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The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client

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THE PERJURIOUS DEFENDANT: A PROPOSED SOLUTION TO THE DEFENSE LAWYER'S CONFLICTING ETHICAL OBLIGATIONS TO THE COURT AND TO HIS CLIENT

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INTRODUCTION

In a criminal case, defense counsel has a dual function: officer of the court and trained legal advocate for his accused client. The roles conflict when the lawyer learns that his client intends to offer false or otherwise misleading testimony. How does the defense lawyer reconcile his obligations and duties to the court with those he owes to his client? Legal experts have offered various solutions, none of which have been enthusiastically accepted. The purpose of this article is to explore the nuances of, and offer a solution to, the ethical dilemma faced by a defense lawyer who is confronted with a client who intends to commit perjury.[1]

The American adversary system of criminal justice is not inquisitorial, but accusatory.[2] Evidence is presented to the judge or jury by trained advocates according to established rules, so that conflicting factual issues may be resolved and truth emerge as the final product.[3]

Chief Justice Burger, in a now well-known metaphor, has compared the American adversary system to a tripod or three-legged stool.[4] The judge, prosecutor, and defense lawyer form the three legs of the tripod. Each must be equally strong and must fulfill his separate duties if the tripod of justice is to maintain its stability and strength.[5] Adding strength to the tripod are the

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1. A lawyer's belief that his client intends to commit perjury must be based upon his independent investigation of the evidence or his client's statement of a clear intent to commit perjury. Mere inconsistency in the client's story is not sufficient to support the lawyer's belief. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 7.7, commentary at 276 (1st ed. 1971) [hereinafter cited as STANDARDS (1st ed.)].

2. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966); Miranda v. Arizona, 384 U.S. 436 (1966).

3. *See generally* United States v. Havens, 446 U.S. 620 (1980); Harris v. New York, 401 U.S. 222 (1971); Tehan v. Shott, 382 U.S. 406 (1966).

4. Address by Chief Justice Warren E. Burger, Second Plenary Session, American Bar Association Annual Meeting (July 16, 1971). *See generally* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

5. *See* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Erickson, *The History of the Tripod of Justice*, 64 MIL. L. REV. 79 (1974).

American Bar Association (ABA) Standards for Criminal Justice which relate to the functions of the trial judge, the prosecution (Prosecution Standards), and the defense (Defense Standards),[6] and the ABA Code of Professional Responsibility (Code of Professional Responsibility).[7]

In our legal system there are many deterrents to the introduction of false or improper evidence at trial. First, the ABA Prosecution Standards and the Code of Professional Responsibility emphasize that the prosecutor's function is to seek justice, not merely to convict.[8] Well-established precedent forecloses the prosecutor from using false or perjured testimony in the pursuit of a conviction.[9] Second, evidentiary and exclusionary rules screen out unreliable evidence and prevent overzealous law enforcement.[10] Finally, the Defense Standards classify intentional misrepresentation of fact or law to the court as unprofessional conduct.[11] The defense lawyer who knowingly uses false evidence deflects the truth finding process as much, if not more, than the overzealous police officer or prosecutor. The misconception that the defense lawyer is the alter ego and mouthpiece of the accused, speaking with the erudition of a lawyer but espousing only the views of his client, has been put to rest.[12]

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

7. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA CODE].

8. PROSECUTION STANDARDS, *supra* note 6, § 3-1.1(C); ABA CODE, *supra* note 7, DR 7-103(B). *See also* People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973); People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1973).

9. The United States Supreme Court has strongly condemned the prosecution for offering false evidence and has set aside convictions obtained by the use of evidence known to be false:

> More than 30 years ago this Court held the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney v. Holohan, 294 U.S. 103. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264; Pyle v. Kansas, 317 U.S. 213; *cf.* Alcorta v. Texas, 355 U.S. 28. There can be no retreat from that principle here.

Miller v. Pate, 386 U.S. 1, 7 (1967).

10. *See* United States v. Calandra, 414 U.S. 338 (1974); *see also* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

11. DEFENSE STANDARDS, *supra* note 6, § 4-7.5. When an accused client or attorney presents false documentary evidence or affidavits to the trier of fact, the courts are in general agreement in barring such evidence. *See, e.g.*, Utz v. State Bar, 21 Cal. 2d 100, 130 P.2d 377 (1942); *In re* Trimble, 226 Ind. 187, 79 N.E.2d 213 (1948); *In re* Ellis, 155 Kan. 894, 130 P.2d 564 (1942); *In re* Kenner, 178 La. 774, 152 So. 520 (1931); State v. Fisher, 103 Neb. 736, 174 N.W. 320 (1919). In addition, the signature of a lawyer on a pleading submitted to the court constitutes certification that, to the best of his information, knowledge, and belief, it is truthful. *See, e.g.*, COLO. R. CIV. P. 11. The criminal defense lawyer's duty not to use false testimony of persons other than the defendant is also well-established. *See, e.g.*, People v. Schultheis, No. 80-SC-299 (Colo. Oct. 19, 1981); Herbert v. United States, 340 A.2d 802, 804 (D.C. 1975); People v. Pike, 58 Cal. 2d 70, 96, 372 P.2d 656, 672, 22 Cal. Rptr. 664, 680 (1962). *See also* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 32 (1975).

12. DEFENSE STANDARDS, *supra* note 6, § 4-1.1, commentary at 4.9. Chief Justice Burger advocates this principle:

> The popular misconceptions about the functions of lawyers in criminal cases flow from many sources including misconduct of some lawyers themselves . . . and a misplaced sentimentality which has put some lawyers in doubt as to their function.
>
> One result of these fallacious and blurred conceptions of the advocate's function is the public image of the criminal lawyer as the servile 'mouthpiece' or the alter ego of the accused or one who does for the accused what the accused would do for himself if he had the legal skills . . . [This] is totally incompatible with the basic duty of a

The Defense Standards describe the role of the modern defense attorney as the accused's professional representative—counselor and advocate—but not alter ego.[13] The *Standards* stress establishment of a close lawyer-client relationship through private, confidential communications.[14] The *Standards* also specify that it is unprofessional conduct for the lawyer who is interviewing a client to encourage less than candid responses.[15] The attorney should probe for all legally relevant information without seeking to influence the response.[16]

The tension between the defense lawyer's role as an officer of the court and his duty to act as a zealous advocate and representative of his accused client creates the lawyer's dilemma. Any solution to this dilemma which fails to protect the integrity of the truth-finding function of the adversary system of justice is inadequate. This article will examine the different approaches to the ethical dilemma which confronts defense counsel when the client intends to commit perjury, and will propose a practical, ethically acceptable solution.

I. THE ETHICAL DILEMMA

A conflict between defense counsel's ethical obligations to the court and those to his client surfaces when the accused client insists upon testifying in his own defense and makes known his intent to commit perjury. The Defense Standards recognize that a defendant has certain rights—to decide the plea which should be entered, whether trial will be to a jury or to the court, and whether to testify in his own defense.[17] As a result, defense counsel can strongly advise the client not to testify, but cannot prevent the client from testifying and committing perjury.

On the other hand, after consulting with the client, defense counsel is the "captain of the ship" and thus the final arbiter for general trial tactics,

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lawyer as an officer of the court and contrary to the traditions and ethics of the legal profession.

A lawyer . . . advocates but does not identify with his client. The alter ego or mouthpiece school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, *i.e.*, the lawyer as an extension of the accused himself with a community of interest, motivation, and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected . . . and find no acceptance among honorable members of the bar.

The lawyer . . . should be . . . a professional advocate with a highly important but nonetheless limited function, *i.e.*, limited and circumscribed by the rules of the system and the ethics of the profession. At the trial stage his duty is to put the prosecution to its proof, to test the case against the accused, to insist that the procedural safeguards be followed and to put forward evidence which is valid, relevant and helpful to his client. On appeal his function is to point to trial errors, if such there be, and expound the applicable rules of law. In short, he is to 'put his client's best foot forward.' . . . Johnson v. United States, 360 F.2d 844, 846-47 (D.C. Cir. 1966) (Burger, J., concurring) (footnotes omitted).

13. DEFENSE STANDARDS, *supra* note 6, § 4-1.1.

14. *Id.* § 4-3.1.

15. *Id.* § 4-3.2.

16. *Id.*

17. *Id.* § 4-5.2(a). The United States Supreme Court has not specifically recognized a defendant's constitutional right to testify in his own behalf. *See* Robinson, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 554-61 (1978).

strategy, and witness selection.[18] If the attorney and client disagree on significant matters of trial tactics, the *Standards* direct the attorney to make a confidential record of the circumstances, his advice and reasons, and the conclusion reached.[19]

The perjury issue assumes ethical dimensions when defense counsel knows that his client intends to offer false testimony. The lawyer's dilemma arises from his duty as an officer of the court not to offer false testimony and his concomitant duty to his client to preserve confidential communications and to discover all relevant facts known to the accused in order to prepare an effective defense.[20] The first component of the dilemma is created by counsel's obligation to determine "all relevant facts known to the accused."[21] It is axiomatic that counsel is unable to prepare a good case if ignorant of essential facts; thus, the foundation for the requirement that defense counsel investigate and obtain all relevant facts is rooted in the sixth amendment's guarantee of effective assistance of counsel.[22] The lawyer's obligation to provide the client with an effective defense depends on the client's willingness to disclose all relevant facts, no matter how prejudicial or embarrassing. Accordingly, protecting client confidences is one of the attorney's most sacred obligations[23] and is "so essential to effective representation and to the proper functioning of the legal system that the obligation is protected by the attorney-client privilege."[24]

The second component of the dilemma is created by the lawyer's oath, which is uniformly required for admission to the bar. In Colorado, the prospective lawyer pledges: "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law. . . ."[25] Thereafter the lawyer is an officer of the court whose official conduct "should be characterized by candor."[26] Moreover, in most states, every lawyer is bound by the professional stan-

18. DEFENSE STANDARDS, *supra* note 6, § 4-5.2.

19. *Id.*

20. Professor Monroe H. Freedman has described the lawyer's position as a "trilemma." *See* M. FREEDMAN, *supra* note 11, at 27-42. Substantially the same material from Professor Freedman's book is reprinted in Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (1975).

21. M. FREEDMAN, *supra* note 11, at 27, (quoting STANDARDS (1st ed.), *supra* note 1, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.2(a)).

22. U.S. CONST. amend. VI provides: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The United States Supreme Court has interpreted this provision in several landmark cases. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). In some jurisdictions, the right to counsel has been interpreted 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. *See, e.g.*, State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

23. ABA CODE, *supra* note 7, Canon 4.

24. Robinson, *supra* note 17, at 548. *See also*, ABA CODE, *supra* note 7, EC 4-1.

25. COLO. R. CIV. P. 220.

26. M. FREEDMAN, *supra* note 11, at 27 (quoting ABA CANONS OF PROFESSIONAL ETHICS No. 22). *See also* ABA CODE, *supra* note 7, EC 9-6; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 287 (1953).

dards contained in the Code of Professional Responsibility,[27] which also forecloses the use of perjured testimony and protects a client's privileged communications to his lawyer.[28]

Therefore, defense counsel faces seriously conflicting obligations when he becomes aware that a client intends to commit perjury. Which obligation is paramount: The duty of candor to the court or the duty to preserve inviolate client confidences? If the defense attorney reveals to the court the client's intent to commit perjury, conviction and enhanced punishment are likely. On the other hand, if the defendant's intent is not revealed, the attorney participates in deceiving the court and the jury.

II. ETHICAL GUIDELINES FOR THE DEFENSE LAWYER

A. *ABA Code of Professional Responsibility*

The American Bar Association adopted the Code of Professional Responsibility in 1969, effective January 1, 1970.[29] Recognizing that the former Canons of Professional Ethics[30] were "generalizations designed for an earlier era,"[31] the Code of Professional Responsibility sought to provide "clear, peremptory rules in the critical areas relating most directly to the duty of lawyers to their clients and to the courts."[32] The Code's mixture of Canons, Disciplinary Rules, and Ethical Considerations,[33] however, often fails to prescribe a precise course of conduct for criminal lawyers.

Disciplinary Rule 7-102(A)(4) dictates that a lawyer shall not "knowingly use perjured testimony or false evidence."[34] While this provision, at

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27. Colorado has adopted the Code as the standard of professional conduct for lawyers licensed to practice in Colorado. COLO. R. CIV. P. 223.

28. *See* ABA CODE, *supra* note 7, DR 7-102(A)(4), DR 7-102(B)(1), DR 4-101.

29. ABA CODE, *supra* note 7, at Preface. The Code replaced the Canons of Professional Ethics adopted by the ABA in 1908. These Canons were originally derived from the first organized code of professional ethics, which was adopted in 1887 by the Alabama State Bar Association. The Alabama code, in turn, was based on a series of lectures by Judge George Sharswood at the University of Pennsylvania Law School in 1854. Sharswood's lectures emphasized an attorney's differing roles to the client, the public, the state, and to his "professional brethren." *See* Armstrong, *A Century of Legal Ethics*, 64 A.B.A.J. 1063 (1978).

30. ABA CANONS OF PROFESSIONAL ETHICS, as amended (1908).

31. ABA CODE, *supra* note 7, at Preface.

32. Armstrong, *supra* note 29, at 1069 (quoting from the 1965 annual address to the American Bar Association by former ABA President Lewis Powell).

33. The provisions of the Code are divided into Canons, Disciplinary Rules, and Ethical Considerations, each of which is described in the Code as follows:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of profesional conduct expected of lawyers in relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.

ABA CODE, *supra* note 7, at Preliminary Statement.

34. *Id.* DR 7-102(A)(4). Various court decisions have held that a rule of this type overrides

first glance, may seem to be unambiguous, the related Disciplinary Rules and Ethical Considerations do not indicate how defense counsel should comply with the rule if his client insists upon taking the witness stand and testifying falsely.[35] In fact, Ethical Consideration 7-26 complicates this ambiguity by expanding a lawyer's obligation not to use perjured testimony or evidence in situations where he "knows, *or from facts within his knowledge, should know*, that such testimony or evidence is false, fraudulent, or perjured."[36]

Other provisions of the Code provide no clarification. Disciplinary Rule 4-101 states the general rule prohibiting a lawyer from revealing the confidences and secrets of his client.[37] Subsection C of DR4-101, however, makes an important qualification: "A lawyer may reveal . . . the intention of his client to commit a crime and the information necessary to prevent the crime."[38]

Does perjury committed during the course of a client's testimony constitute a crime within the meaning of DR 4-101(C)? The plain meaning of the rule would indicate that perjury, since it is a crime, would fall within the exception. Professor Freedman, however, has argued to the contrary.[39] He bases his position on the extreme prejudice that can result from informing a judge of the defendant's intention to lie under oath, since that judge may later hear the case and sentence the defendant.[40] In addition, statutory enactments in some jurisdictions preclude prosecution for perjury when the defendant's false statement was a denial of his guilt at trial.[41] Regardless of whether perjury is a crime to which the rule applies, it is important to note that the exception is discretionary. It provides only that a lawyer *may* reveal the intentions of his clients to commit a crime; it does not dictate revelation.[42]

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a defendant's right to the effective assistance of counsel. *See, e.g.*, People v. Schultheis, 618 P.2d 701 (Colo. App. 1980), *rev'd*, No. 80-SC-299 (Colo. Oct. 19, 1981); *see also In re* Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969); People v. Pike, 58 Cal. 2d 70, 372 P.2d 656, 22 Cal. Rptr. 664 (1962); People v. Lewis, 75 Ill. App. 2d 560, 393 N.E.2d 1380 (1979); State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

35. M. FREEDMAN, *supra* note 11, at 29. *See also* Lawry, *Lying, Confidentiality and the Adversary System of Justice*, 1977 UTAH L. REV. 653; Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

36. ABA CODE, *supra* note 7, EC 7-26 (emphasis added.)

37. *Id.* DR 4-101(A), (B). The rule provides:

> Preservation of Confidences and Secrets of a Client
>
> (A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), 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 the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

See generally Morrell v. State, 575 P.2d 1200 (Alaska 1978); *In re* January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976).

38. *Id.* DR 4-101(C). *See generally* State v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977).

39. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

40. *Id.* at 1476-78.

41. *See, e.g.*, COLO. REV. STAT. § 18-8-507 (1973).

42. *But see* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 314 (1965) (interpreting ABA CANONS OF PROFESSIONAL ETHICS, (1908)), which indicates that a lawyer *must* dis-

Similarly, the rule relating to frauds upon the court fails to provide adequate guidance to a lawyer who discovers that his client has committed perjury:

> A lawyer who receives information clearly establishing that: [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.[43]

The straightforward requirement that attorneys report client frauds upon the court,[44] however, is also muddled by a qualification. Under DR 7-102(B)(1), if defense counsel learns of his client's fraud through "a privileged communication," he need not inform the court.[45] The Code, however, fails to provide any clear definition of which communications are so privileged.[46] Moreover, DR 4-101(C)(2) allows a lawyer to reveal confidences or secrets whenever "permitted" under the Disciplinary Rules.[47] It is uncertain, however, which confidences and secrets falls within the "privileged communication" clause in DR 7-102(B)(1), so as to permit their disclosure.[48]

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close even the confidences of his clients if "the facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed."

43. ABA CODE, *supra* note 7, DR 7-102(B)(1). *Cf.* AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT rule 11(d) (1971): "Subject to whatever qualifications may exist from the confidential privilege that exists between a lawyer and his client, the lawyer should expose without fear before the proper tribunals perjury, subornation of perjury and any professional misconduct."

44. The use of perjured testimony or false evidence is generally regarded as a fraud upon the court for the purposes of DR 7-102(B)(1). *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT rule 3.3 at 128 (Proposed Final Draft May 30, 1981) [hereinafter cited as ABA MODEL RULES].

45. ABA CODE, *supra* note 7, DR 7-102(B)(1). As originally adopted, the rule did not contain any exception; it was added in the 1974 amendments to the Code. Hence, it may be argued that the purpose of the original wording of the provision was to make disclosure mandatory in all situations. *See* M. FREEDMAN, *supra* note 11, at 20; A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 147 (1976). Further, the ABA STANDARDS, referring to the original draft of DR 7-102(B)(1), state that the provision "is construed as not embracing the giving of false testimony in a criminal case." STANDARDS (1st ed.), *supra* note 1, STANDARDS RELATING TO THE DEFENSE FUNCTION, Supplement at 18. Therefore, even before the amendment the clause did not apply to the criminal defense lawyer. *See* M. FREEDMAN, *supra* note 11, at 29. One ABA Opinion states that

> [t]he tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 341 (1975).

46. A. KAUFMAN, *supra* note 45, at 147.

47. ABA CODE, *supra* note 7, DR 4-101(C)(2).

48. A. KAUFMAN, *supra* note 45, at 147. "Confidences and secrets" are defined in ABA CODE, *supra* note 7, DR 4-101(A). *See also* note 37 *supra*. The ABA Committee on Ethics and Professional Responsibility has attempted to resolve this uncertainty through circular reasoning: "The balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communications' . . . as referring to those confidences . . . that are required to be preserved by DR 4-101." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 341 (1975).

B. *The Defense Standards Proposal*

Proposed section 4-7.7 of the Defense Standards[49] provides another answer to the ethical dilemma. When a lawyer discovers that his client intends to commit perjury, he must strongly advise his client not to offer the false or misleading testimony. If the defendant insists on taking the stand and testifying falsely, defense counsel must seek to withdraw from the case. The motion to withdraw should not specify the basis for withdrawal and the intended perjury should not be revealed to the court. If withdrawal is not feasible because trial is imminent or has commenced, or if the motion to withdraw is denied, defense counsel should limit direct examination of the defendant to those areas where counsel believes that the defendant's answers will not be perjurious. The lawyer should avoid direct examination on matters which defense counsel believes the defendant will offer perjurious testimony. He should merely ask the defendant if he wishes to make any additional statement concerning the case to the judge or jury. Defense counsel should then make a record, out of the presence of the jury, of the fact that his client is taking the stand against his advice.[50]

In an attempt to accommodate conflicting ethical duties, the Defense Standard properly stresses the lawyer's duty not to present known false testimony.[51] Nonetheless, the proposal presents significant difficulties.[52] The constitutional and practical deficiences of implementing section 4-7.7 have come to light in recent efforts to prepare a new code of ethical conduct.[53]

The defendant could assert the denial of the effective assistance of counsel[54] because the lawyer is prohibited from developing the perjured testimony on direct examination, or advocating acceptance of the testimony in closing argument. Similarly, the fact that a lawyer is subject to disciplinary sanctions for presenting false testimony forces the lawyer to take a position adverse to his client.[55]

In addition, section 4-7.7 presents several practical problems. First, if the trial is about to commence or has already begun, the court will in all likelihood deny the motion to withdraw.

Second, since the defense lawyer is prohibited from disclosing his reasons for withdrawal, denial of the motion is inevitable. Inquiry by the court

49. The 1980 version of the STANDARDS FOR CRIMINAL JUSTICE only contains a proposed standard relating to the perjurious defendant. The ABA House of Delegates has deferred adoption of proposed section 4-7.7 until the ABA Special Commission on Evaluation of Professional Standards reports its final recommendations. DEFENSE STANDARDS, *supra* note 6, § 4-7.7, editorial note at 4.95. The proposed standard, however, is substantially similar to the 1971 version. The most significant change is that the 1980 version adds a provision which states that "it is unprofessional conduct for the lawyer to lend aid to [the defendant's] perjury or use the perjured testimony." DEFENSE STANDARDS, *supra* note 6, § 4-7.7(c).

50. DEFENSE STANDARDS, *supra* note 6, § 4-7.7.

51. ABA CODE, *supra* note 7, DR 7-102(A)(4).

52. *See* Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978); Robinson, *supra* note 17.

53. *See* ABA MODEL RULES, *supra* note 44; AMERICAN LAWYERS CODE OF CONDUCT (Discussion Draft June 1980).

54. U.S. CONST. amend. VI.

55. Lowrey v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstettler, J., specially concurring); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976).

into the lawyer's motives for withdrawal forces the lawyer either to disregard his confidential relationship with his client or to stand mute. In either event, the court will conclude that the defendant intends to commit perjury and therefore, will consider the defendant's conduct an obstruction of justice. Upon conviction, an enhanced sentence can be anticipated.

Third, section 4-7.7 does not state what the defense lawyer should do if the prosecutor objects to defense counsel's narrative question.[56] Moreover, the prosecution is permitted to emphasize the defense lawyer's failure to develop the client's testimony. As a result, the focus of the trial shifts from a determination of the defendant's guilt or innocence of the crime charged, to an inquiry into the defendant's perjury.

Finally, if the lawyer is permitted to withdraw, the defendant may use the same tactic with new counsel to obtain unlimited continuances. The delays which could result from such a procedure are intolerable. After having been "educated" by his former lawyer's refusal to present perjured testimony, the defendant may begin his relationship with new counsel with a false statement of the facts. If this "truthful" testimony is all that is known, the new counsel is not involved in presenting known false evidence to the court. The ends of justice, however, are subverted because the defendant is still presenting false testimony.

A brief analysis of *Lowrey v. Cardwell*[57] highlights the deficiencies of section 4-7.7. The defendant in *Lowrey* was charged with first-degree murder. During a trial to the court, the defendant took the stand and offered what defense counsel believed to be perjured testimony. Counsel then requested a recess and, without stating his reasons, moved to withdraw. The motion was denied. Thereafter, counsel did not develop his client's testimony and did not rely on the testimony in closing argument. The trial judge found the defendant guilty of second-degree murder.

In reversing the defendant's conviction and remanding for a new trial, the court of appeals concluded that the defendant was denied a fair trial because defense counsel's action amounted to an unequivocal announcement to the judge that his client was testifying falsely. In a special concurrence, Judge Hufstettler stated that the defendant was denied the effective assistance of counsel:

> [W]hen defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to [the defendant's] interests as to deprive her of effective assistance of counsel. 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.[58]

The Defense Standards approach constitutes an effort to limit the effect

56. *See* M. FREEDMAN, *supra* note 11, at 37.

57. 575 F.2d 727 (9th Cir. 1978).

58. *Id.* at 732 (Hufstettler, J., specially concurring).

of perjured testimony. The flaws in section 4-7.7, however, compromise the integrity of the truth-finding process.

C. *The Proposed Model Rules of Professional Conduct*

The ABA Special Commission on Evaluation of Professional Standards is presently drafting a new set of ethical rules—the Model Rules of Professional Conduct (Model Rules).[59] The Commission, commonly known as the Kutak Commission,[60] was created in 1977 after the ABA Board of Governors accepted the recommendation of the late President William B. Spann, Jr., to "thoroughly and systematically rethink not only the Code of Professional Responsibility, but also the entire range of issues in ethical lawyering."[61] The fourth draft of the Model Rules is now being considered;[62] its approach differs markedly from that of former codes. Various social, economic, and technological changes in the legal system during the past decade, which are reflected in such areas as lawyer advertising and specialization, have caused the Commission to recognize the need for more definitive rules. To reach that end, the Commission has taken "the underlying structural thrust of the Code of Professional Responsibility—its bifurcation of disciplinary rules and ethical considerations—to its next logical step by drafting rules that are the foundation of good professional conduct. . . ."[63]

In approaching the lawyer's dilemma, the Model Rules identify the need for the attorney, as an advocate, to insure candor to the tribunal.[64] Although the Model Rules recognize that a criminal accused has a right to the assistance of an advocate, a right to testify in his own defense, and a right of confidential communication with counsel,[65] the Kutak Commission maintains that an accused should not have a right to assistance of counsel in committing perjury.[66] In the Commission's view, the law imposes obligations and restraints on lawyers which may conflict with the client's ultimate objectives.[67] Therefore, the Commission asserts that an advocate has an ethical and legal obligation to avoid implicating himself in the commission of

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59. ABA MODEL RULES, *supra* note 44.

60. Robert J. Kutak of the national firm of Kutak, Rock and Huie is chairman of the ABA Commission. Professor Geoffrey C. Hazard, Jr. of Yale Law School is the reporter.

61. Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 47 (1980).

62. This draft has not been approved by the ABA and does not presently constitute ABA policy.

63. Kutak, *supra* note 61, at 47.

64. ABA MODEL RULES, *supra* note 44, rule 3.3 at 124. The Model Rules recognize that the lawyer is an officer of the court and must always conduct himself in accordance with the law. "Given this duty, never, under any circumstances, may a lawyer knowingly proffer perjured testimony and thereby participate in a fraud against the court." Burger, *Standards of Conduct for Prosecution and Defense Personnel*, 5 AM. CRIM. L.Q. 11, 12 (1966). *See also* Frankel, *The Search for Truth*, 123 U. PA. L. REV. 1031 (1975).

65. ABA MODEL RULES, *supra* note 44, rule 3.3 at 126.

66. *Id.*

67. *Id.* at 129.

> Although a lawyer's paramount duty is to vigorously pursue the client's interests, "that duty must be met in conjunction with, rather than in opposition to, other professional obligations." Thorton v. United States, 357 A.2d 429 (D.C. App. 1976). "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The [lawyer] cannot serve two mas-

perjury or other falsification of evidence.[68] Such an obligation overrides the lawyer's duty to keep the client's revelations confidential.

Rule 3.3(a)(4) of the Model Rules provides that "a lawyer shall not knowingly . . . offer evidence that the lawyers 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."[69]

When a criminal defendant seeks to offer testimony that the lawyer knows to be false, the proposed rules provide that the attorney should attempt to dissuade the client from giving perjurious testimony.[70] If this confrontation occurs before trial and the dissuasion fails, the lawyer should seek to withdraw from the case.[71] The Commission recognizes, however, that withdrawal may not always be possible, "because trial is imminent or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available."[72] If the court does not permit withdrawal, the Model Rules require a lawyer to disclose his client's perjury to the court. "It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing."[73]

If the client controverts the lawyer's version of their communication after the lawyer's disclosure, and the issue of whether the client has committed perjury arises, the Commission recognizes that a mistrial may be unavoidable since the lawyer cannot represent the client in the resolution of the perjury issue.[74] If a client attempts to produce several mistrials in the same manner, the Model Rules provide that such actions are "a deliberate abuse of the right to counsel and as such a waiver of the right to further representation."[75]

Although the Model Rules envision that an advocate must disclose perjury in all instances when it occurs, Rule 3.3(a) provides that the obligation

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ters and the one [he has] undertaken to serve primarily is the court." *In re* Integration of the Nebraska Bar Ass'n, 133 Neb. 283, 275 N.W. 265, 268 (1937).

Id.

68. *Id.* at 126.

69. *Id.* at 124. Commentary to rule 3.3 compares this rule to the Code of Professional Responsibility:

> [T]he first sentence of this subparagraph is similar to DR 7-102(A)(4), which provides that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of Rule 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence.

Id. at 128.

70. *Id.* at 126.

71. *Id.*

72. *Id.*

73. *Id.* at 127. The Model Rules recognize that a practical time limit on the obligation to rectify the presentation of false evidence is required. *Id.* "The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." *Id.* Further, rule 1.6(b)(3) provides: "A lawyer may reveal [information relating to representation of a client] to the extent the lawyer believes necessary: . . . to rectify the consequences of a a client's criminal or fraudulent act in the commission of which the lawyer's services had been used. . . ." *Id.*, rule 1.6(b)(3), at 37. Rule 1.6(b)(3) modifies DR 7-102(B)(1) by making the disclosure of a fraud committed in the course of representation optional rather than mandatory.

74. *Id.* at 127.

75. *Id.*

is subordinate to constitutional requirements.[76] The qualification addresses the situation in some jurisdictions in which the right to counsel in criminal cases is construed to include a right that counsel not disclose perjury by the accused.[77] Further, the duty to disclose perjury under Model Rule 3.3(a) arises only when a lawyer "knows" that the offered evidence is false. The rule permits, but does not require, an attorney to refuse to offer evidence that he "reasonably believes is false."[78] This rule would presumably give the lawyer more discretion to refuse to offer testimony than the Code of Professional Responsibility presently allows.[79]

D. *The American Lawyer's Code of Conduct*

In 1979, at the request of the Association of Trial Lawyers of America (A.T.L.A.), a commission of the Roscoe Pound-American Trial Lawyers Foundation was formed to prepare a new code of conduct for lawyers.[80] Professor Freedman serves as the reporter for the project, and released the first discussion draft of the American Lawyer's Code of Conduct (Code of Conduct) for public comment in June of 1980.[81]

The general philosophy of the Code of Conduct is that the lawyer's primary duty is to the client; it rejects any proposal to weaken the protection of an accused client's rights, including the proposition that a lawyer should reveal a client's secrets "except in the most extreme circumstances."[82] The philosophy set forth in the Code of Conduct is an extension of Professor Freedman's assertion that the "lawyer must hold in strictest confidence the disclosures made by the client in the course of the professional relationship."[83] He concludes that, between confidentiality to the client and candor to the court, the former is significantly more important.[84] In his view, the lawyer has a duty to attempt to dissuade a client from committing perjury,[85] but if the defendant insists upon taking the witness stand to testify falsely, "the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury."[86] Consequently, the lawyer should

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76. *Id.*

77. *Id.* at 127. *See, e.g.*, Ohio v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

78. *See* ABA MODEL RULES, *supra* note 44, rule 3.3(c) at 124.

79. *Id.* at 128. *See* ABA CODE, *supra* note 7, DR 7-102(A)(4), which prohibits the lawyer from offering evidence the lawyer "knows" is false. A number of court decisions, however, support the approach of the Model Rules in this regard. *See In re* Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969); *In re* Atchley, 48 Cal. 2d 408, 310 P.2d 15 (1957); Thornton v. United States, 357 A.2d 429 (D.C. App.), *cert. denied*, 429 U.S. 1024 (1976); Illinois v. Brown, 54 Ill. 2d 21, 294 N.E.2d 285 (1973). The belief required by rule 3.3(c) is a "reasonable" one. See Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977) for the proposition that an unsubstantiated suspicion is insufficient. *See also* Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959).

80. AMERICAN LAWYER'S CODE OF CONDUCT ii (Discussion Draft June 1980) [hereinafter cited as CODE OF CONDUCT].

81. *Id.*

82. *Id.* at v.

83. M. FREEDMAN, *supra* note 11, at 27.

84. *Id.*

85. Freedman, *supra* note 39, at 1478.

86. *Id.* at 1477-78. Professor Freedman was subjected to personal attack after he presented

place the client on the stand, elicit testimony on direct examination, and then argue the testimony to the jury as skillfully as he possibly can.[87] In Professor Freedman's opinion, any contrary position would be inconsistent with "the maintenance of the adversary system, the presumption of innocence, the prosecutor's burden to prove guilt beyond a reasonable doubt, . . . and the obligation of confidentiality. . . ."[88]

Two alternative sets of rules regarding the lawyer-client confidential relationship are provided in the Code of Conduct.[89] Both are more protective of confidentiality than either the present Code of Professional Responsibility or the proposed ABA Model Rules of Professional Conduct. Section 1.2 of Alternative A provides:

> Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, except as provided in Rules 1.3 to 1.6, and Rule 6.5. (Rules 1.3 to 1.6 permit divulgence under compulsion of law; to prevent imminent danger to life; to avoid proceeding before a corrupted judge or juror; and to defend the lawyer or the lawyer's associates from formally instituted charges of misconduct. Rule 6.5 permits withdrawal in non-criminal cases when the client has induced the lawyer to act through material misrepresentation, even though withdrawal might indirectly divulge a confidence.).[90]

Alternative A prohibits using a client's confidence in a way detrimental to the interests of the client. In all instances in the Code of Conduct, the interests of the client are determined by the client after having been counseled by the lawyer.[91] Further, Alternative A permits, but does not require, divulgence of a client's confidences in certain situations, but rejects the previously recognized exception which permits lawyers to violate confidentiality to collect an unpaid fee.[92] In addition, if there has been inadequate opportunity for consultation with the client, the Code of Conduct provides that "the lawyer should act in accordance with the lawyer's reasonable understanding of what the client would perceive to be in the client's interest."[93]

Alternative B is even more protective of confidentiality between lawyer and client:

> Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, as the client per-

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the substance of this position in a paper to the Criminal Trial Institute of the District of Columbia. Several judges complained to the Committee on Admissions and Grievances of the District Court of the District of Columbia, urging that disciplinary action be taken against him. After four months of proceedings, the committee announced its decision to "proceed no further in the matter." Robinson, *supra* note 17, at 552 n.52.

87. *See* Robinson, *supra* note 17, at 552. *See also* M. FREEDMAN, *supra* note 11, at 31.

88. Freedman, *supra* note 39, at 1482.

89. CODE OF CONDUCT, *supra* note 80, § 1.2.

90. *Id.*

91. *Id.* at 106. *See also id.* §§ 2.1, 3.1, 3.2, and Preamble at 4.

92. *Id.* at 106. The Code of Conduct claims that the reason for such an exception—the lawyer's financial interest—"is not sufficiently weighty to justify impairing confidentiality." *Id.* *See also* ABA CODE, *supra* note 7, at DR 4-101(C)(4).

93. CODE OF CONDUCT, *supra* note 80, at 103.

> ceives them, or as the lawyer reasonably understands the client to perceive them if there is inadequate opportunity for consultation.[94]

Neither alternative permits divulging a client's confidence in cases of future or continuing crimes.[95] In fact, under the Code of Conduct, a disciplinary violation is committed if an attorney refrains from presenting a client's false testimony in the ordinary manner, or refrains from using that testimony in summation to the jury.[96]

A major objection to the Code of Conduct is that the obligation of confidentiality should not apply to a client's statement that he intends to commit perjury. The attorney-client privilege has not historically extended to the client who seeks legal assistance in the commission of a future crime.[97] Further, the position espoused by Professor Freedman is a "significant extension and corruption of the defense attorney's role,"[98] since it encourages an attorney to actively assist in presenting known perjured testimony. This role had been summarily rejected in the first edition of the Defense Standards:

> It has even been suggested, but universally rejected by the legal profession, that a lawyer may be excused for acquiescing in the use of known perjured testimony on the transparently spurious thesis that the principle of confidentiality requires this. While no honorable lawyer would accept this notion and every experienced advocate can see its basic fallacy as a matter of tactics apart from morality and law, the mere advocacy of such fraud demeans the profession and tends to drag it to the level of gangsters and their 'mouthpiece' lawyers in the public eye. That this concept is universally repudiated by ethical lawyers does not fully repair the gross disservice done by the few unscrupulous enough to practice it.[99]

In this regard, the approach to the client-perjury issue recommended by the American Lawyer's Code of Conduct does not adequately address the lawyer's obligation to insure candor to the court.

III. A PROPOSED SOLUTION

The Defense Standards suggest that every jurisdiction establish an Advisory Council of eminent trial lawyers to assist attorneys in resolving ethical questions:

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94. *Id.*

95. But rule 3.6 of the Code of Conduct states: "[a] lawyer shall not knowingly participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment." Therefore, although an attorney may not "knowingly participate" in creating perjured testimony, if the perjured testimony is a result of the client's decision, the attorney does not commit a disciplinary violation by developing the client's direct testimony and arguing it to the jury. *Id.* at 110, Illustrative Case 1(j).

96. *See id.* at 109, Illustrative Case 1(i).

97. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 95 (2d ed. 1972); Robinson, *supra* note 17, at 547 n.10.

98. Lefstein, *supra* note 52, at 674. There is, however, some evidence that practicing attorneys favor Professor Freedman's approach. *Id.* at 675.

99. STANDARDS (1st ed.), *supra* note 1, STANDARDS RELATING TO THE DEFENSE FUNCTION, at 142.

> Advisory councils on professional conduct
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> (a) In every jurisdiction an advisory body of lawyers selected for their experience, integrity, and standing at the trial bar should be established as an advisory council on problems of professional conduct in criminal cases. This council should provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in criminal cases.
>
> (b) Communications between a lawyer and such an advisory council should have the same privilege for protection of the client's confidences as exists between lawyer and client. The council should be bound by statute or rule of court in the same manner as a lawyer is bound not to reveal any disclosure of the client except
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> (i) if the client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council, and
>
> (ii) if the lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.[100]

To date, no jurisdiction has adopted the standard relating to Advisory Councils.[101] The concept, however, can be used to reach a practical and ethically sound solution to the lawyer's dilemma.[102]

Under the Advisory Council concept, when defense counsel learns, prior to trial, that his client intends to commit perjury, he must submit a written statement to the Council, documenting to the extent possible the facts which establish the basis for the conclusion that the accused client intends to offer false testimony. The statement should also set forth the efforts which defense counsel has made to persuade the client not to testify falsely. If the Council determines that the written statement substantiates the lawyer's belief that his client intends to commit perjury, the Council then shall recommend to the court that the lawyer be allowed to withdraw. The Council's recommendation should appear on the outside of a sealed file which contains a documented and complete record of the Advisory Council's proceedings. The file is then delivered to the court. If the Advisory Council recommended that the lawyer be permitted to withdraw, the court must grant the motion and advise the defendant regarding subsequent procedures and that the sealed materials may be used for impeachment at any subsequent trial. Thereafter, the defendant has a new right to appointed or hired counsel.[103]

If the defendant elects to adhere to the same version of the facts, his new

100. DEFENSE STANDARDS, *supra* note 6, at 4-1.4. The Advisory Council idea is borrowed from England, where a somewhat similar body has existed for some years. *See* R. WALKER & M. WALKER, THE ENGLISH LEGAL SYSTEM 226 (4th ed. 1976). *See also* Hoolihan, *Ethical Standards for Defence Counsel*, STUDIES IN CRIM. L. & PROC. (Canadian Bar Association 1973); Schroeder, *Some Ethical Problems in Criminal Law*, L.S.U.C. Special Lectures 87 (1963).

101. DEFENSE STANDARDS, *supra* note 6, at 4-1.4, commentary at 4.18.

102. Ideally, an Advisory Council should be established in each judicial district within the state.

103. The Advisory Councils will advise lawyers on a broad range of ethical problems, such as threats by clients against his lawyer, conflicts of personality, and conflicts of interest. Therefore, the court will be unaware of the defendant's prior intention to commit perjury. At this juncture, it is only apparent that an irreconcilable conflict between the lawyer and his client mandates withdrawal.

counsel would have no basis for knowing that the defendant intends to commit perjury, and the case would proceed to trial. The Advisory Council's file would remain sealed unless the defendant elects to take the witness stand. At that point, the court is authorized to open the file and review its contents. If the file establishes that the defendant intended to commit perjury at his first trial, the contents would be disclosed to both prosecution and defense counsel. When the defendant testifies, the prosecution may use the information contained in the file for impeachment.[104] Defense counsel is permitted to fully develop his client's testimony on direct examination, and may advocate acceptance of his client's testimony in closing argument, because his client's credibility is for the jury to determine, and the attorney is not sponsoring testimony known to be false. The defendant's credibility, of course, will be weighed against his prior inconsistent statements to his former lawyer, which the prosecutor will use for impeachment purposes. In this way, the truth-finding goal of the adversary system is not compromised.[105]

If the new counsel discovers, prior to trial, that the defendant intends to commit perjury, he must also submit a written statement to the Advisory Council, documenting the facts which establish the proposed perjury. Upon receipt of a second file which recommends withdrawl, the court must open both files to determine if the defendant's intention to commit perjury is the basis for withdrawal in both cases. If such is the case, the court will not permit counsel to withdraw, and the defendant will be deemed to have waived his privilege to testify in his own behalf.[106] The defendant's privilege thus gives way so that the lawyer is not required to develop and argue known false testimony.[107] Such a procedure prevents use of the same ploy for unlimited continuances. The judge may also consider the mendacity of the defendant in sentencing.[108] Again, the truth-finding goal of the adversary system is not compromised because the defendant is prohibited from offering perjured testimony.

The ethical dilemma created by the perjurious defendant may also arise in another setting. If defense counsel does not learn of his client's intended perjury until trial is imminent or has commenced, he must still make a motion to withdraw under the Council system. Defense counsel cannot specify the reasons for his motion, but should request a brief recess to present the ethical dilemma to the Advisory Council. The trial court must grant the recess so that the Advisory Council procedure can be followed. If the Council recommends withdrawal, the trial court, under the doctrine of manifest

104. *See* Harris v. New York, 401 U.S. 222 (1971). Either the prosecution or the defense must then be permitted to call the first defense counsel as a witness, in order to preserve the defendant's right of confrontation under the sixth amendment. *See* California v. Green, 399 U.S. 149 (1970). Moreover, the admission of the first lawyer's statements contained in the file may be subject to a hearsay objection by the defendant.

105. *See* DEFENSE STANDARDS, *supra* note 6, at Introduction.

106. *Id.*

107. The lawyer vouches for the authenticity of the evidence he submits at trial. *See* C. MCCORMICK, *supra* note 97.

108. *See* United States v. Grayson, 438 U.S. 40 (1978).

necessity,[109] must grant defense counsel's motion to withdraw and declare a mistrial.

The establishment of an Advisory Council is within the rule-making power of the highest court of each state.[110] For example, in Colorado, the Supreme Court has both constitutional and statutory authority to promulgate rules governing practice and procedure in criminal cases.[111] The Defense Standards generally provide that the communications between a lawyer and the Advisory Council have the same privilege for the protection of the client's confidences as exists between the lawyer and client.[112] Therefore, the rule in each jurisdiction which creates an Advisory Council must also provide for a limited waiver of the attorney-client privilege to permit impeachment as a means of protecting the integrity of the truth-finding goal of the adversary system.[113] Consequently, a limited waiver of the attorney-client privilege is justified when the court is authorized to open the sealed file and reveal its contents to the prosecutor for impeachment purposes.[114]

It should be kept in mind that the lawyer's dilemma occurs infrequently in practice. Accordingly, the intricacies of the proposed solution are justified. The Advisory Council solution resolves the ethical dilemma which has been analyzed and reanalyzed so often.

IV. CONCLUSION

The common law adversary system as a means for ascertaining the truth of a criminal charge can survive only if both prosecution and defense counsel present reliable evidence to guide the trier of fact. Truth-finding is deflected whenever perjury is committed. As officers of the court, lawyers have a primary duty to preserve the integrity of the adversary system by preventing the court or jury from being misled by the presentation of false or perjured testimony. Even the attorney-client privilege must bend when the sanctity of the oath is disregarded by an accused client proferring false evidence. The obligations of defense counsel to the court and to his client are in direct conflict under the current ABA Code. The author's solution to the dilemma balances the ethical considerations in such a way that the lawyer is not forced to advocate the acceptance of perjured testimony. Perjury is exposed with the least possible invasion of the attorney-client privilege.

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109. *See* United States v. Jorn, 400 U.S. 470, 485 (1970); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

110. J. PARNESS & C. KORBAKES, A STUDY OF THE PROCEDURAL RULEMAKING POWER IN THE UNITED STATES (American Judicature Society 1973).

111. COLO. CONST. art. 6, § 21; COLO. REV. STAT. § 13-2-109 (1973).

112. DEFENSE STANDARDS, *supra* note 6, at 4-1.4, commentary at 4-1.8.

113. The attorney-client privilege is a substantive right. *See* COLO. REV. STAT. § 13-90-107(b) (1973). It is within the province of the judiciary, however, to determine the procedural limitations imposed on the privilege. *See, e.g.*, People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

114. The rule should be tightly drafted to prevent the disclosure of any privileged communications unrelated to the perjury between the client and lawyer or between the lawyer and the Advisory Council. Additionally, the rule should permit either the prosecutor or the defense lawyer to call the first defense lawyer who was confronted with the dilemma to testify as to the facts which were before the Advisory Council.