to be fully and ably represented at trial.<sup>143</sup>

Second, assuming a criminal defendant exception, the following seems the most practical way to deal with an obviously bad situation:

a) The lawyer should seek as powerfully and persuasively as possible to dissuade the client from taking the stand to perjure himself.<sup>144</sup> Everybody agrees with this approach; it invades no constitutional right, and it makes sense.

If all such efforts to dissuade fail:

b) The lawyer should move to withdraw, giving no reason(s), other than "irreconcilable differences," "a conflict prevents me from representing the defendant," or other similar, general phrasing of the motion. No ethics provisions or "professional dilemma" should be mentioned, to avoid signalling the judge of the perjury problem. There are today many reasons why a lawyer might move

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<sup>142</sup> See *supra* note 3. A lawyer's refusal to follow his client's desires regarding which witnesses to call may cause discord, but that attorney-client problem does not reach the same ethical/constitutional proportion as does the perjurious client problem.

<sup>143</sup> Admittedly, should the courts, or more specifically the United States Supreme Court, find, as either held or at least suggested by the Seventh Circuit in *Curtis*, 742 F.2d at 1076-77, that a defendant is not entitled to these presumed basic constitutional rights, then of course no exception is necessary.

<sup>144</sup> A range of possible bases exists upon which to seek to dissuade a defendant from testifying falsely: your proposed testimony is unlawful, your story will not stand up to cross-examination; the details in your version can be shown by the prosecutor to be false; if the judge thinks you are lying, he can increase any sentence you may receive. The lawyer should tell the client he will have to move to withdraw if the client persists in his perjurious intentions. The lawyer should not threaten to testify against his client, see *Whiteside*, 744 F.2d 1323, nor should he threaten to disclose the client's perjury. The authors view the latter threat to be as improper as the threat to testify which the court condemned in *Whiteside*.



to withdraw.<sup>145</sup> The number of other reasons justify moving to withdraw.

If the motion to withdraw is denied:

c) The lawyer should proceed to try the case like any other.<sup>146</sup> No narrative should be attempted; there is no major difference between putting a defendant on the stand and asking him to narrate his testimony and occasionally interjecting "what happened next?"<sup>147</sup> The case may be argued in full, including the use of the defendant's testimony if the lawyer deems it worthy of argument.<sup>148</sup> Most experienced defense lawyers probably would shy away from arguing the perjurious testimony, not because of its perjurious nature, but rather because of the fear that the jury, no less the lawyer himself, might break out laughing. Moreover, in closing, counsel's argument usually takes the form of "you heard the witness testify that" rather than the lawyer personally vouching for the truthfulness of that testimony. Indeed, the ABA itself acknowledges that it is "unprofessional conduct" for a lawyer — prosecutor or defense counsel — to "express [a] personal belief or opinion as to the truth or falsity of any testimony in closing argument."<sup>149</sup>

Under this proposal, the judge may sentence the defendant more harshly if he reasonably believes the defendant perjured himself, but the lawyer will not have confessed his own client to be a

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<sup>145</sup> See *supra* note 119. The authors agree with Chief Judge Lay of the Eighth Circuit that "[w]ithdrawal before trial, or when feasible, without advising the trial judge of the particulars of the situation, normally will not constitute an 'unequivocal announcement' depriving a defendant of his or her constitutional rights." *Whiteside*, 750 F.2d at 717 n.2 (Lay, C.J., concurring in denial of *reh'g en banc*).

<sup>146</sup> Each lawyer is reminded to make a private record of the perjury (i.e., a letter signed by lawyer and client and witnessed by fellow attorney) for use, if need be, in any subsequent disciplinary or court proceeding.

<sup>147</sup> Why go to all the trouble to avoid conveying the basis for the motion to withdraw, then effectively scream perjury to the judge (and jury) by the classic use of the narrative direct examination and limited closing argument procedure? See *supra* notes 37-38, 132-34 and accompanying text.

<sup>148</sup> Not only can perfunctory closing argument be ineffective assistance, *Matthews v. United States*, 449 F.2d 985 (D.C. Cir. 1971); *United States ex rel. Wilcox v. Commonwealth*, 273 F. Supp. 923 (E.D. Pa. 1967), *aff'd sub nom. United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, but a requirement that the lawyer avoid his client's testimony in closing argument also may result in the pointing out of the perjury problem to the judge. See *supra* note 133 and accompanying text. Whether to argue the client's version should simply be a decision left to the lawyer's discretion and judgment. It may be that the lawyer will find the tale too incredible, or even too humorous to argue. While the prosecutor may think the defense lawyer highly ethical in refusing to argue what seems to be perjurious testimony, counsel indeed may simply be acting highly practicably, in the best interests of his client.

<sup>149</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION, Standard 3-5.8(b); ABA PROJECT, THE DEFENSE FUNCTION Standard 4-7.8(b).

perjurer. This proposed procedure will help, rather than harm the criminal justice system. Without this procedure, counsel's role will continue to erode: clients' deception of their lawyers will be encouraged and open communication will be discouraged; two people who should work together at all times for the proper functioning of the adversary system will, instead, be separated.

The only alternative to this proposal,<sup>150</sup> if the disclosure, the narrative, and the limited closing argument are generally approved as the way to deal with client perjury, is to give criminal defense lawyers the automatic right to opt out of the dilemma without signalling the court in any way: afford criminal defense lawyers the absolute, automatic right to withdraw in any and every criminal case involving client perjury.

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<sup>150</sup> Seeking to dissuade the client, moving to withdraw due to irreconcilable differences, and fully representing the client thereafter has been proposed by others, as well, as the solution to the client perjury problem. See, e.g., Comment, *Confidentiality and the Lawyer's Conflicting Duty*, 27 How. L.J. 329, 343-44 (1984).