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Casenotes: Attorney Conduct — a Defense Attorney Who Follows ABA Standards When His Client Manifests an Intent to Commit Perjury Is Not Jeopardizing the Client's Right to Effective Assistance of Counsel. Nix v. Whiteside, 475 U.S. 157 (1986)

John M. Seeberger
University of Baltimore School of Law

ATTORNEY CONDUCT - A DEFENSE ATTORNEY WHO FOLLOWS ABA STANDARDS WHEN HIS CLIENT MANIFESTS AN INTENT TO COMMIT PERJURY IS NOT JEOPARDIZING THE CLIENT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. *Nix v. Whiteside*, 475 U.S. 157 (1986).

A defense attorney represented a man charged with first degree murder.[1] Shortly before trial, the defendant informed his attorney that he intended to commit perjury.[2] The attorney attempted to dissuade the defendant from testifying falsely.[3] The attorney advised the defendant that, as an officer of the court, he could not suborn perjury and would inform the court of the perjury, seek to withdraw from the case, and testify as a rebuttal witness against the defendant.[4] During trial, the defendant testified truthfully and was convicted of second degree murder.[5]

On appeal, the defendant claimed that his attorney denied him effective assistance of counsel by dissuading him from testifying as he proposed.[6] The Supreme Court of Iowa affirmed the judgment because the attorney had good cause to believe the defendant's proposed testimony would be perjurious.[7] Subsequently, the defendant petitioned for a writ of habeas corpus.[8] The United States Court of Appeals for the Eighth

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1. Nix v. Whiteside, 475 U.S. 157, 160-61 (1986).
2. *Id.* While the attorney prepared for trial, the defendant maintained that, although he had not actually seen a gun, he thought his victim had a gun. One week before trial, however, the defendant stated that he had seen something "metallic" in his victim's hand. He also remarked, "If I don't say I saw a gun, I'm dead." *Id.*
3. *Id.* at 161. The attorney explained that a claim of self-defense would not require that a gun actually exist, only that the defendant reasonably believed that he was in danger. *Id.* At trial, the attorney presented evidence to show that the victim had been observed with guns on other occasions, that the police failed to thoroughly search the victim's apartment, and that the victim's family had taken all his belongings prior to the police search. *Id.* at 162.
4. *Id.* at 161.
5. *Id.* at 161-62. The defendant testified that he knew his victim had a gun, and that he acted swiftly in self-defense when the victim reached for the gun. On cross examination, however, the defendant admitted that he never actually saw a gun. *Id.* Upon his conviction by a jury, the defendant was sentenced to prison for forty years. *See* State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978).
6. *Whiteside*, 272 N.W.2d at 470.
7. *Id.* at 471. The Supreme Court of Iowa commended both the attorney and his associate for their ethical conduct and noted that their actions comported with the applicable provisions of the Iowa Code of Professional Responsibility for Lawyers. *See id.* (citing IOWA CODE ANN. § 610 App. Iowa Code of Professional Responsibility for Lawyers (1973) DR 4-101(C)(3) ("A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.") and Canon 7 ("A lawyer should represent a client zealously within the bounds of the law.")). Iowa adopted the ABA Model Code of Professional Responsibility on Oct. 4, 1971. *See also infra* note 69.
8. *See* Whiteside v. Scurr, 744 F.2d 1323, 1326 (8th Cir. 1984), *rev'd sub. nom.*, Nix v. Whiteside, 475 U.S. 157 (1986). The district court denied the defendant's petition and held that, because the defendant had no right to testify falsely, the attorney's conduct did not deny the defendant due process or effective assistance of counsel. *Id.* (citing Whiteside v. Scurr, No. Civil 81-246-C, slip op. at 2 (S.D. Iowa Dec. 7, 1982)). The court adopted the state court's finding that the defendant's proposed testimony would have been perjurious. *Id.* Consequently, *Whiteside* does not in-

Circuit held that the defendant had been denied a fair trial[9] and effective assistance of counsel because the attorney's conduct compromised his duties of zealous advocacy, loyalty, and confidentiality to the defendant.[10] The United States Supreme Court reversed the Eighth Circuit and held that, because the attorney's conduct was a reasonable professional response under the circumstances, the defendant was not denied the effective assistance of counsel.[11]

Under the fifth[12] and sixth[13] amendments of the United States Constitution, the federal government must provide individuals with the fundamental right to a fair trial.[14] Under the due process clause of the fourteenth amendment,[15] state governments also must provide individuals with this right. In *McMann v. Richardson*[16] the Supreme Court expanded this right to include the "effective assistance of counsel."[17] Although the Court equated *effective* assistance of counsel with *compe-*

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volve an attorney who lacks good cause to believe his client intends to commit perjury. *But cf.* United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) (the attorney lacked a firm factual basis for his belief that the defendant would testify falsely); Butler v. United States, 414 A.2d 844, 850 (D.C. 1980) ("[T]he record does not support an inference that defense counsel knew his client was going to commit perjury.").

9. *Whiteside*, 744 F.2d at 1326. The court indicated that the defendant's claims that he had been denied due process, the right to present his defense, and effective assistance of counsel are different legal arguments for one ground of relief — that his attorney denied him the right to a fair trial. *Id.*
10. *Id.* at 1330. The Eighth Circuit applied the two prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984) for effective assistance of counsel. Under this test, the court considers both the attorney's conduct and whether that conduct prejudiced the outcome of the case. *See infra* notes 36-50 and accompanying text. The court concluded that the attorney had threatened his client, thereby undermining the defendant's right to effective assistance of counsel. The court also considered that the attorney's threat to testify against his client created a conflict of interest between his duty of loyalty to the defendant and his concern for the code of professional ethics. A conflict of interest under *Strickland* creates a presumption of prejudice. *Id.* at 1328-31.
11. Nix v. Whiteside, 475 U.S. 157 (1986). The Court voted unanimously to reverse the Eighth Circuit, but the Court was sharply divided (5-4) on its rationale. Although both opinions applied *Strickland*, the majority (White, Powell, Rehnquist, O'Connor, and Burger) concentrated on the attorney's conduct in light of prevailing professional norms. *Id.* at 159-76. The concurring opinion (Blackmun, Brennan, Marshall, and Stevens) focused exclusively on the prejudice element of *Strickland* because they considered this case an improper forum for discussing professional ethics. *Id.* at 177-91.
12. The fifth amendment states, "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. Amendment V.
13. The sixth amendment states, "In all criminal prosecutions, the accused shall enjoy the right to . . . a public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense." U.S. CONST. Amendment VI.
14. *See* Strickland v. Washington, 466 U.S. 668, 684-85 (1984).
15. The fourteenth amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor . . . deprive any person . . . due process of law . . . ." U.S. CONST. Amendment XIV.
16. 397 U.S. 759 (1970).
17. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (dicta).

tent assistance of counsel,[18] it provided no additional guidelines.[19] Without adequate guidelines, courts have established their own standards for measuring the effective assistance of counsel.[20] Nonetheless, the right to effective assistance of counsel provides an additional legal basis for challenging the fairness of a trial by appeal or collateral attack.[21]

Before and after *McMann*, defense attorneys have been faced with a dilemma when they learn that their client intends to commit perjury.[22] On the one hand, an attorney has a duty to provide zealous advocacy and confidentiality for his client. On the other hand, an attorney has a duty

18. *Id.* at 771.
19. *See* Maryland v. Marzullo, 435 U.S. 1011, 1011 (1978) (White, J., dissenting from denial of certiorari) ("the Federal Courts of Appeals are in disarray" concerning a standard of ineffective assistance of counsel).
20. *Id.* at 1011-12. A host of standards evolved as lower courts considered ineffective assistance of counsel claims. A number of courts considered whether counsel's conduct made a farce, sham, or mockery of the trial. *See* United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir. 1980); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978). Others considered whether the defendant's trial was prejudiced. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc). Courts faced with ineffective assistance claims by defendants who intended to commit perjury at trial also applied a variety of standards. *See* Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (concurring opinion); Rickenbacher v. Warden, 550 F.2d 62, 65 (2d Cir. 1976); United States v. DeCoster, 159 U.S. App. D.C. 326, 331, 487 F.2d 1197, 1202 (4th Cir. 1973); State v. Jones, 110 Ariz. 546, 550, 521 P.2d 978, 980, *cert. denied*, 419 U.S. 1004 (1974). Some courts considered whether the attorney's conduct was reasonable. *See* Thornton v. United States, 357 A.2d 429, 435 (D.C. 1976); People v. Dudley, 46 Ill. 2d 305, 308, 263 N.E.2d 1, 3 (1970); State v. Fosnight, 235 Kan. 52, 59, 679 P.2d 174, 180 (1984); State v. Robinson, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976); People v. Lowery, 52 Ill. App. 3d 44, 48, 366 N.E.2d 155, 158 (1977).

    For a thorough analysis of the various standards federal and state courts developed for ineffective assistance of counsel claims in general, see Casenote, *Constitutional Law — Sixth Amendment Guarantees Assistance of Counsel That Is Reasonably Effective and Does Not Prejudice the Fairness of the Proceedings*, 14 U. BALT. L. REV. 335, 337-44 (1985).
21. A claim of ineffective assistance of counsel may challenge counsel's conduct regarding a wide range of matters. *See* Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir. 1984) (trial strategy); Davis v. Wainwright, 547 F.2d 261, 264 (5th Cir. 1977) (speedy trial); United States v. Rodriguez, 498 F.2d 302, 310 (5th Cir. 1974) (use of entrapment defense); United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970) (counsel fell asleep at trial). *See also*, Modern Status of Rule as to Test in Federal Court of Effective Representation by Counsel, 26 A.L.R. Fed. 218 (1976). Notwithstanding the broad application of ineffective assistance claims, this casenote focuses particularly upon ineffective assistance claims that consider the conduct of an attorney who has been placed in a dilemma when he learns that his client intends to commit perjury.
22. *See* United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3rd Cir. 1977); McKissick v. United States, 379 F.2d 754 (5th Cir. 1967); Newcomb v. State, 651 P.2d 1176 (Alaska 1982); State v. Perkins, 141 Ariz. 278, 686 P.2d 1248 (1984); People v. Blye, 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965); State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970); People v. Collier, 105 Mich. App. 46, 306 N.W.2d 387 (1981); People v. Salquerro, 433 N.Y.S.2d 711, 107 Misc. 2d 155 (N.Y. Sup. Ct. 1980);In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979); State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977); Commonwealth v. Wolfe, 447 A.2d 305 (Pa. 1982).

to assist the court in its search for truth.[23] If an attorney discloses to the court his client's intention to commit perjury, he may have breached his duty to provide confidentiality to his client.[24] Notwithstanding, if the attorney does not disclose his client's intention to commit perjury, he may have breached his duty to assist the court in its search for the truth.[25] Once an attorney learns that the defendant intends to commit perjury, he knows that his actions will be subject to scrutiny.[26] This occurs when the defendant claims, either on appeal or in collateral proceedings, that his attorney's conduct deprived him of his right to a fair trial, due process, or effective assistance of counsel.[27]

The American Bar Association Standards Relating to the Administration of Criminal Justice (ABA Defense Function Standard) define ethical standards for criminal trial attorneys faced with a defendant who intends to commit perjury.[28] Upon learning that the defendant intends

23. *See* Nix v. Whiteside, 475 U.S. 157 (1986). *See also* Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11 (1966); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Noonan, *The Purposes of Advocacy and Limits of Confidentiality*, 64 MICH. L. REV. 1485 (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); Brazil, *Unanticipated Client Perjury and the Collisison of Rules of Ethics, Evidence and Constitutional Law*, 44 MO. L. REV. 601 (1979); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 32 (1976).

24. *See* Freedman, *supra* note 23, at 1477; *see also* New Jersey v. Portash, 440 U.S. 450, 458-60 (1979) (A criminal defendant's testimony cannot be impeached at trial with testimony given before a grand jury under a grant of immunity.); Gerders v. United States, 425 U.S. 80, 89-91 (1976) (the trial court erred by forbidding the defendant to consult with his defense counsel during an overnight recess, even though it recognized that the truth seeking process might suffer).

25. *See* Burger, *supra* note 23, at 12. *See also* In re Michael, 326 U.S. 224, 227 (1945) ("[a]ll perjured relevant testimony is at war with justice"); Clark v. United States, 289 U.S. 1, 15 (1933) ("There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused.").

26. *See supra* note 22.

27. *See supra* note 9. Convicted defendants challenging an attorney's conduct in these situations claim they have been denied any number of constitutional rights. *See, e.g.*, United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 117 (3d Cir. 1977) (right to testify); Newcomb v. State, 651 P.2d 1176, 1181 (Alaska App. 1982) (abuse of discretion); People v. Blye, 233 Cal. App. 2d 143, 147, 43 Cal. Rptr. 231, 236 (1965) (right to testify); People v. Collier, 105 Mich. App. 46, 54, 306 N.W.2d 387, 391 (1981) (fair trial); State v. Trapp, 52 Ohio App. 2d 189, 195, 368 N.E.2d 1278, 1281 (1977) (assistance of counsel). Because the attorney's conduct in this dilemma evokes a variety of constitutional challenges, the effect of *Nix v. Whiteside* is not limited to ineffective assistance of counsel claims, but ought to be considered whenever the dilemma arises, no matter what specific challenge is made.

28. Section 4-7.7 of the Standards states:

> "Testimony by the defendant.
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> (a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel

to commit perjury, the attorney should move to withdraw from the case.[29] If the court denies the motion, the attorney should allow the defendant to testify in narrative form.[30] If an attorney's conduct complies with these guidelines, the majority of courts will reject the defendant's claim of ineffective assistance of counsel.[31]

Nevertheless, defendants claim that this behavior by their attorney deprives them of effective assistance of counsel.[32] First, an attorney's attempt to withdraw evinces a desire to disassociate himself from the defendant.[33] Second, the narrative form of the defendant's testimony

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must strongly discourage the defendant against taking the witness stand to testify perjuriously.

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

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

See American Bar Association Standards Relating to the Administration of Criminal Justice: The Defense Function (2d ed. 1980). In Ferguson v. Georgia, 365 U.S. 570 (1961), the Supreme Court held unconstitutional a Georgia law which denied a defendant the assistance of counsel while the defendant made his unsworn statement to the Court. *Id.* at 572, 580. Arguably, because the narrative approach set out by the ABA Defense Function Standard also deprives the defendant assistance by his attorney, it may fall under the prohibition set forth in *Ferguson*. The ABA Defense Function Standard is but one set of guidelines for practicing attorneys. *See infra* note 69.

29. *See* Thornton v. United States, 357 A.2d 429, 432 (D.C. 1976); State v. Fosnight, 235 Kan. 52, 59, 679 P.2d 174, 177 (1904); State v. Robinson, 290 N.C. 56, 58, 224 S.E.2d 174, 175 (1976).
30. *See* United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir. 1980); *Thornton*, 357 A.2d at 433; People v. Lowery, 52 Ill. App. 3d 44, 45-46, 366 N.E.2d 155, 156 (1977); *Fosnight*, 235 Kan. at 59, 679 P.2d at 177.
31. *See Campbell*, 616 F.2d 1151; *Thornton*, 357 A.2d 429; *Lowery*, 52 Ill. App. 3d 44, 366 N.E.2d 155; *Fosnight*, 235 Kan. 52, 679 P.2d 174; *Robinson*, 290 N.C. 56, 224 S.E.2d 174. *But cf.* Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).
32. *See supra* note 31.
33. *Cardwell*, 575 F.2d at 732 (concurring opinion); *Thornton*, 357 A.2d at 437; *Robinson*, 290 N.C. at 66-67, 224 S.E.2d at 180.

alerts jury suspicion regarding the defendant's credibility.[34] Notwithstanding these assertions, most courts hold that conduct in compliance with the ABA Defense Function Standard is sufficient proof that the defendant was provided with effective assistance of counsel.[35]

The Supreme Court in *Strickland v. Washington*[36] established a standard for determining ineffective assistance of counsel. In *Strickland*, the defendant claimed that his attorney's failure to request a psychiatric examination or find character witnesses during his capital sentencing hearing denied him effective assistance of counsel.[37] According to the Court, the benchmark for judging a claim of ineffective assistance of counsel is "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."[38] To reach this determination, the Court developed a conjunctive two-prong test requiring that the defendant show that the attorney's performance was deficient and that this deficiency prejudiced his defense.[39] Unless the defendant meets both requirements, his claim fails.[40]

The first prong — counsel's performance — is measured by an objective standard of reasonableness.[41] Although reasonableness is considered in light of prevailing professional norms, norms such as those

34. *Thornton*, 357 A.2d at 437; *Lowery*, 52 Ill. App. 3d at 46, 366 N.E.2d at 157. *Cf. Robinson*, 290 N.C. at 67, 224 S.E.2d at 180 (the narrative testimony in this case was that of a witness).

35. *Campbell*, 616 F.2d at 1152 (counsel made an effort to comply with the ABA Defense Function Standard); *Thornton*, 357 A.2d at 437-38 ("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."); *Lowery*, 52 Ill. App. 3d at 47, 366 N.E.2d at 157-58 ("We fail to understand how the actions of an attorney which closely parallels the recommendations of the American Bar Association Standards for the Administration of Criminal Justice, can establish incompetence sufficient to constitute a denial of defendant's right to effective representation."); *Fosnight*, 235 Kan. at 57, 679 P.2d at 179 (citing State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970)) ("The high ethical standards demanded of counsel in no way mollify the fair, full and loyal representation to which an accused is entitled . . . [c]ounsel, of course, must protect the interests of his client and defend with all his skill and energy, but he must do so in an ethical manner."); *Robinson*, 290 N.C. at 66, 224 S.E.2d at 179-80 (counsel action in notifying the court that the defendant intends to commit perjury was commendable). *But see Cardwell*, 575 F.2d at 730; Butler v. United States, 414 A.2d 844, 852 (D.C. 1980) (when counsel follows professional norms and informs the court of his ethical dilemma, he prevents the judge as factfinder from objectively deciding the merits of the case and thereby denies the defendant his right to a fair trial).

36. 466 U.S. 668 (1984).

37. Strickland v. Washington, 466 U.S. 668, 675 (1984). There was no indication of any mental illness. *Id.* at 676. By acting as he did, the attorney was able to prevent the prosecution from presenting damaging evidence of the defendant's background. *Id.* at 673. The defendant already had pleaded guilty to three murders. *Id.* at 672.

38. *Id.* at 686. The basic purpose of the right is to ensure the defendant a fair trial. *Id.* at 684-85.

39. *Id.* at 687.

40. *Id.*

41. *Id.* at 687-88.

reflected in ABA standards are only guidelines.[42] An attorney's conduct is evaluated not with hindsight, but from the perspective of an attorney who is faced with the dilemma in light of surrounding circumstances.[43] Because evaluating an attorney's conduct is inherently difficult, the defendant must bear the burden of proving that the attorney's conduct was unreasonable under the circumstances.[44]

The second prong — prejudice to the outcome — requires that the defendant prove that there exists a reasonable probability, but for the attorney's conduct, that the result of the trial would have been different.[45] A possibility that the attorney's conduct could have affected the outcome of the trial is insufficient. The attorney's conduct must actually have undermined the defendant's status once the trial has ended.[46] A limited presumption of prejudice will lie if the defendant proves that the attorney had a conflict of interest while representing him.[47]

If the defendant fails to satisfy either prong, the court need not address the other.[48] It is more difficult for the defendant to satisfy the second prong — prejudice to the outcome, than the first prong — counsel's performance.[49] Therefore, to avoid grading an attorney's performance, courts should initially focus upon the prejudice prong to determine whether the defendant was denied his right to effective assistance of counsel.[50]

Although all federal courts[51] have recognized, and many state courts[52] have adopted the *Strickland* two prong test, its application dif-

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42. *Id.* at 688.
43. *Id.* at 689.
44. *Id.*
45. *Id.* at 694.
46. *Id.* at 693.
47. *Id.* at 692. As explanation of this limited presumption of prejudice provision, the Court cited Cuyler v. Sullivan, 446 U.S. 335 (1980). *Id.* The conflict of interest in *Cuyler* arose when the attorney represented multiple parties in a murder case. *See Cuyler*, 446 U.S. at 345. The *Strickland* Court also cited Federal Rules of Criminal Procedure 44(c) (joint representation) as explanation of the *Strickland* presumption provision. *See Strickland*, 466 U.S. at 692.
48. *Id.* at 697.
49. *Id.*
50. *Id.*
51. *See* Morrison v. Kimmelman, 752 F.2d 918, 922 (3d Cir. 1985); Imge v. Procunier, 758 F.2d 1010 (4th Cir. 1985); United States v. Vincent, 758 F.2d 379 (9th Cir. 1985); Perron v. Perrin, 742 F.2d 669 (1st Cir. 1984); Mitchell v. Scully, 746 F.2d 951 (2d Cir. 1984); Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984); Rogers v. Israel, 746 F.2d 1288 (7th Cir. 1984); Kellog v. Scurr, 741 F.2d 1099 (8th Cir. 1984); McGee v. Crist, 739 F.2d 505 (10th Cir. 1984); Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). *See generally* Special Project, *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and the Court of Appeals 1984-1985 Trial*, 74 GEO. L.J. 751, 756-65 (1986).
52. *See* Baldwin v. State, 456 So. 2d 129 (Ala. 1984); State v. Salazar, 146 Ariz. 540, 707 P.2d 944 (1985); Curry v. United States, 498 A.2d 534 (D.C. App. 1985); Quince v. State, 477 So. 2d 535 (Fla. 1985); Brogdon v. State, 255 Ga. 64, 335 S.E.2d 383 (1985); People v. Butler, 137 Ill. App. 3d 704, 484 N.E.2d 921 (1985); Coff v. State, 483 N.E.2d 39 (Ind. 1985); Harris v. State, 303 Md. 685, 496 A.2d 1074 (1985);

fers from court to court.[53] Despite the nonuniform application of the test, the Court has yet to clarify the generalized standards set out in *Strickland*.[54] In *Hill v. Lockhart*,[55] however, the Court merely extended the application of *Strickland* to include a claim of ineffective assistance of counsel during plea bargaining.[56]

Three courts have applied the *Strickland* standard in cases where a defendant intended to commit perjury.[57] In *United States v. Curtis*,[58] the United States Court of Appeals for the Seventh Circuit held that the attorney's refusal to allow the defendant to take the stand did not constitute ineffective assistance of counsel because the defendant, who had no right to testify falsely, was not prejudiced.[59] Conversely, in *State v. Lee*,[60] the Supreme Court of Arizona held that an attorney's failure to follow ethical guidelines when he permitted two witnesses to perjure themselves resulted in a denial of the defendant's right to effective assistance of counsel.[61] In *Whiteside v. Scurr*,[62] however, the United States Court of Appeals for the Eighth Circuit held that the attorney's attempts

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Carter v. State, 698 S.W.2d 589 (Mo. App. 1985); State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985).

53. *See* Burger v. Kemp, 753 F.2d 930, 940 (11th Cir. 1985) (per curiam) (considers first prong only); McCleskey v. Kemp, 753 F.2d 877, 900 (11th Cir. 1985) (considers second prong only); Tsirizotakis v. Lefevre, 736 F.2d 57, 62-65 (2d Cir.) (considers both prongs), *cert. denied*, 469 U.S. 869 (1984); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir. 1984) (considers first prong only); Rogers v. Israel, 746 F.2d 1288, 1292 n.3 (7th Cir. 1984) (considers both prongs); *see also* State v. Salazar, 146 Ariz. 540, 542, 707 P.2d 944, 945 (1985) ("In deciding an ineffective assistance claim the court need not approach the inquiry in specific order or address both prongs of the inquiry if the defendant makes an insufficient showing in one."); Curry v. United States, 498 A.2d 534, 540 (D.C. App. 1985) (considers both prongs); Brogdon v. State, 255 Ga. 64, 67, 335 S.E.2d 383, 386 (1985) (considers both prongs); State v. Carter, 698 S.W.2d 589, 590 (Mo. App. 1985) (considers both prongs); State v. Davidson, 77 N.C. App. 540, 544, 335 S.E.2d 518, 520 (1985) (considers both prongs).

54. *See* Waye v. Morris, 469 U.S. 908, 909 (1984) (Marshall, J., dissenting); *see also* Alvord v. Wainwright, 469 U.S. 956, 959-60 (Marshall, J., dissenting) (noting the importance of ABA ethical standards as guides in determining the reasonableness of counsel's assistance).

55. 475 U.S. 52 (1985).

56. *See* Hill v. Lockhart, 475 U.S. 52, 57-60 (1985).

57. *See* United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984); Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984); State v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984).

58. 742 F.2d 1070.

59. *Id.* at 1075. The attorney knew the defendant would perjure himself if allowed to testify. In accord with DR 7-102(a)(4), the attorney refused to permit his client to take the stand. *Id.*

60. 142 Ariz. 210, 689 P.2d 153.

61. *Id.* at 216, 689 P.2d at 159. The attorney's conduct fell below the minimal standards acceptable. *Id.* Although Maryland has yet to consider an attorney's conduct when faced with a client intending perjury, it has dealt with the issue of an attorney's conduct regarding a perjury alibi witness. *See* State v. Lloyd, 48 Md. App. 535, 541, 429 A.2d 244, 247-48 (1981) (an attorney's failure to call an alibi witness did not render his assistance ineffective where the defendant admitted to his attorney that he committed the crime). *See also* Cornell v. State of Maryland, 396 F. Supp. 1092, 1096-1104 (D. Md. 1975) (an attorney's failure to call an alibi witnesses and to offer evidence tending to prove the defendant's innocence did not render the

to dissuade his client from testifying falsely rendered his assistance ineffective because his conduct prejudiced the trial outcome for his client[63] and was unreasonable.[64]

In *Nix v. Whiteside*,[65] the Supreme Court relied upon the first prong of the *Strickland* test to determine whether the attorney's conduct protected his client's right to effective assistance of counsel.[66] The Court recognized the attorney's ethical duty to advance his client's interests zealously.[67] The Court limited that duty, however, to lawful conduct compatible with the search for truth.[68]

The Court supported its position with a century of the legal profession's canons and codes of ethics, all of which temper an attorney's advocacy for his client with his duty to comply with professional norms of

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attorney's assistance ineffective where the defendant admitted to his attorney that he committed the crime).

62. 744 F.2d 1323 (8th Cir. 1984).
63. Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984). The attorney threatened to testify against the defendant if he persued his planned perjury. The attorney's actions deprived the defendant of due process. *Id.* "Surely a lawyer who actually testified against his own client could not be said to be rendering effective assistance. The same is true, we think, of a lawyer who threatens to testify against his own client." *Id.* at 1331.
64. *Id.* at 1331. "[C]ounsel went so far in his . . . commendable zeal to avoid deceiving the court that he became an adversary to his own client." *Id.* at 1331.
65. 475 U.S. 157 (1986) (The court received this case in the form of a writ of habeas corpus.) The issue in *Nix* is "whether the Sixth Amendment right of a criminal defendant to [effective] assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." *Id.* at 159.
66. *Id.* at 166-71. The Court recognized that two codes of ethics exist: (1) the Model Code of Professional Responsibility adopted by the ABA in 1969 and subsequently adopted by nearly every state (with modifications), and (2) the more recent Model Rules of Professional Conduct, adopted by the ABA in 1983. At the time *Nix* was decided, thirteen states had adopted the Model Rules: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington. *Id.* at 167 n.4. Since the Court's decision, Maryland adopted the Model Rules, effective January 1, 1987. 13 Md. Reg. 1-52 (1986). As a backdrop to its analysis, the Court made it clear that the defendant did not have a right to testify falsely. *Nix*, 475 U.S. at 173 (citing *Harris v. New York*, 401 U.S. 222 (1971)). There appears to be debate within the Court whether the right to testify is constitutionally guaranteed. *Nix*, 475 U.S. at 164 & 168 n.5. For a historical outline of the development of a criminal defendant's right to testify, see Ferguson v. Georgia 365 U.S. 570 (1961).
67. *See Nix*, 475 U.S. at 166. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3; Freedman, *supra* note 23.
68. *See Nix*, 475 U.S. at 168. The Court concluded:

> [T]he legal profession has accepted that an attorney's ethical duty to advance the interest of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically insures that the client may not use false evidence.

Chief Judge Burger has advocated that an attorney's obligation to the court's "search for truth" is dominant over his obligation to his client, particularly when the client is intending perjury. *See* Burger, *supra* note 23.

conduct.[69] Citing the Model Rules of Professional Conduct, the Court opined that an attorney's first duty is to attempt to dissuade his client from committing perjury.[70] If unsuccessful, the attorney should advise the trial judge of the defendant's attempt to commit perjury and withdraw from the case.[71] The Court concluded that, if an attorney's conduct falls within the codes of professional norms, there can be no deprivation of effective assistance of counsel under the sixth

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69. *Nix*, 475 U.S. at 166-67 ("nor should any lawyer render any service or advice involving disloyalty to the law. . . . He must . . . observe and advise his client to observe the statute of law") (quoting the first Canons of Professional Ethics Canon 32 (1908)); *see also* Canons of Professional Ethics Canon 37 (1982) ("The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect."). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-102 Representing a Client Within the Bounds of the Law.

A. In his representation of a client, a lawyer shall not:

* * *

(4) Knowingly use perjured testimony or false evidence.

* * *

(7) Counsel or assist his client in conduct that the lawyerknows to be illegal or fraudulent.

* * *

B. A lawyer who receives information clearly establishing that:

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

See also ABA Model Rules of Professional Conduct

Rule 3.3 (1983) Candor toward the Tribunal

a. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * *

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

c. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

* * *

See also Model Rule of Professional Conduct Rule 3.3 comment (1983).

70. *See Nix*, 475 U.S. at 169. The Court viewed *Nix* as a case in which the attorney successfully dissuaded his client from committing perjury. *Id.* at 172. *See also* Model Rules, rule 3.3, *supra* note 69; Wolfram, *supra* note 23, at 846.

71. *See Nix*, 475 U.S. at 169-70. Both the Model Rules and the Rules of Professional Conduct sanction disclosure of the perjury and withdrawal from the case. *See* Model Rules of Professional Conduct, Rule 3.3(a)(4) & Comment (1983); Model Rules of Professional Conduct DR 2-110(B)(2), (C)(1)(C), (2), DR 7-102(A)(4) & (7) (1980).

amendment.[72]

Critical of the majority opinion, the four-judge concurrence did not examine the attorney's conduct.[73] Instead, the concurrence relied upon the second prong of the *Strickland* two prong test and held that the defendant failed to show any cognizable prejudice.[74] The concurrence reasoned that the defendant's claim relied upon the belief that, if he had been allowed to testify falsely, he would have been acquitted.[75] The concurrence, however, concluded that withholding false testimony could not detract from the reliability of a trial because a defendant's right to testify does not extend to perjured testimony.[76] Thus, the defendant was attempting to claim a right the law did not recognize.[77] Consequently, the defendant was not denied effective assistance of counsel because he suffered no prejudice.[78]

Nix expands the *Strickland* test for effective assistance of counsel in three ways. First, the divergent approaches used by the majority and concurrence implicitly suggest that trial courts may choose which prong of the *Strickland* test to apply. The concurrence pointed out that under *Strickland*, claims should be disposed of on grounds of insufficient prejudice whenever possible.[79] The majority, however, focused primarily upon whether the attorney's conduct was reasonable.[80] Following the majority's interpretation, courts can examine more readily the conduct of an attorney in specific circumstances, rather than limiting their decision to whether the defendant suffered prejudice. These decisions should provide more guidance to practitioners and trial courts in their efforts to ensure a fair trial for defendants. Thus, the majority's analysis provides

72. *See Nix*, 475 U.S. at 175. Although the Court speaks in terms of codes of ethics, the majority appears most persuaded by the more recent Model Rules of Professional Conduct. *Id.* at 170 n.6. The concurring opinion claims that the majority opinion effectively constitutionalizes the code of ethics regarding this matter and that each situation requires specific actions which cannot be generalized in any code of conduct. *Id.* at 177 (Brennan concurring). Nevertheless, the majority states that it is not constitutionalizing any code of ethics. Furthermore, conduct that is acceptable under the sixth amendment is broader than the requirements of ethical standards. Thus, a breach of an ethical standard is not necessarily a denial of effective assistance of counsel. *Id.* at 165.

73. *See Nix*, 475 U.S. at 177. The concurring Justices did not believe a federal habeas corpus case was the proper forum in which to resolve the attorney dilemma of effective assistance of a client intending perjury. *Id.* at 177-78. In this regard, the concurrence was in agreement with the Eighth Circuit's approach in *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

74. *Id.* at 186-87. The concurrence suggests that under *Strickland*, the second prong — prejudice — should be considered first. *Id.* at 184.

75. *Id.* at 186.

76. *Id.* at 185-86. *See* Harris v. New York, 401 U.S. 222 (1971).

77. *Nix*, 475 U.S. at 186.

78. *Id.* at 186-87. Because the prejudice was not proved, the concurrence found no reason to consider the attorney's conduct. *Id.* at 188. *See supra* note 44-49 and accompanying text.

79. *Nix*, 475 U.S. at 184.

80. *Id.* at 165-75.

greater guidance for determining the proper conduct for an attorney who is found with a difficult ethical dilemma.[81]

Second, the majority's strong reliance upon the professional codes of ethics suggests that such codes may be the sole basis for rejecting an ineffective assistance of counsel claim.[82] The *Strickland* Court characterized the professional codes of ethics as "only guides" in determining what is reasonable attorney conduct.[83] Nevertheless, the majority rested its opinion upon the canons of ethics and current rules of professional conduct.[84] Specifically, the Court concluded that, if an attorney has not breached a recognized professional duty, there can be no deprivation of the defendant's right to effective assistance of counsel.[85] Using this reasoning, the Court avoids the anomoly that an attorney could conceivably render *ethical* assistance of counsel, but not *effective* assistance of counsel.[86] Consequently, professional codes of ethics provide more than a mere relevant factor in determining reasonable conduct: they provide the determining factor for evaluating the merits of an ineffective assistance of counsel claim.[87]

Third, the concurring opinion's application of the prejudice prong expands the *Strickland* test by requiring proof that a right be violated.[88] The concurrence suggested that a defendant is not prejudiced unless he can prove that he was deprived of a right. Under *Strickland*, the prejudice prong was satisfied if the outcome of the trial would have been different but for the attorney's conduct.[89] The concurring opinion, however, reasoned that, because the defendant had no right to testify falsely, his inability to do so could not have prejudiced his case.[90] Under this reasoning, a defendant intending perjury could never show prejudice. Also, proof that the attorney acted unreasonably by preventing the defendant from testifying falsely would have been irrelevant because the

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81. *Compare Nix*, 475 U.S. at 169-70 (an attorney may attempt to dissuade his client from testifying falsely, inform the court of the perjury, withdraw from the case; but an attorney may not passively tolerate any act of perjury) *with Nix*, 475 U.S. at 177 (Blackmun, J., concurring) ("How an attorney ought to act when faced with a client who intends to commit perjury at trial" ought not be considered in a federal habeas corpus case). The Court was in complete agreement regarding what constitutes a conflict of interest under *Strickland*. The Court determined that a claim by a criminal defendant intending to commit perjury that a conflict of interest exists between his attorney's duty to his client and to the court is not the kind of conflict of interest envisioned by *Strickland*. *Nix*, 475 U.S. at 175-76, 187-88. *See supra* note 47 and accompanying text.

82. *See supra* notes 65-72 and accompanying text.

83. Strickland v. Washington, 466 U.S. 668, 688 (1984).

84. *See Nix*, 475 U.S. at 165-70.

85. *Id.* at 175.

86. *Contra* Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984).

87. *See Nix*, 475 U.S. at 175. An attorney who acts in accord with the ethical guidelines of the ABA will provide his client with effective assistance of counsel.

88. *See Id.* at 186.

89. *Strickland*, 466 U.S. at 674.

90. *See Nix*, 475 U.S. at 186-87.

defendant could not prove this conduct prejudiced the outcome of the trial.[91] Implicitly, the concurrence effectuates a *per se* rule that no prejudice is suffered when a defendant claims he was unable to testify falsely.

Nix is the first case in which the Supreme Court considered the dilemma an attorney faces when his client intends to commit perjury. The Court joins the majority of jurisdictions that reject challenges to an attorney's conduct[92] and puts to rest the argument made by a minority of courts that an attorney's duty to his client supersedes his duty to the court.[93]

Nevertheless, several uncertainties remain regarding the procedure an attorney may follow when a client announces his intention to commit perjury. Although the Court embraced most of the ABA guidelines, the Court rejected the ABA Defense Function Standard that provides for narrative testimony when the defendant's testimony is false.[94] In this regard, the Court has favored the Model Rules that prohibit attorneys from passively tolerating false testimony.[95] The Court concluded that most courts rejected this standard,[96] but apparently overlooked a number of courts that embraced the ABA Defense Function Standard when faced with facts similar to those in *Nix*.[97] According to the Court's reasoning, an attorney who follows the ABA Defense Function Standard is suborning perjury.[98] Consequently, *Nix* will discourage attorneys from permitting their clients to narrate testimony they know may be untruthful.

Nix also fails to address whether an attorney's conduct should depend upon whether the case is before a jury or judge.[99] Some courts distinguish between jury and non-jury cases. They contend that, once a judge in a non-jury trial is informed of an intended perjury, he no longer possesses the objectivity necessary to decide the case on the merits.[100] Notwithstanding, the Court did not consider what effect informing the judge would have had because the defendant was tried by a jury and the attorney successfully dissuaded him from testifying falsely. Consequently, this aspect of the client perjury dilemma remains unresolved.

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91. *See Strickland*, 466 U.S. at 697 (if defendant fails to meet either prong, his claim is lost).
92. *See, e.g.*, McKissick v. United States, 379 F.2d 754, 761 (5th Cir. 1967) (if defendant informs his attorney he has committed perjury, counsel must inform the court or else be subject to disciplinary action); State v. Henderson, 205 Kan. 231, 236, 468 P.2d 136, 140-41 (1970) (counsel's professional duty requires him to be honest with the court; confidentiality owed to his client does not extend to committing perjury).
93. *See* Freedman, *supra* note 23, at 1477.
94. *See Nix*, 475 U.S. at 170 n.6.
95. *Id.* at 170-71.
96. *Id.* at 170 n.6.
97. *See supra* notes 28-35 and accompanying text.
98. *Nix*, 475 U.S. at 169.
99. *See* Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978); Butler v. United States, 414 A.2d 844, 852 (D.C. 1980).
100. *See Lowery*, 575 F.2d at 730; *Butler*, 414 A.2d at 852. *See supra* note 34.

The concurrence feared that the majority's position will encourage attorneys to take on the role of judge and jury to determine whether their client's testimony is truthful.[101] This concern was unnecessary because the appellate state court determined that the defendant actually intended to commit perjury.[102] Because the attorney had good cause to know his client intended to commit perjury,[103] the question of what might establish good cause was never at issue. Thus, the concurring opinion's criticism was misplaced.

Nix expands the *Strickland* test by permitting courts to take a more active role in reviewing claims of ineffective assistance of counsel. The majority opinion in *Nix* embraced the ABA Model Rules as the proper standard of conduct for a defense attorney whose client intends to commit perjury. Under these rules, an attorney may never knowingly allow false testimony. Until the Court is confronted with a case dealing specifically with ethics in the profession, *Nix* provides guidance for both practitioners and judges who must determine the proper conduct for an attorney whose client announces an intention to commit perjury.

John M. Seeberger

101. *See Nix*, 475 U.S. at 188-89.
102. See *supra* note 6-9 and accompanying text.
103. *Id.* at 162-63.