

1-1-1989

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Recommended Citation

Steven H. Goldberg, Heaven Help the Lawyer for A Civil Liar, 2 Geo. J. Legal Ethics 885 (1989), <http://digitalcommons.pace.edu/lawfaculty/85/>.

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Heaven Help the Lawyer for a Civil Liar

STEVEN H. GOLDBERG*

Heaven help the lawyer for a civil liar—no one else will. And do not waste your time worrying about criminal defense lawyers with lying clients. Their problems with client perjury are almost over.

It used to be the other way around. The civil trial lawyer could look to the American Bar Association's 1983 *Model Rules of Professional Conduct* (*Model Rules*) for clear instruction. Model Rule 3.3, Candor Toward the Tribunal,¹ and specifically, subsection 3.3(a)(4) prohibited the civil trial lawyer from offering evidence the lawyer knew to be false and required the lawyer to take reasonable remedial measures upon discovery that one of the lawyer's witnesses committed perjury. If no other remedy would nullify the effect of the perjury, the lawyer was required to reveal confidential information otherwise protected by Model Rule 1.6.² In civil litigation, the Model

* Associate Dean, University of Minnesota School of Law. I am indebted to my colleagues, Victor Kramer and John Matheson, for their support and for their comments on an earlier draft of this essay. Carol Rieger, a talented civil trial lawyer at Lindquist & Venum in Minneapolis, and Professor Frances S. Fendler of the University of Arkansas at Little Rock Law School, offered perceptive criticisms, for which I am grateful. I owe a special debt to Professor Geoffrey C. Hazard, Jr., Sterling Professor of Law at the Yale Law School, and reporter for the Kutak Commission, who was gracious in his willingness to review this article about an important part of that Commission's work — Model Rule 3.3. Each of the individuals mentioned identified things I had missed and errors I had made. They have not, necessarily, approved of my conclusions nor are they responsible for the errors and opinions that remain.

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983)(hereinafter cited as MODEL RULES). Rule 3.3 reads as follows:

- (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;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (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.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Id.

2. MODEL RULES Rule 3.3(b). Rule 3.3(b) states that "(t)he duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of infor-

Rule left the trial lawyer free to choose from a smorgasbord of reasonable remedial measures to nullify client perjury, without violating a client confidence or becoming the unofficial prosecutor of a perjury charge. The criminal defense lawyer, by contrast, was confused by a quarter century of conflicting advice from the great constitutional debate about the proper response when faced with potential client perjury³ and by a comment to Model Rule 3.3 that confessed uncertainty about whether the candor rule applied in the criminal practice.⁴ The criminal defense lawyer seemingly could not make a move without violating either the client's confidence and the client's constitutional right to present a defense on the one hand, or the lawyer's obligation to the truth, as an officer of the court, on the other.

In April of 1987, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 87-353.⁵ Influenced by the problem of a criminal defendant's potential perjury, as discussed in *Nix v. Whiteside*,⁶ the Formal Opinion focuses on subsection 3.3(a)(2)⁷ of Model Rule 3.3, rather than on subsection 3.3(a)(4).⁸ As a re-

mation otherwise protected by Rule 1.6." Rule 1.6 addresses the confidentiality of information generally. See MODEL RULES Rule 1.6.

3. In a recent client perjury article, Dean Lefstein lists the new recruits to the "small army" of commentators on criminal defendant perjury. See Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, n.2 (1988). See also Maddox v. State, 613 S.W.2d 275, 279 & n.4 (Tex. Ct. App. 1981) (coining the "small army" term and providing an extensive bibliography of courts and commentators addressing the perjurious defendant issue). For a comprehensive treatment of client perjury, see Wolfram, *Client Perjury*, 50 SO. CAL. L. REV. 809 (1977).

4. MODEL RULES Rule 3.3 comment (stating that "[w]hether an advocate for a criminally accused has the same duty of disclosure has been intensely debated").

5. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987) (hereinafter cited as Formal Op. 353).

6. 475 U.S. 157 (1986).

7. MODEL RULES Rule 3.3(a)(2) provides that a lawyer cannot knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Formal Op. 353 echoes this language, stating that

...if the lawyer knows, from the client's clearly stated intention, that the client will testify falsely, and the lawyer cannot effectively withdraw from the representation, the lawyer must either limit the examination of the client to subjects on which the lawyer believes the client will testify truthfully; or if there are none, not permit the client to testify; or if this is not feasible, disclose the client's intention to testify falsely to the tribunal.

Formal Op. 353, *supra* note 5.

8. Rule 3.3(a)(4) stipulates that a lawyer may not knowingly "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." Formal Opinions of the Standing Committee, though no more binding on states and courts than are the *Model Rules*, are often as influential as the *Model Rules* in shaping the ethics of the legal profession. The Supreme Court of the United States considers the ethical positions of the organized bar to be guidelines for defining effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 688, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .").

sult, the Opinion advises all lawyers — civil and criminal — who know that their clients will lie to the jury, to “disclose the client’s intention to testify falsely to the tribunal,”⁹ unless they can withdraw from the representation or prohibit the prospective lie.¹⁰ It advises lawyers whose clients have already committed perjury to “persuade the client to rectify the perjury [or] disclose the client’s perjury to the tribunal.”¹¹

The Formal Opinion takes away the civil trial lawyer’s flexibility in choosing an appropriate remedy after a witness has offered material false evidence and requires disclosure of a civil client’s intention to lie, even under circumstances in which the lawyer does not intend to offer the client’s testimony. By deciding that Model Rule 3.3 applies in criminal cases, the Formal Opinion purports to resolve the dilemma that has deviled criminal defense lawyers for more than twenty years.¹² It prescribes a course of conduct, however, that may not solve the problem for the adversary system created by a lying criminal defendant.

The interpretation of Model Rule 3.3 in Formal Opinion 87-353 is the profession’s latest and potentially most dangerous attempt to resolve the client perjury problems by concentrating on the criminal defendant who is willing to lie to the jury and feels compelled to tell the lawyer about it ahead of time. Its conclusion that subsection 3.3(a)(2) applies to lawyers presenting evidence on the merits to the trier of fact misconstrues Model Rule 3.3 and carries the potential for disastrous results on three levels. As a matter of theory, the Opinion changes the delicate balance between duty to client and duty to court that defines our adversary dispute resolution system and that separates it from the inquisitorial model. As a matter of practice, the Opinion removes useful options from civil lawyers whose clients may lie, without any corresponding benefit to the validity of adversary justice results.¹³ As a matter of interpretation for all of the *Model Rules of Professional Conduct*, the Opinion threatens the meaning and advice of Model Rules 1.2(d)¹⁴ & (e)¹⁵, 3.4(a)¹⁶ & (b)¹⁷, 4.1(b)¹⁸, 8.3¹⁹, and 8.4(a)²⁰.

9. Formal Op. 353, *supra* note 5.

10. *Id.*

11. *Id.* Formal Op. 353, *supra* note 5, states:

If, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client’s perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation.

12. See Lefstein, *supra* note 4, for a discussion of the problems remaining for the criminal defense lawyer after *Nix v. Whiteside*, 475 U.S. 157 (1986) and the issuance of Formal Opinion 87-353.

13. Formal Opinion 87-353 may unnecessarily restrict remedial possibilities for criminal defense lawyers as well. This essay, however, is primarily concerned with the problems of civil lawyers and considers the criminal defense lawyer’s problems only incidentally.

14. MODEL RULES Rule 1.2(d).

15. MODEL RULES Rule 1.2(e).

I. MODEL RULE 3.3—A MINOR REVOLUTION

Model Rule 3.3, Candor Toward the Tribunal,²¹ was at the heart of the profession's debate over a new ethics code and is the centerpiece of the 1983 *Model Rules of Professional Conduct*. The organized bar finally and explicitly decided that an adversary system of dispute resolution could operate effectively even if the obligations of the lawyer as an officer of the court were increased at the expense of the lawyer's single-minded attention to the interests of the client.²²

Model Rule 3.3 addresses all aspects of a lawyer's duty of candor toward the tribunal and recognizes that the lawyer has a different role with respect to the tribunal as a forum²³ than with respect to the trier of fact. It requires the lawyer, as the representor of information to the tribunal as forum, to be accurate and complete. By contrast, it requires the lawyer, as presenter of evidence to the trier of fact, to be only accurate—leaving the problems of completeness to cross examination and to the adversary's presentation. These differing obligations are clear from the text, the order, and the context of the Rule.

The first section of Model Rule 3.3—section 3.3(a)—contains all of the

16. MODEL RULES Rule 3.4(a).

17. MODEL RULES Rule 3.4(b).

18. MODEL RULES Rule 4.1(b).

19. MODEL RULES Rule 8.3.

20. MODEL RULES Rule 8.4(a).

21. MODEL RULES Rule 3.3.

22. In adopting Rule 3.3, the organized bar reversed the rule of the 1969 *Model Code of Professional Responsibility*, as amended in 1974, which reflected the view that fidelity to client confidences was a superior value to obligations of candor to the tribunal in the adversary system. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1974), which compels a lawyer to disclose fraud perpetrated upon a tribunal "except when the information is protected as a privileged communication" (emphasis added).

Before 1969, the bar was either ambivalent or unclear about the relative importance of the two values. Canon 41, in a general way, admonished a lawyer to warn others about fraud. See AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, (hereinafter cited as ABA CANONS), Canon 41 (1908) (stating that a lawyer who knows "some fraud or deception has been practiced" in the case must first "advise his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps") but the opinions interpreting it were inconsistent, at best.

23. "Tribunal as forum" is here used to describe the role of the court in making decisions on issues other than matters exclusively within the jurisdiction of the trier of fact. The lawyer's representation in that circumstance may be as varying as a factual assertion or presentation of a witness upon which a pretrial motion depends, an assertion about the availability or even the name of a witness called at trial, or a recitation of the state of the controlling law in the jurisdiction. Although the distinction between matters for the court and matters for the trier of fact has long been a matter of controversy and change as between the two, the difference between the two is always clear from the perspective of the lawyer making a presentation. See generally Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147 (1890).

candor obligations of lawyers in adversary proceedings.²⁴ The first three subsections—3.3(a)(1), (2) & (3)²⁵—describe the twin candor requirements of accuracy and completeness for a lawyer making representations to the tribunal as forum. Although the subsections are not limited to pre-trial matters, that is the context for most decisions by the tribunal as forum. Subsection 3.3(a)(1) contains the accuracy obligation, forbidding the lawyer as representor to lie to the tribunal about fact or law.²⁶ Subsections 3.3(a)(2) and 3.3(a)(3) are the obverse of subsection 3.3(a)(1) and contain the obligation to be complete. They require the lawyer to present all of the facts material to an issue before the tribunal as forum²⁷, and to cite all controlling legal precedent, even if the facts or law are harmful to the client's position.²⁸

Subsection 3.3(a)(4) addresses the lawyer as the presenter of evidence to the trier of fact and stands in sharp contrast to the first three subsections of Model Rule 3.3.²⁹ Where the first three subsections speak of “facts” and

24. See MODEL RULE 3.3(a) and *infra* notes 13a-20 and accompanying text. Sections 3.3(b) and (c) do not contain candor obligations and Section 3.3(d) does not apply to adversary proceedings.

Section 3.3(b) provides the context for the section 3.3(a) obligations. It sets a time limit on the obligations as the “conclusion of the proceeding” and proclaims these obligations superior to the confidentiality requirements of Model Rule 1.6. See MODEL RULES Rule 3.3(b).

Section 3.3(c) is not obligatory. It permits the lawyer, as presenter of evidence to the trier of fact, to “refuse to offer evidence that the lawyer believes is false.” See MODEL RULES Rule 3.3(c).

Section 3.3(d) considers *ex parte* matters. Unlike the lawyer presenting evidence through witnesses in an adversary setting, the lawyer making representations to a tribunal when the adversary is not present is obligated to present all material facts “which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” See MODEL RULES Rule 3.3(d).

25. MODEL RULES Rule 3.3(a)(1), (a)(2) & (a)(3).

26. Rule 3.3 reads:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal[.]

MODEL RULES Rule 3.3.

27. Rule 3.3(a)(2) reads:

- (a) A lawyer shall not knowingly:
 -
 - (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[.]

MODEL RULES Rule 3.3(a)(2).

28. Rule 3.3(a)(3) reads:

- (a) A lawyer shall not knowingly:
 -
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]

MODEL RULES Rule 3.3(a)(3).

29. Rule 3.3(a)(4) reads:

- (a) A lawyer shall not knowingly:
 -
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material

"law," subsection 3.3(a)(4) speaks only of "evidence."³⁰ Where the combination of the first three subsections requires a complete and accurate representation of material fact or controlling precedent, subsection 3.3(a)(4) requires only an accurate presentation of evidence.³¹ Subsection 3.3(a)(4) forbids a lawyer to knowingly "offer evidence that the lawyer knows to be false" and requires "reasonable remedial measures," if one of the lawyer's witnesses has "offered material evidence" and the lawyer "comes to know of its falsity."³²

The obligation to be complete that emerges from the combination of the first three subsections of Model Rule 3.3 is distinct not only from subsection 3.3(a)(4), but from every other candor obligation in the adversary system.³³ Borrowed from the inquisitorial system of cooperative rather than adversarial decision making, the lawyer's obligation to be complete is inconsistent with the adversarial assumption of presentations to and decisions by the trier of fact on the merits. The first three subsections of Model Rule 3.3, in contrast to those adversarial assumptions, exist to allow the tribunal as forum to perform its enormous management role in the present pre-trial dominated adversary system. It is possible for a litigant to gain outcome advantage from the operation of pre-trial system, but that is an unfortunate consequence, not the design, of the system. The system is designed to present an equitable preparation and forum for the presentation of the dispute on the merits to the trier of fact. The lawyer, as officer of that tribunal as forum, is therefore prohibited from advancing the client's procedural interests³⁴ at the cost of allowing the tribunal to be misled.

The lawyer presenting a case to a trier of fact, by contrast, is not required to put on all of the evidence of which the lawyer is aware. And the lawyer's witness need only provide accurate answers to the questions put by the interrogator and need not tell all that the witness knows. The adversarial system of evidence presentation assumes that one lawyer will not present all of the material facts. Adversarial cross-examination assumes that the witness will not present facts completely and may not present facts accurately.

The distinction between the lawyer who makes representations to the tribunal and the lawyer who presents evidence to the finder of fact provides the

evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

MODEL RULES Rule 3.3(a)(4).

30. *Id.*

31. *Id.*

32. *Id.*

33. The only parallel obligation to be complete is found in MODEL RULES Rule 3.3(d). It exists precisely because the *ex parte* hearing is not adversarial and the tribunal cannot depend upon the other side to either test the accuracy or to complete the presentation.

34. The term "procedural interests" is used to describe all of the tactical matters that fall short of being the stake that the client has in the presentation on the merits to the trier of fact.

structure and the content for Model Rule 3.3. Subsections 3.3(a)(1), (2) & (3)³⁵ speak of “material fact” and “law” for a “tribunal” and subsection 3.3(a)(4)³⁶ speaks only of “evidence” and makes no mention of “tribunal”³⁷, in order to maintain the distinction—the foundation for a dispute resolution system in which the adversary’s champion is also an officer of the court.

Model Rule 3.3 was adopted in 1983 with the intention that it describe the candor obligations for lawyers in both civil and criminal matters, though the drafters were aware that the constitutional criminal procedure issues dominating the client perjury dialogue had not been resolved.³⁸ They authorized, therefore, a comment to subsection 3.3(a)(4) that recognized the possibility that the criminal defendant’s rights to testify and to counsel might modify the application of subsection 3.3(a)(4) to criminal defense lawyers.³⁹

II. *NIX V. WHITESIDE*⁴⁰ AND FORMAL OPINION 87-353⁴¹: A CRIMINAL PROCEDURE PERSPECTIVE ON ETHICS

The profession has viewed the client perjury problem as one of constitutional criminal procedure, at least since Professor Monroe Freedman’s suggestion that criminal defense lawyers face a constitutional dilemma when they know their clients intend to lie to the jury.⁴² As a result of this constitutional dilemma, the client perjury dialogue has focused on the one-in-a-million criminal defendant who will lie to the jury but not to the lawyer — to the virtual exclusion of the overwhelming number of civil litigants who might stretch the truth on a regular basis in deposition or at trial. Without a similar constitutional claim to the right to testify or to the assistance of counsel, civil litigants have been treated as a lesser included category of criminal defendants by client perjury commentators. They have assumed that any solution that will work for the more difficult constitutional problem of the lying criminal defendant will work for all liars and their lawyers.⁴³

35. MODEL RULES Rule 3.3(a)(1), (a)(2) & (a)(3).

36. MODEL RULES Rule 3.3(a)(4).

37. *Id.* Note that Rule 3.3(d) provides that *ex parte* presentations follow the same pattern of “material fact” and “tribunal” as Rule 3.3(a)(2).

38. *See* MODEL RULE Rule 3.3 comment.

39. The comment to Rule 3.3 acknowledges that “the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.” *Id.*

40. 457 U.S. 157 (1986).

41. Formal Op. 353, *supra* note 5.

42. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Professor Freedman suggests that a constitutional problem arises when an attorney, fearing that his client will perjure himself, refuses to put the client on the stand. Freedman states that the client might appeal on the basis of a claim of “due process and denial of the right to counsel.” *Id.* at 1477.

43. On the issue of presenting a false case, Professor Subin observed that “civil lawyers ride the ethical coattails of the criminal lawyer. . . . If . . . the criminal lawyer should not be permitted to

The dialogue's concentration on the criminal defendant, combined with the uncertainty about the application of Model Rule 3.3 to the criminal defense lawyer, may explain why the ABA Standing Committee on Ethics and Professional Responsibility issued no opinion interpreting Model Rule 3.3 until four years after its adoption.⁴⁴ Despite the Rule's new understanding of the relationship between the often competing obligations of candor toward the tribunal and client confidences, and despite the existence of two Standing Committee opinions on candor that were apparently contrary to Model Rule 3.3,⁴⁵ the Committee did not comment on Model Rule 3.3 until after the Supreme Court of the United States suggested in dictum that a criminal defense lawyer may be under no constitutional compulsion to present the testimony of a criminal defendant, if the lawyer knows the defendant will commit perjury.⁴⁶

Emanuel Whiteside testified truthfully⁴⁷ after his lawyer threatened to divulge to the court and to the jury that his testimony was perjured.⁴⁸ The Supreme Court held that the lawyer's coercion of the truthful testimony did not constitute ineffective assistance of counsel under *Strickland v. Washing-*

impede . . . a truthful verdict . . . then similar claims by civil lawyers would be weaker still." Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 126 (1987).

44. See Formal Op. 353, *supra* note 5.

45. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (hereinafter cited as Formal Op. 287) (interpreting ABA Canons, advises that attorney for client in divorce action *may not* reveal to the court his client's perjury in securing divorce, when such perjury is revealed to him by the client after divorce is granted); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975) (hereinafter cited as Informal Op. 1314) (interpreting the 1969 *Model Code*, states that attorney has no duty to disclose client's perjury to court after it has occurred, since "the confidential privilege . . . must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud" by his client).

46. See 457 U.S. 157, 173. Dictum in the United States Supreme Court is often tomorrow's opinion. In this case, however, there is reason to believe that the dictum may not be followed. The important points of ethics and criminal procedure in the dictum were not raised, briefed, nor argued by the parties. In addition, Chief Justice Burger, who had a long-standing agenda on the issue, is no longer a member of the Court. Although commentators have varying views on the reach of *Nix v. Whiteside*, and on the likelihood that its dictum will become law, no one suggests that the court's description of the appropriate lawyer conduct is anything but dictum. Compare Lefstein, *supra* note 4, at 525 ("Counsel will . . . find it difficult to ignore . . . the Supreme Court's opinion in *Nix v. Whiteside*") with Freedman, *The Aftermath of Nix v. Whiteside: Slamming the Lid on Pandora's Box*, 23 CRIM. L. BULL. 25, 28-29 (1987) (noting efforts by the ABA and American Law Institute to avoid the *Nix* outcome) and Auerbach, *What Are Law Clerks For?—Comments on Nix v. Whiteside*, 23 SAN DIEGO L. REV. 979, 982 (1986) (arguing that rather than settling the matter, the Court in *Nix* merely "raised the issues that the Court saved for another day").

47. The Supreme Court accepted the Iowa Supreme Court's conclusion that Whiteside intended to commit perjury. 457 U.S. at 163. Dean Lefstein argues persuasively that the Iowa Supreme Court did not use an "actual knowledge" test in assessing the lawyer's state of mind. Lefstein, *supra* note 4, at 532. For a discussion of the appropriate meaning of "know" in the context of Model Rule 3.3, see *infra* text accompanying notes 88-95.

48. 475 U.S. 157, 161.

ton.⁴⁹ Although *Nix v. Whiteside*⁵⁰ did not raise the issue of whether it is constitutionally permissible for a lawyer or a tribunal to prohibit a potentially perjurious criminal defendant from testifying, the majority opinion suggests that a lawyer's assistance is not constitutionally ineffective, if the lawyer's threat of disclosure actually dissuades the client from testifying.⁵¹ Chief Justice Burger's majority opinion suggests that a lawyer is ethically obligated to disclose potential perjury to the tribunal⁵² and implies that the tribunal has power to prohibit a criminal defendant's testimony upon a finding that the defendant will testify falsely.⁵³

Justice Blackmun, joined in concurrence by Justices Brennan, Marshall, and Stevens, states that the problem of how a defense attorney ought to act when faced with a client who intends to commit perjury is a "thorny problem" not raised by the *Whiteside* case.⁵⁴ Justice Brennan, in a separate concurrence, chastises the majority for a gratuitous excursion into rules of ethical conduct over which it enjoys no jurisdiction.⁵⁵ The majority's description of the "correct response to a criminal client's suggestion that he will perjure himself," according to Justice Brennan, "is pure discourse without force of law."⁵⁶ He warns "[l]awyers, judges, bar associations, students and others [to] understand that the problem has not now been 'decided.'"⁵⁷

The Standing Committee began work on Formal Opinion 87-353⁵⁸ soon after the *Whiteside* decision. It rejected the narrow interpretation of *Whiteside*, that a lawyer's threat that produces truthful testimony is not ineffective assistance of counsel under *Strickland v. Washington*,⁵⁹ and adopted Chief

49. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

50. 475 U.S. 157 (1986).

51. *Id.* at 173. While Chief Justice Burger's wide ranging discourse on ethics and criminal procedure seems to approve a threat that compels a potential perjurer not to testify, at least one court actually faced with a defendant who did not testify reached a contrary judgement. See *United States v. Butts*, 630 F. Supp. 1145 (D. Me. 1986). The *Butts* Court held that the defendant's failure to testify as a result of counsel's prohibition of such testimony satisfies the prejudice prong of the test in *Strickland v. Washington*. *Id.* at 1148-49.

52. 475 U.S. 157.

53. Although concerned with what the lawyer, not the tribunal, may do, the Chief Justice observed that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*." 475 U.S. 157, 173. The necessary implication of the opinion is that the lawyer should tell the court about the proposed perjury so that the court can take action to prevent it. The due process problem with a tribunal excluding a witness is not a problem of criminal procedure, the focus of Chief Justice Burger's attention. It offends the historic purpose and nature of all jury trials. For a discussion of the authorities that hold that a tribunal may not prohibit a witness from testifying because of its own judgment that the witness will commit perjury, see *infra* text accompanying notes 54-70.

54. 475 U.S. 157, 178 (Blackmun, J., concurring).

55. *Id.* at 176-77 (Brennan, J., concurring).

56. *Id.* at 177.

57. *Id.*

58. Formal Op. 353, *supra* note 5.

59. 466 U.S. 668.

Justice Burger's expansive position.⁶⁰ The committee said that "the Supreme Court of the United States held in *Nix v. Whiteside*. . . that a criminal defendant is not entitled to the assistance of counsel in giving false testimony and that a lawyer who refuses such assistance. . . has not deprived the client of effective assistance of counsel."⁶¹

The Standing Committee took *Whiteside* to mean that there was no longer any constitutional impediment to applying Model Rule 3.3 to criminal defense lawyers; and it read the Model Rule to require disclosure of potential or completed client perjury. The Committee's interpretation of *Whiteside*, as a decision that the Constitution permits a lawyer to disclose a client's intended perjury and allows the tribunal to exclude the testimony on the basis of the lawyer's representation, should have liberated the client perjury dialogue from the tyranny of the criminal defense lawyer hypothetical. If the applicability of Model Rule 3.3 to the criminal defense lawyer was decided in *Whiteside*, the client perjury discussion should have moved on to the more important inquiry about the variety of ways in which a lawyer might meet the Model Rule 3.3 candor obligations in various litigation situations.

It did not work out that way. The ghostly figure of the criminal defense lawyer haunts the consideration of client perjury in Formal Opinion 87-353 to the exclusion of civil examples.⁶² The lack of civil examples may explain why the Formal Opinion does not explore the various lawyer roles contemplated by Model Rule 3.3 nor consider the possibility that subsection 3.3(a)(4) applies to all lawyers faced with the client perjury dilemma — including criminal defense lawyers — and that subsection 3.3(a)(2) disclosure applies only in those litigation situations that do not involve issues for the trier of fact.

Formal Opinion 87-353 interprets Model Rule 3.3 to impose an almost universal obligation of disclosure to the tribunal upon all trial lawyers faced with potential or completed client perjury, by concluding that the mandatory disclosure provision in subsection 3.3(a)(2)⁶³ applies to a lawyer presenting

60. Formal Op. 353, *supra* note 5.

61. *Id.*

62. The Standing Committee discussed and overruled two earlier and widely followed committee opinions that preferred criminal cases: Formal Op. 287, *supra* note 25 and Informal Op. 1314, *supra* note 25. Although Formal Op. 287 concerned discovered perjury in both a civil divorce and criminal sentencing, Formal Op. 353, *supra* note 5, did not consider the civil case as a matter of discovered perjury. The divorce perjury that had been relevant to the disclosure question in Formal Op. 287 was discovered after the "conclusion of the proceeding," thus putting it outside of the time limitation in Rule 3.3 (b) and, therefore, beyond consideration of the allocability of that Rule's remedy requirements. Although Informal Op. 1314 was not, by its terms, limited to criminal cases, the committee uses only criminal court examples for the problem raised in that opinion—prospective false testimony.

63. Model Rule 3.3 (a)(2) states that "[a] lawyer shall not knowingly fail to disclose a material

evidence to the trier of fact.⁶⁴ No other portion of the Model Rule mandates disclosure of facts in an adversary proceeding. The Standing Committee did not find conflict between subsection 3.3(a)(2), mandatory disclosure, and the subsection 3.3(a)(4) requirement of any “reasonable remedial measure” that will nullify the effect of false material evidence.⁶⁵ Indeed, the Committee proceeded to an analysis of whether subsection 3.3(a)(2) applies to client perjury precisely because it believed the two subsections complemented each other:

Rule 3.3(a)(2) and (4) complement each other. While (a)(4), itself, does not expressly require disclosure by the lawyer for the tribunal of the client’s false testimony after the lawyer has offered it and learns of its falsity, such disclosure will be the only “reasonable remedial [measure]” the lawyer will be able to take if the client is unwilling to rectify the perjury.⁶⁶

If the complementary view of the relationship between subsection 3.3(a)(2) and subsection 3.3(a)(4) is coincidentally correct for the criminal defense lawyer,⁶⁷ it is not correct for lawyers whose clients intend to or have lied in civil cases. The Formal Opinion’s attempt to clarify the client perjury dilemma for the criminal defense lawyer unwittingly produces unfortunate changes for the civil trial lawyer. Application of the subsection 3.3(a)(2) mandatory disclosure requirement to the lawyer presenting evidence to the trier of fact nullifies the remedial flexibility that subsection 3.3(a)(4) gives to the civil trial lawyer and abrogates the subsection 3.3(a)(4) limitation of their remedy requirement to those lawyers who have “offered material evidence” — two results that violate the basic tenet of construction that every word and phrase of a rule must be given effect.⁶⁸

A. SUBSECTION 3.3(A)(2): WRONG QUESTION, WRONG ANSWER

The failure of Formal Opinion 87-353 to identify a contradiction between subsection 3.3(a)(2) and subsection 3.3(a)(4) — on the assumption that the criminal model for client perjury would cover civil cases — is the same oversight made during the great constitutional debate over whether a criminal

fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.” MODEL RULES Rule 3.3(a)(2).

64. See Formal Op. 353, *supra* note 5.

65. *Id.*

66. *Id.*

67. Criminal defense lawyers may sometimes be in situations where disclosure is not the only reasonable remedial measure available. Indeed, disclosure to the tribunal may never be a reasonable remedy for any trial lawyer making a presentation to a trier of fact. See *infra* text accompanying footnotes 53-73.

68. See W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION Chapter 7 (1988).

defense lawyer must keep a client's perjury confidential.⁶⁹ Whatever may be the lot of the criminal defense lawyer whose client has constitutional control over the presentation of the case,⁷⁰ the civil trial lawyer who cannot persuade the client to rectify the perjury has "remedial measures" other than disclosure that are "reasonable" and that will ensure that perjury does not infect the adversary system result, without divulging the client's perjury or breaching the client's confidence. The civil lawyer can withdraw exhibits, stipulate to facts, withdraw an issue from jury consideration, agree to a new trial, accept remittitur, or engage in other after-evidence or after verdict activity that will nullify the perjury without disclosing a confidence or accusing a client of perjury.⁷¹ Further, the court in a civil case may direct a verdict against the client, enter a judgement notwithstanding the verdict, or order a new trial — actions unavailable to a criminal tribunal — and thus remove any need for the lawyer to remedy the client's perjury.⁷²

The Committee's conclusion that subsection 3.3(a)(2) applies to all client perjury — because the lawyer knows a material fact, the disclosure of which is necessary to avoid assisting the perjury — obligates the non-offering lawyer for the civil liar to disclose client perjury, even though the lawyer did not offer the client's testimony. Unlike the defense lawyer in a criminal case, the civil trial lawyer's client may be called to testify at a deposition or by the opponent for cross examination under the rules at trial. If the civil lawyer's client, when called to testify by the other side, tells a lie of which the lawyer is aware, the Committee's view of Model Rule 3.3 forces the lawyer to disclose the perjury to the tribunal. Presumably the same requirement of disclosure applies to a lawyer who appears at a deposition or trial for a non-party witness. Although Bentham might applaud such a change in the adversary

69. See *supra* text accompanying note 24.

70. To the extent the Committee's view of the criminal defense lawyer's lack of remedial options is correct, it is in part because the Constitution and the *Model Rules* give control over case presentation to the criminal defendant, personally, and in part because the tribunal has diminished power to manage and no power to decide criminal cases against a defendant. See *infra* text accompanying notes 96-100.

71. Model Rule 1.2 vests ultimate control over the "means" for achieving the client's "objectives" in the lawyer. See MODEL RULES Rule 1.2 comment ("a lawyer is not required to . . . employ means simply because a client may wish that the lawyer do so"). The lawyer must "consult" with his client, but need not obtain the client's agreement to the "means . . . to be pursued," except as to the acceptance of an offer to settle. By contrast, Rule 1.2 requires client consent to decisions about important "means" in a criminal trial, including client testimony.

72. Remedies other than disclosure to the tribunal in time to affect potential perjury provide the lawyer with a measure of flexibility because they allow time for the lawyer to be creative and persuasive with the client. This is particularly important in civil litigation, where the bulk of the testimony, and probably the perjury, are in deposition. The Formal Opinion 353, *supra* note 5, insistence on disclosure to the tribunal forecloses less drastic, but equally effective remedies and forces an issue that might not otherwise arise.

system,⁷³ if the drafters of Model Rule 3.3 intended such a broad attack on confidentiality and the attorney-client privilege, there is nothing in the commission drafts, the American Bar Association debates, or the comments to the Model Rules to suggest it. The drafters of subsection 3.3(a)(4) presented a vision of adversary justice in which the obligation to remedy false evidence rested solely with the offeror. Thus, a lawyer aware that a witness called by the opponent has told a lie, has no obligation to expose the witness,⁷⁴ particularly if it is the lawyer's client.

The criminal law assumption in Formal Opinion 87-353 may, also, account for its failure to attach any significance to the Model Rule's apparent description of different candor obligations for lawyers in different roles. The criminal prosecution is a particularly unfortunate vehicle for understanding the broad scope of Model Rule 3.3 and the limited applicability of its first three subsections. The criminal justice system, compared to civil litigation, rarely sees the lawyer as representor of information to the tribunal as forum. Criminal pre-trial matters, to the extent they exist, are usually mini-trials in which the tribunal hears evidence as a trier of fact and law on the merits of a constitutional issue. The lawyer is only rarely the source of information upon which the criminal tribunal will reach a constitutional decision and there are relatively few forum decisions to be made. Civil litigation, by contrast, is mainly pre-trial procedural wrangling over compelling discovery, Rule 11 violations, attorney disqualification, production of documents, and other procedural matters for which the tribunal makes a decision based upon information gathered more from the lawyers than from witnesses.⁷⁵ Had the committee a pre-trial example before it, with the lawyer as the major source of information for the tribunal, it might have realized that the candor obligations of subsections 3.3(a)(1), (2) & (3) are written mainly for that lawyer and not for the lawyer as presenter of evidence to the trier of fact.⁷⁶

The mandatory disclosure provision of subsection 3.3(a)(2) is not necessary for the Formal Opinion's conclusion that a lawyer must disclose a cli-

73. Jeremy Bentham opposed confidentiality and the attorney-client privilege. He believed they served no useful purpose and had no base in rationality. See J. BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 302-12 (1827). His view, though attractive to many, including this author, has never prevailed.

74. The lawyer probably would be a fool to cross examine such a witness and derelict in duty not to take advantage in closing argument of the other side's helpful presentation of evidence.

75. Summary judgment motions are, also, a large part of civil pre-trial practice. While the tribunal is required to consider potential evidence, it is not required to weigh the evidence in place of a trier of fact. Quite the contrary, the tribunal is asked to determine that there are no issues for a trier of fact.

76. Model Rule 3.3 applies to all tribunals and subsections 3.3(a) (1), (2), & (3) apply to all presentations other than those to a trier of fact. See *supra* discussion accompanying notes 12-20. Appellate arguments, therefore, that are addressed to any issue other than a review of the propriety of the verdict of a trier of fact, are included within the coverage of the first three subsections.

ent's perjury when there is no other reasonable remedy available to cure the damage caused by the introduction of the false material evidence.⁷⁷ Indeed, the comment to Model Rule 3.3 contemplates that disclosure might be a subsection 3.3(a)(4) "reasonable remedial measure" in some circumstances.⁷⁸ The Committee, however, may have felt obligated to answer more than the question about what a lawyer should do about completed client perjury. It may have felt obligated by the long debate over the potential perjury of a criminal defendant to find an answer in Model Rule 3.3 to the problem: What should a criminal defense lawyer do when a client who intends perjury tells the defense lawyer of the intention before testifying?

The Committee looked for the answer in *Nix v. Whiteside*⁷⁹ and found the Chief Justice's observation that a lawyer must always disclose potential perjury rather than allow the client to testify falsely. But the remedy requirement of subsection 3.3(a)(4) depended upon the lawyer's discovery of completed perjury. The Chief Justice's mandatory disclosure answer was in subsection 3.3(a)(2).

The Committee started with the wrong question, in considering whether subsection 3.3(a)(2) applied to client perjury. Instead of asking about the nature of the obligation in subsection 3.3(a)(2) and to whom it applied, the Committee asked about the secondary object of the subsection.⁸⁰ It asked whether "criminal or fraudulent act" in subsection 3.3(a)(2) included client perjury.⁸¹ The Committee's answer to the wrong question led it astray:

Although Rule 3.3(a)(2) . . . does not specifically refer to perjury . . . it would require an irrational reading of the language [in subsection 3.3(a)(2)]: 'a criminal or fraudulent act by the client,' to exclude false testimony by the client.⁸²

Subsection 3.3(a)(2) requires disclosure to the tribunal only when it is necessary to "avoid assisting" a criminal or fraudulent act by the client. The Committee concluded that subsection 3.3(a)(2) covered potential client perjury, because it found the conduct described in the first sentence of subsection 3.3(a)(4)—"offering evidence the lawyer knows to be false"—to be an "assist."⁸³

The Committee returned to the question of completed perjury, after finding subsection 3.3(a)(2) applicable to potential perjury. It concluded that subsection 3.3(a)(2) also applied to completed perjury, because "a lawyer's

77. See Formal Op. 353, *supra* note 5.

78. MODEL RULES Rule 3.3 comment.

79. 475 U.S. 157.

80. Formal Op. 353, *supra* note 5.

81. *Id.*

82. *Id.*

83. *Id.*

failure to take remedial measures . . . when the lawyer [discovers] the client has given false testimony, is included” as an assist needed to invoke subsection 3.3(a)(2).⁸⁴

The central thesis of this essay is that subsection 3.3(a)(2) cannot apply to a lawyer presenting evidence to a trier of fact. The Committee found itself in the wrong subsection of Model Rule 3.3 for the answer to the client perjury problem, because it began its analysis with the wrong question. Asking whether the “criminal or fraudulent act” language of the subsection includes perjury and concluding that “it would require an irrational reading of the language: ‘a criminal or fraudulent act by the client’ to exclude false testimony by the client”⁸⁵ was no more useful than asking if “client” includes the president of a corporate defendant and concluding that “it would require an irrational reading of the language ‘client’ to exclude the president of a corporate defendant.” Both answers may be correct, but neither is of any value in determining the lawyer conduct covered by subsection 3.3(a)(2). The Committee did not spend time on the general structure of Model Rule 3.3 and the specific language and obligation of subsection 3.3(a)(2), once it discovered the attractive short path to subsection 3.3(a)(2). That short path, unfortunately, passed by the difference between subsection 3.3(a)(2) and subsection 3.3(a)(4) and obscured the distinction between “fact” and opinion; information that is “material” and information that is not; the “tribunal” as a forum, of which the lawyer is an officer, and the trier of fact that weighs “evidence;” a lawyer who makes a “statement” to a tribunal and a lawyer who “offer[s] evidence”—all of which are critical to an understanding of Model Rule 3.3.

Two examples from a single hypothetical highlight the importance of the distinction between making representations to a tribunal as forum and presenting evidence to a trier of fact. They demonstrate how the precise language of Model Rule 3.3 recognizes and preserves the distinction.

Plaintiff in a housing discrimination class action against a corporate owner of apartment buildings in Minneapolis, Chicago, New York, and Los Angeles makes a motion for production of documents after a request is denied by defendant. The lawyer believed the document request to be burdensome under the law of the jurisdiction. Officers of the corporate defendant and the lawyer know that the documents are located in Minneapolis, Chicago, New

84. *Id.* The committee stated that

[i]t is apparent to the Committee that. . . Rule 3.3(a)(2). . . is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary under Rule 3.3 (a) (2) to avoid assisting the client’s criminal act.

Id.

85. *Id.*

York, and Los Angeles. Subsection 3.3(a)(1), which requires accuracy from the lawyer making representations that the tribunal will use to resolve the plaintiff's motion for production, prohibits the lawyer's inaccurate assertion either that the documents do not exist or that they are located somewhere else, for example, Washington, D.C. Similarly, subsection 3.3(a)(1) prohibits the lawyer's statement that a controlling case in the jurisdiction holds that such a document request is burdensome, when the case cited for the proposition holds the exact opposite. Subsection 3.3(a)(1) does *not* prohibit the lawyer's assertion or presentation of a witness' affidavit that presents incomplete information to the tribunal that "there are documents in Minneapolis, Chicago, and New York," even though there are also documents in Los Angeles. It does *not* prohibit the lawyer's presentation of three favorable cases on burdensome document requests, while suppressing the latest and contrary precedent. But subsections 3.3(a)(2)—"material fact" (document location)—and 3.3(a)(3)—"legal authority" (the controlling precedent)—*do* prohibit the lawyer from being incomplete in making those representations, when the tribunal will use them to decide the production motion.

Contrast the lawyer's obligation under subsections 3.3(a)(1), (2) and (3), to be complete in the document motion, with the lawyer's obligation under subsection 3.3 (a)(4), as the offeror of evidence to a trier of fact. The lawyer may properly ask an officer of the corporate client "Does the corporation rent apartments to blacks?". No ethical, procedural or evidentiary rule requires the lawyer to supplement the accurate response: "Of course; we have black tenants in Minneapolis, Chicago and New York." The lawyer's knowledge that the client has never rented to blacks in Los Angeles and is actively engaged in racial discrimination in that city does not require the lawyer to disclose to anyone that the witness' answer is incomplete. Even if the lawyer believes that the trier of fact will infer from the answer that the corporate client does not discriminate anywhere, the lawyer has no duty to disclose the omission. It may well be — and the adversary system assumes — that the plaintiff's lawyer will ask "Have you ever rented to blacks in Los Angeles?". Model Rule 3.3 obligates the corporation's lawyer to do something only after the corporate officer falsely answers "yes." Subsection 3.3 (a)(4) instructs the lawyer to take "reasonable remedial measures" to nullify the effect of the "yes."

In both the pre-trial and the trial situations, the client's incomplete answer is deceptive and has the purpose to deceive — "fraudulent" as defined in the Model Rules.⁸⁶ Nevertheless, subsection 3.3 (a)(2) applies in the documents example before the tribunal and does not apply in the discrimination example

86. The terminology section of the *Model Rules* defines "fraud" or "fraudulent" as denoting "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." MODEL RULES Terminology.

before the trier of fact. The applicability of subsection 3.3(a) (2) depends first upon the role of the lawyer, and only secondarily upon whether the client's action is fraudulent.

B. INTENT TO LIE AND PERJURY ARE RARELY "MATERIAL FACTS"

Model Rule 3.3 does not contemplate that disclosure is always the appropriate remedy for client perjury. And it almost never contemplates disclosure of client perjury to the tribunal. Although Model Rule 3.3 presents a startling shift from the existing candor ethic by requiring a remedy for perjury, even when it necessitates divulging a client confidence,⁸⁷ it does not go so far as to require lawyers to become the system's perjury police in every case of potential or completed perjury. The Model Rule maintains the adversary system assumptions that common law tribunals do not have the same power to pre-screen witnesses for credibility as do courts in an inquisitorial dispute resolution system and that adversary system credibility judgments belong uniquely and unalterably to the trier of fact.⁸⁸ If the lawyer for a liar has no remedy that will purge the lie from the adversary system result, other than disclosure, that disclosure must be to the trier of fact, not to the tribunal. Only the trier of fact has the power to give the lawyer's disclosure the weight that it deserves.⁸⁹ The Committee's conclusion that subsection 3.3(a)(2) mandates disclosure of client perjury to the tribunal incorrectly implies the contrary. It would not have required disclosure to the tribunal, if it thought that the tribunal had no power to nullify the perjury with the lawyer's information.

The precise language describing the obligation of subsection 3.3(a)(2) demonstrates that the requirement of disclosure to the tribunal does not apply to a lawyer faced with the potential of completed client perjury at trial.⁹⁰ The

87. Under the 1969 *Model Code of Professional Responsibility*, as amended in 1974, and the ABA opinions interpreting it, the client's confidence could not be violated, even if necessary to remedy a client's completed perjury. Although prior promulgations, arguably, preferred candor to confidence, the Model Rule is the first to be explicit about the inferiority of the confidentiality principle. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4.

88. See *Quercia v. United States*, 289 U.S. 466 (1933)(reversible error where trial judge's instructions included comment that in his opinion defendant was lying when he testified).

89. *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978) suggests, in dictum, that it is a denial of due process for a defense attorney in a criminal case to testify before the trier of fact about the lawyer's *belief* that the defendant committed perjury, because that would disable "the fact finder from judging the merits of the defendant's defense." To the extent that the dictum about due process survives *Nix v. Whiteside*, 457 U.S. 157, it only strengthens the conclusion that only the lawyer's presentation of *facts* to the trier of fact allows the jury to consider all that is relevant in reaching an appropriate decision.

90. Subsection 3.3(a)(2) does apply to client perjury committed before a tribunal hearing testimony to determine an issue wholly within the tribunal's jurisdiction and for which a future trier of fact has no role — for example, the earlier document production motion. Client testimony is rare in those circumstances. MODEL RULES Rule 3.3(a)(2).

subsection requires disclosure only of “material fact[s].”⁹¹ The lawyer’s conclusion that the client intends to commit perjury is never a “fact;” neither is the lawyer’s conclusion that the client’s testimony was perjurious.

“My client will commit perjury” is a lawyer’s opinion, not a “fact,” whether it derives from the client’s assertion of an intent to lie or from a combination of the client’s proposed testimony and contrary information the lawyer has from another source. In either case, the lawyer has reached a conclusion, actually a prediction, about what the client will do — the kind of opinion that is routinely excluded from evidence because it is speculative.⁹² “My client committed perjury” avoids the speculative problem, but remains the lawyer’s opinion and not a “fact” upon which subsection 3.3(a)(2) preconditions disclosure.⁹³

Even in those circumstances in which the lawyer has “facts” to disclose to the tribunal, they will almost never be “material.” A lawyer’s report to the tribunal of the occurrence of a conversation, “my client told me she intends to tell a lie,” is about a fact — the conversation. Rather than the client’s communicated conclusion, a lawyer might transmit the details of the client’s intent: “My client’s president originally told me that the corporation does not rent to blacks in Los Angeles. After I said that would probably be the fact upon which the plaintiff will prevail, the president told me she remembered that the corporation does rent to blacks in Los Angeles.” The lawyer’s report to the tribunal might include the fact of communication combined with other facts the lawyer has collected:

the president of my client tells me she is going to testify that the corporation rents to blacks in Los Angeles. I have seen all of their records and interviewed all of the people in the Los Angeles office and I found no record or statement that the corporation has ever rented to blacks in Los Angeles. I did find a memo from the President saying, “the corporation will not rent to blacks in Los Angeles.”

91. *Id.*

92. Rule 701, which limits the range of acceptable testimony, allows a lay witness to express an opinion or inference only if “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” See FED. R. EVID. Rule 7d.

A lawyer’s testimony, “my client will commit perjury,” an opinion, is not nearly so “helpful to a clear understanding” as the lawyer’s testimony, “my client told me that she will say she saw it happen on Wednesday and three days ago she told me that she saw it happen on Tuesday.” Moreover, until the client has testified, her credibility is not at issue. Until her credibility is at issue, neither the lawyer’s opinion nor the facts of the conversation are helpful to “the determination of a fact in issue.”

93. See MODEL RULES Rule 3.3 (a)(2). Note that such a statement by an attorney is probably an inadmissible opinion. “Perjury” is a legal conclusion about the commission of a crime—a conclusion that can only be reached by a jury after a trial at which the defendant is presumed innocent until proven guilty beyond a reasonable doubt.

In order to be “material,” any of the preceding sets of facts must relate to an issue that the tribunal has the power to decide.⁹⁴ Subsection 3.3(a)(4) supports this view of materiality. Even though false testimony is never good, subsection 3.3(a)(4) does not require a remedy for every falsehood. The first sentence of subsection 3.3(a)(4) sets a standard that prohibits lawyers from knowingly offering *any* false evidence; but the only false evidence that the lawyer must remedy is false evidence that is “material.”⁹⁵ This is consistent with the perjury statute in almost every jurisdiction. False evidence carries no penalty, while giving “material” false evidence constitutes the crime of perjury.⁹⁶

An adversary system tribunal has no power to do anything with facts about potential or completed perjury before a trier of fact.⁹⁷ The tribunal might not like what it hears when the lawyer discloses, but it has no power to do anything about or with the disclosure.⁹⁸ While a court of inquisition might properly decide who should testify and what weight ought to be given

94. The *Model Rules* do not define “material,” but at a minimum, facts must relate to something a decision maker has the power to decide in order to be “material.” A legal dictionary definition of material is “[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.” BLACK’S LAW DICTIONARY 1128 (4th ed. 1975).

95. MODEL RULES Rule 3.3(a)(4).

96. The federal perjury statute is typical of those in most of the states. It states, in part “[w]hoever. . . having taken an oath before a competent tribunal. . . willfully and contrary to such oath states or subscribes any *material* matter which he does not believe to be true . . .” 18 U.S.C. § 1621 (1976)(emphasis added).

97. Even a civil tribunal, which unlike a criminal tribunal becomes a trier of fact at the time a party requests a directed verdict or judgment notwithstanding the verdict, cannot use the lawyer’s “facts” about the client’s testimony, even if they are presented to the trier of fact, to take the decision on the merits from the trier of fact. The only time that a credibility judgment can be taken from the trier of fact is when there is *no* evidence contrary to the uncontradicted and unimpeached evidence produced by the party requesting a directed verdict. In that circumstance, the trial court may take the matter from the trier of fact, because the trier of fact is not free to disbelieve the movant’s witnesses without contrary evidence from the other party. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209 (1931). If any evidence is presented that raises a fact question — for example, the client’s perjured testimony — there is an issue for the trier of fact and the tribunal may not direct a verdict, no matter how certain the tribunal is about the client’s lack of credibility. *Cf. Maroney v. Minneapolis & St. Louis R.R. Co.*, 123 Minn. 480, 144 N.W. 149 (1913) (fact that case rested wholly upon testimony of plaintiff and her physician was not sufficient grounds for court to “depriv[e] her of the right to have the facts in her case passed upon by a jury”).

98. There is only one instance in which the lawyer’s conversation with the client might be “material” to something within the tribunal’s province. It may be that the lawyer’s testimony before the jury is the only way to nullify the client’s perjury. The lawyer, presumably, would consult with the opponent, explain the nature of the testimony, and receive no objection to it. Under Model Rule 3.7, a lawyer may act as a witness in a trial in which he also serves as an advocate if his testimony relates to an uncontested issue. MODEL RULES Rule 3.7. Thus, if the opponent does not contest the lawyer’s testimony about the client’s perjury, Model Rule 3.7 does not prohibit the lawyer’s testimony. If, however, the tribunal is concerned that Model Rule 3.7 might prohibit the testimony, the lawyer’s facts become material to an issue for the tribunal as forum. It must determine whether the lawyer may testify before the trier of fact.

to the testimony, an adversary system tribunal may not dismiss a witness, even if the tribunal believes the witness will commit perjury.⁹⁹ The trier of fact must have the opportunity to hear the testimony and accept so much of it as the trier of fact, in its sole discretion, considers credible.¹⁰⁰ Similarly, the tribunal has no authority to dismiss a witness and instruct the trier of fact not to consider the testimony, because the tribunal believes the testimony to have been perjurious.¹⁰¹ The trier of fact's complete authority on issues of credibility is so important that even those jurisdictions that allow the tribunal to comment on the evidence do not allow comment so strong as to effec-

99. A flatly contradictory prior statement by the prospective witness does not *per se* invalidate the testimony and justify keeping it from the trier of fact. *Guthrie v. Van Hyfte*, 36 Ill.2d 252, 222 N.E.2d 492 (1966). The point is so axiomatic and well known to trial courts that lawyers do not try to keep testimony from the trier of fact by challenging witness credibility and trial courts do not exclude testimony on credibility grounds. As a result, there are few decisions that even discuss the issue, let alone approve, prohibiting the testimony of a potential perjurer. Not even the Chief Justice's discourse in *Nix v. Whiteside* presents authority for or states the bald proposition that a court may exclude a witness upon its own determination of the witness' future credibility.

100. The trier of fact is entitled to accept part of a witness' testimony and reject another part of that same witness' testimony. *Dodwell v. Missouri Pacific R.R. Co.*, 384 S.W.2d 643 (Mo. 1964). The testimony of a witness that is self contradicting and, therefore, self destructive, is the only narrow exception to the rule. No case is made for the jury where a party presents evidence from only one witness when that witness' testimony contains statements that cancel each other out so that there is, in effect, no evidence for the other party. *Foerstel v. St. Louis Public Service Co.*, 241 S.W.2d 792 (Mo. App. 1951).

101. In *United States v. Thompson*, 615 F.2d 329 (5th Cir. 1980) a prosecution witness testified contrary to her previous grand jury testimony. Out of the hearing of the jury, the witness was confronted with her prior testimony and acknowledged it. When again before the jury, the witness testified consistent with her earlier jury testimony. The tribunal told the jury that the witness had committed perjury and dismissed the witness. The appellate court said that "[a]lthough contradictory testimony such as that confronting the trial court here must surely provoke judicial indignation, case law precedent and constitutional precepts forbid judicial interference with the jury's duty to resolve credibility issues." *Id.* at 332.

The tribunal does not even have the power of penalty. A few litigants have argued that even if the tribunal does not have the power to take credibility issues from the trier of fact, it does have the power to penalize the perjurious plaintiff by dismissing the cause of action. The few courts that have considered the argument have rejected it. See *Russell v. Casebolt*, 384 S.W.2d 548 (Mo. 1964); *Parham v. Kohler*, 134 So.2d 274 (Fla. Dist. Ct. App. 1961). *But cf. Mas v. Coca-Cola Co.* 163 F.2d 505 (4th Cir. 1947) (court of equity might use the unclean hands doctrine to dismiss an action to overturn the Patent Office's finding of interference, because the claimant had used perjured testimony in the Patent Office hearing).

In rejecting the proposition that a law court might dismiss a claim in a case in which the plaintiff admits to perjury, the Casebolt court emphasized that perjury had other more appropriate remedies:

There are other and independent remedies for relief against perjury[] — if and when it is found or suspected. The witness may be cited for contempt and a hearing held, with appropriate punishment if justified; or, the matter may be referred to the prosecuting attorney of the county for appropriate criminal action, if that is found to be justified.

384 S.W.2d at 553. Even if such a penalty were appropriate, the issue would not be ripe until presentation of all the evidence had been made.

tively take the credibility issue from the jury.¹⁰² Further, the tribunal may never base a credibility comment upon information that has not been heard by the jury.¹⁰³

Witness credibility, unlike questions of competence that are exclusively for the tribunal, is an issue solely for the trier of fact.¹⁰⁴ Were the rule different, it would be easy to imagine most trials bogging down in extensive pre-testimony proffers as lawyers try to demonstrate by various means that the witness' credibility is so suspect that the tribunal should not even allow the trier of fact to hear the evidence. The trier of fact's sole dominion over credibility is not merely a matter of form or convenience. It is one of the definitional benchmarks of adversary dispute resolution.¹⁰⁵ The tribunal's lack of authority to pre-screen or dismiss evidence that the tribunal disbelieves is the *sine qua non* of the common law jury system and an important difference between the inquisitorial and the adversarial dispute resolution models.¹⁰⁶

What then is the tribunal supposed to do with the "facts" that the lawyer discloses, if the Formal Opinion is right and subsection 3.3(a)(2) obligates the lawyer to disclose the perjury to the tribunal? The tribunal cannot refuse to

102. *United States v. Bates*, 468 F. 2d 1252 (5th Cir. 1972).

103. *Cf. United States v. Breitling*, 61 U.S. (20 How.) 252 (1858)(error to charge facts upon a jury on which no evidence has been offered).

104. *Kimble v. State*, 262 Ind. 522, 319 N.E.2d 140 (1974). Even though the tribunal's common law power to exclude an incompetent witness was rooted in the system's search for the truth, it has never had the power to declare incompetent a witness with the capacity to lie purposefully. In *Kimble*, the Supreme Court of Indiana addressed the issue of witness credibility. The court held that the fact that the complaining witness had used drugs did not automatically make his testimony less credible. In analyzing his credibility, the court stated that such challenges contain two distinct elements: "[t]he first challenge is to . . . competency; the second is to . . . credibility. The distinction between these objections must be clearly delineated. Competency is a question of law to be determined by the court, credibility is a question for the trier of fact." *Id.* at 525, 319 N.E.2d at 142-43.

105. *See Quercia v. United States*, 289 U.S. 466 (1933)(in reversing decision of federal judge who expressed opinion concerning the credibility of witness, holding that "[i]t is for the jury to decide the credibility of the . . . witness"(citing *Allison v. United States*, 160 U.S. 203, 207 (1895)).

106. The proposition is so imbedded in our jurisprudence that it was not budged even by a criminal defendant's due process claim. In *Hoffa v. United States*, 385 U.S. 293 (1966), the defense claimed that the circumstances of a prosecution witness made him incredible as a matter of law. The Supreme Court of the United States rejected the claim with attention to the inviolability of the trier of fact's credibility jurisdiction, stating that "it does not follow that his testimony was untrue The established safeguards of the Anglo American legal system leave the veracity of a witness to be tested by cross examination, and the credibility of his testimony to be determined by a properly instructed jury." *Id.* at 311.

The law/fact dichotomy that defines tribunal power versus trier of fact power has continued to shift away from the jury. *See Kotler, Reappraising The Jury's Role As Finder Of Fact*, 20 GA. L. REV. 123 (1985)(jury's role should be solely that of true finder of fact to increase predictability, efficiency and fairness of trial process). However, credibility is the one area of "fact" in which there has been no encroachment. As one commentator has observed, "the institution of the jury was developed for the purpose of carrying out this special function of determining whether a witness should be believed." Annotation, 62 A.L.R.2d 1191, 1193 (1958).

let a party present a witness, cannot tell the jury that the witness lied, cannot tell the jury to ignore the witness' testimony, and cannot tell the jury anything it heard from the lawyer outside the presence of the jury. The lawyer's "facts" about the perjury are not "material" to the tribunal, because the tribunal has no power to help purge the system of proposed or accomplished perjury.¹⁰⁷

If facts are not "material" to the tribunal, they should not be disclosed to it. Indeed, subsection 3.3(a)(2) requires disclosure to the tribunal only when "necessary to avoid assisting a criminal or fraudulent act by the client."¹⁰⁸ Disclosure to a tribunal without power to act may be more than not "necessary." It may be, ultimately, harmful. If the lawyer discloses to the tribunal, on the theory that disclosure is the only "reasonable remedial measure" for perjury, the lawyer may be prohibited by other Rules and laws from taking any further action that might be effective.¹⁰⁹

The Formal Opinion's implicit assumption in applying subsection 3.3(a)(2) to client perjury — that potential or completed perjury is a "material fact" to be disclosed to a tribunal — warps the meaning of "material," misapprehends the power of the tribunal, and makes things more difficult for the trial lawyer without purging the adversary system of results tainted with false evidence. While client perjury is always a "criminal or fraudulent act of the client," it is almost never a "material fact" that must be disclosed to a tribunal. We have and need criminal penalties for perjury precisely because the system does not come equipped with a credibility screen for witnesses.

C. OF NO "ASSISTANCE"

"Assist" is an important concept in the *Model Rules* and a precondition to applicability of subsection 3.3(a)(2). Throughout the *Model Rules*, the lawyer is admonished not to aid the client in breaking the law or committing a fraud.¹¹⁰ The terminology section of the *Model Rules* does not define "as-

107. It is possible that the Committee reads "tribunal" in Model Rule 3.3 broadly to mean either the tribunal as forum or the jury as trier of fact. Although that broad definition would cure the problem of a tribunal without power to act on the perjury information, it would create an insoluble adversary system problem. If "tribunal" includes trier of fact, the subsection 3.3(a)(2) requirement that a lawyer disclose material facts to avoid assisting a client's fraud would require a lawyer to cure a client's incomplete answer given with the intent to deceive the trier of fact. While that obligation is consistent with the lawyer's duty to the tribunal in procedural matters, it is inconsistent with the adversary assumptions of trial on the merits.

108. MODEL RULES Rule 3.3(a)(2) (emphasis added).

109. See *infra* text accompanying notes 96-100 (discussion of the criminal defense lawyer's obligation to remain silent and take no action if disclosure to the tribunal does not remedy the client's perjury).

110. See, e.g., MODEL RULES Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."); Rule 3.4 (lawyer should not "counsel or assist" any person in obstructing or tampering with evidence, and a lawyer

sist,” but the usage throughout the *Model Rules* suggests the normal concept of help in preparation of or in completion of the act that is “assisted.”

Formal Opinion 87-353 defines “assist” as a failure to take action to reverse the completed act of another.¹¹¹ Without that definition, subsection 3.3(a)(2) cannot apply to a lawyer’s after-the-fact discovery of client perjury. The subsection requires disclosure only if necessary to “avoid assisting a criminal or fraudulent act by the client.”¹¹² But the Committee’s analytic path to the conclusion that subsection 3.3 (a)(2) applies to client perjury does not begin with completed perjury. It begins with an analysis of the situation in which the lawyer “knows” of the client’s *intention* to commit perjury. The Committee finds disclosure is required under subsection 3.3(a)(2) because “offering evidence the lawyer knows to be false, [prohibited by subsection 3.3(a)(4)]” constitutes “assisting a criminal or fraudulent act by the client.”¹¹³

Subsection 3.3(a)(4) sets a standard of conduct, prohibiting a lawyer from offering false evidence. However, it does not follow that failure to live up to the standard assists a “criminal or fraudulent act of the client.” It is only on the issue of “assisting,” rather than the general question of subsection 3.3(a)(2) applicability, to which the Committee’s original question about the “criminal or fraudulent act of the client” is relevant. The Committee’s conclusion that “offering evidence the lawyer knows to be false” must be an “assist,” does not take account of the general question of subsection 3.3(a)(2) applicability.¹¹⁴ False evidence is not “criminal” unless it is material and is not “fraudulent” unless the witness intends to deceive the tribunal or the trier of fact. Subsection 3.3(a)(4), from which the committee takes its “assisting” act, recognizes the distinction and requires no remedy for evidence that is only false.¹¹⁵ It is inconsistent to contend that breach of a standard requiring no remedy in subsection 3.3 (a)(4), compels a disclosure remedy by reference under subsection 3.3(a)(2).¹¹⁶

The Formal Opinion’s conclusion that a lawyer “assists” client perjury by

shall not “assist a witness to testify falsely”); Rule 8.4(a)(“It is professional misconduct for a lawyer to violate or attempt to violate the rules, knowingly assist or induce another to do so, or do so through acts of another”).

111. See Formal Op. 353, *supra* note 5.

112. *Id.*

113. *Id.*

114. *Id.*

115. See MODEL RULES Rule 3.3(a)(4)(requiring remedial action by lawyer where “material” false evidence is offered).

116. The subsection’s important materiality distinction between the standard of conduct and the need for remedial action recognizes that false testimony that is neither material nor relevant is often presented in a lawsuit without objection. Consider the corporate officer’s untrue testimony that the officer is not personally responsible for a decision incorporated in a document which is material to liability and which has already been admitted into evidence and conceded to bind the corporation.

discovering it after-the-fact and failing to remedy it, is more serious and carries the risk of great mischief beyond the borders of Model Rule 3.3. Ironically, the conclusion is not necessary to achieving a disclosure result in appropriate cases. Subsection 3.3(a)(4), by itself, requires a "reasonable remedial measure" for completed client perjury¹¹⁷ and disclosure could be that remedy. The Standing Committee, apparently unsatisfied with the uncertainty of disclosure under subsection 3.3(a)(4), attempted to demonstrate that the mandatory disclosure of subsection 3.3(a)(2) applied to completed client perjury. The "assisting" requirement of subsection 3.3(a)(2) appeared to foreclose the possibility, because later discovered client perjury involves no action or anticipatory inaction by the lawyer. The Formal Opinion does not address the qualities of an "assist" to overcome the analytic problem, but rather defines "assist" by reference to the result:

It is apparent . . . that as used in Rule 3.3(a)(2), the language, "assisting a criminal or fraudulent act by the client". . . is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary . . . to avoid assisting the criminal act.¹¹⁸

Though it offers no rationale for the conclusion that failure to remedy is an "assist," the Opinion attempts to counter an anticipated argument over the definition: "assisting . . . is not limited to the criminal law concepts of aiding and abetting."¹¹⁹ Although the importance of "criminal law concepts" is less than clear, the assertion may be intended to anticipate an argument about the lawyer's lack of assisting intent at the time the lawyer offers the direct testimony of the lying client. But the problem with the Formal Opinion's definition of "assist," as a failure to remedy after-the-fact, is not that the definition needs lawyer "intent" to make it work. It lacks temporal relevance. The inaction with knowledge, which the Formal Opinion considers an "assist," occurs after the testimony. Even the most colloquial definition of "assist" requires that it precede or be concurrent with the assisted act.¹²⁰

The officer's volunteered lie is neither material nor relevant to the lawsuit, but it is important to the executive's position and standing within the company.

What about the testimony of a spouse who, in a no-fault divorce state testifying for the purpose of determining property division, offers false testimony about a series of affairs? All issues, save the property division, are settled and the affairs are not material to property division. There have been hints of infidelity, however, and the spouse/client intends to falsely deny any infidelity for the sake of his future relationship with his divorcing spouse and children.

117. See MODEL RULES Rule 3.3(a)(4).

118. Formal Op. 353 comment, *supra* note 5.

119. *Id.*

120. If the Committee has the old common law concept of "accessory after the fact" in mind, it does not say so. Although the concept has virtually evaporated from the law, at its height of popularity it required after-the-fact comfort or assistance to the principal. Silence with knowledge after

Until Formal Opinion 87-353, “remedy” and “assist” had nothing to do with each other. If “assist” does mean “failure to remedy,” many of the Model Rules will mean something other than what the drafters intended. Model Rule 1.2(d) prohibits a lawyer to “assist a client, in conduct that the lawyer knows is criminal or fraudulent,” but goes on to say that the lawyer “may discuss the legal consequences of any proposed course of conduct with a client.”¹²¹ If failure to provide a remedy for a client’s criminal or fraudulent act is an “assist,” Model Rule 1.2 requires remedy of any criminal or fraudulent act the lawyer hears of in consultation with the client about the legality of the proposed act — even though the client acted against the lawyer’s advice.

Consider, again, the discriminatory rental policy of the corporate client. California passes a law making it a crime not to file a statement of non-discrimination with the state’s Human Rights Department. The corporation asks the lawyer about the consequences of not filing the statement or of filing a misleading disclosure. The lawyer tells the corporation that non-filing and false filing are crimes. A corporate officer asks the lawyer to file a misleading non-discrimination statement. The lawyer advises against that course of action and declines to file the document, in order to avoid assisting a crime in violation of Model Rule 1.2. The subject is dropped without resolution. The lawyer continues to represent the client on many other related matters.¹²²

When the client later tells the lawyer that it is neither going to file the statement of non-discrimination, nor is it going to file a false document, is the lawyer obligated to tell the Human Rights Department? Model Rule 1.6 clearly prohibits the disclosure¹²³ but the Formal Opinion definition of “as-

the act would not suffice. *See, e.g.,* *Buck v. Commonwealth*, 116 Va. 1031, 83 S.E. 390 (1914)(failure to report to authorities the escape of a person who has just committed a felony does not make one an accessory after the fact).

121. Model Rules 1.2(d) and (e) read as follows:

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

MODEL RULES Rule 1.2(d) & (e).

122. Model Rule 1.16 contemplates circumstances in which a lawyer who is aware of a client’s improper action may, nevertheless, continue to represent the client in other matters. Indeed, the rules contemplate that it is better for a lawyer to stay with the client and try to reverse the improper action than to abandon the client to an environment of no legal advice or to another unsuspecting lawyer who can do no more and may, unwittingly, become involved in the illegality. *See* MODEL RULES Rule 1.6 comment.

123. Model Rule 1.6 reads:

sist” would make the lawyer’s failure to remedy the client’s criminal non-filing of the non-discrimination statement an unethical assist under Model Rule 1.2. The “failure to remedy” definition of “assist,” thus creates inconsistent obligations in Model Rule 1.2 and Model Rule 1.6 and nullifies the major rationale for Model Rule 1.2 — the belief that client crime and fraud will be reduced if clients feel free to discuss the legality of the proposed action with a lawyer before taking the action.

The lawyer who learns of a client’s fraud after a deposition is faced with an insoluble dilemma if “assist” means “failure to remedy.” Although Model Rule 3.3 does not apply to pre-trial activity conducted away from a tribunal,¹²⁴ Model Rule 3.4 does apply.¹²⁵ Section 3.4(b) prohibits a lawyer from “assist[ing] a witness to testify falsely.”¹²⁶ Assume that the corporate client in the rental case answers an interrogatory asking for the names of renters in Los Angeles by including the names of blacks who are not renters, but who have been paid to appear and to claim to be renters of the corporation’s apartments, if their depositions are noticed by the plaintiff. None of them is willing to testify at trial nor to have their deposition used at trial. After the testimony one of the phony renters, at a deposition noticed by the plaintiff and at which the lawyer for the corporation asked no questions, the President tells the lawyer that none of these witnesses can be called at trial, because they never rented from the corporation. The President explains the agreement about not calling nor using the depositions of the phony renters and tells the lawyer that the names were put into the interrogatory answer in hopes that the other side would be put off after taking the deposition and eliciting the information.

Model Rule 1.6 prohibits the lawyer from divulging the confidence, even after the lawyer withdraws¹²⁷ from the representation.¹²⁸ Using the normal definition of “assist,” the lawyer’s compliance with Model Rule 1.6, by fail-

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- (a) A lawyer shall not reveal information relating to representation of a client
 - (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

MODEL RULES Rule 1.6

124. See MODEL RULES Rule 3.3 (entitled “Candor Toward the Tribunal”).

125. See MODEL RULES Rule 3.4 (entitled “Fairness to Opposing Party and Counsel”).

126. See MODEL RULES Rule 3.4(b).

127. Model Rule 1.16(b)(1) permits a lawyer to withdraw from representation “if the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.” MODEL RULES Rule 1.6(b)(1).

128. Model Rule 1.6(d) states that “[u]pon termination of representation, a lawyer shall take steps . . . to protect a client’s interests.” MODEL RULES Rule 1.6(d). The comment to Rule 1.6 suggests that one such interest might include confidentiality: although the court may want an explanation for the withdrawal, the lawyer “may be bound to keep confidential the facts that would constitute such an explanation.” *Id.* at comment.

ing to tell the opposing lawyer of the problem, would not create a violation of section 3.4(b). The Formal Opinion definition of “assist,” however, makes a section 3.4(b) violation of the lawyer’s failure to tell the opposing lawyer and puts the lawyer in the untenable position of violating either Model Rule 3.4 or Model Rule 1.6.¹²⁹

Subsection 3.4(a), concerned with destruction and concealment of evidence presents a similarly difficult dilemma for the lawyer, if “assist” means “failure to remedy.” It provides that a lawyer “shall not counsel or assist another person” to “unlawfully . . . alter, destroy, or conceal a document or other material having potential evidentiary value.”¹³⁰ What if a client, in a jurisdiction that makes destruction of potential evidence in anticipation of litigation a crime, shows a lawyer three specific documents that might be damaging in an anticipated federal antitrust action and asks if the client may destroy them? The lawyer tells the client that the reasonable anticipation is enough to make destruction a crime and advises that destruction will violate the statute even though litigation has not been started. The litigation begins a month later, the government requests production of the documents, and the client tells the lawyer that no such document exists. When the lawyer asks what happened to the documents, the client explains that they were destroyed.

Model Rules 1.6 and 4.1¹³¹ absolutely prohibit the lawyer from telling the government that the documents have been destroyed. The crime exception in Model Rule 1.6 does not permit the lawyer to divulge the confidence, because the destruction crime can neither be prevented nor is it one involving imminent death or substantial bodily harm. Section 4.1(b) (prohibiting disclosure), rather than subsection 3.3(a)(2) (requiring disclosure), applies to the request situation, because the matter is not before a tribunal and the lack of candor is not directed at the tribunal. If, however, the lawyer’s failure to tell the government of the destruction is an “assist,” the lawyer must choose between violating section 3.4(a) or violating Model Rules 1.6 and 4.1.

Model Rule 8.4 defines professional misconduct and includes within that definition “knowingly assist[ing]” another lawyer in violating the rules of professional conduct.¹³² According to the Formal Opinion definition, silence

129. Most perjury, indeed most testimony, takes place in pre-trial deposition and never finds its way to a fact finder. Model Rule 3.4, regulating pre-trial activity, understandably does not contain a provision similar to that contained in Model Rule 3.3, overriding confidentiality. If “assist” means “failure to remedy,” then the entire pre-trial procedure contemplated in the Model Rules is turned upside down.

130. MODEL RULES Rule 3.4(a).

131. Model Rule 4.1(b) requires disclosure of a material fact to a third person if necessary to avoid assisting a client fraud, but it contains a specific exception if the disclosure requires a breach of Model Rule 1.6 confidentiality. MODEL RULES Rule 4.1(b).

132. MODEL RULES Rule 8.4(a).

with after-the-fact knowledge of a rule violation is an "assist." A lawyer, therefore, violates Model Rule 8.4 unless the lawyer reports every discovered violation. That definition of assist and interpretation of Model Rule 8.4 is inconsistent with Model Rule 8.3,¹³³ which deals directly with reporting. Under Model Rule 8.3, it is clear that a lawyer does not commit a reporting violation, by failing to report all discovered violations.¹³⁴ This represents a substantial departure from the universal reporting requirement of the *Model Code of Professional Responsibility*.¹³⁵ The Rule gives a lawyer discretion not to report a violation unless the violation "raises a substantial question."¹³⁶

IV. THE ETHICAL LAWYER IN THE ADVERSARY SYSTEM

Model Rule 3.3 provides a sensible and consistent recitation of candor obligations for all trial lawyers, civil and criminal, if attention is paid to the Rule's precise language. The letter of the Rule accurately reflects the adversary system spirit that the Rule is written to preserve. It requires the lawyer, as officer of the court, to make representations to a tribunal that are complete, as well as accurate, when the tribunal will rely upon those representations to shape the forum in which the substantive matter will be presented to the trier of fact. At the same time, it requires a lawyer presenting evidence to the trier of fact to be accurate. It does not require the lawyer to anticipate false testimony from witnesses, but does require remedy if the lawyer discovers that one of those witnesses has offered false evidence that might affect the quality of the result on the merits.

The great danger from Formal Opinion 87-353, and the reason that it ought to be withdrawn, is beyond its technical misconstructions of the letter of Model Rule 3.3. The danger is to the adversary system spirit of the *Model Rules*, distorted by the failure to recognize the different duties of candor for the lawyer before a tribunal and the lawyer before the trier of fact. Further, the importance of the independent trier of fact in the common law system of adversary justice is threatened by the failure to understand the proper function of lawyer and tribunal in assessing the credibility of evidence.

It is worth pausing to note that disclosure of client perjury to a tribunal does not contravene the natural law of decision making. There are many systems of dispute resolution that may be as good as or better than the adver-

133. MODEL RULES Rule 8.3.

134. *Id.*

135. DR 1-103(A) requires that a lawyer report all unprivileged knowledge of violations of the *Model Code*. MODEL CODE DR 1-103(A).

136. Model Rule 8.3(a) provides that "[a] lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." MODEL RULES Rule 8.3(a).

sary system. It may be that our justice system would be better served if we used a more inquisitorial model, giving the lawyer greater responsibility for testing the evidence to be presented and giving the tribunal greater control over the presentation and weighing of evidence. A pure adversary system model might well be improved by repealing client confidentiality and the attorney-client privilege,¹³⁷ thereby eliminating any contrary value to that of candor to the tribunal. The society and the profession have made a contrary judgment.

An assumption that adversary system lawyers and judges can “know” things that they either cannot or should not “know” under our system of dispute resolution is at the heart of the advice in Formal Opinion 87-353 to disclose potential or completed client perjury to the tribunal. Justice Stevens’ concurrence in *Nix v. Whiteside* properly warns that the client perjury problem is beset by the elusiveness of certainty. He relies on Justice Holmes for the reminder that words of dispute resolution certainty, like “fact” and “know,” have a life of their own.¹³⁸ What may be “as clear and certain as a piece of crystal or a small diamond”¹³⁹ after the case has been tried and examined by multiple layers of jurists, may present a different picture to the trial lawyer examining a “handful of gravel.”¹⁴⁰

A. THE MEANING OF “KNOW”

Knowledge — “know” — is a concept that must be defined in context, and it is the context that the Standing Committee has missed in its interpretation of Model Rule 3.3. “Knows” is used throughout the *Model Rules* much as it is in normal parlance — to identify a level of intellectual certainty sufficient to allow or to require the “knowing” person or institution to act or refrain from acting. The level of intellectual certainty that constitutes “know” depends upon the method of gaining the information, the nature of the information to be known, and the enterprise for which the information is relevant. How well an individual “knows,” for example, about another’s intoxication level is different, depending upon whether the information is gained from another, from observation of the individual drinking, from observation of the individual after drinking, or from blood testing. What an individual is willing to “know” may also depend upon the reason for “knowing” — whether

137. Commentators have suggested that a functional analysis of confidentiality, focusing on its utilitarian rationale, demonstrates that the concept does nothing to improve the quality of surrogate performance or of the adversary system results on the merits. See, e.g., Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956). The position, however theoretically attractive, has never gained much adherence in the profession or among the commentators on American justice.

138. 106 S. Ct. 988 at 1007.

139. *Id.*

140. *Id.*

to sell another drink, whether to allow the person to drive, or whether to find that the person is guilty of drunk driving. Similarly, what a lawyer “knows” about how the case will be presented or about what a client’s testimony will be is necessarily different from what a trier of fact “knows” after hearing it. What a trial court is entitled to “know” for purposes of a ruling is different from what an appellate court must “know” in order to reverse that ruling.

Without the lawyer’s understanding of the adversary system context, the terminology section of the Model Rules is of no help in defining “knows.” It defines “knows” in its own terms, as “actual knowledge of the fact in question” and allows that “knowledge” can be gained by something other than direct observation of the fact to be known — “knowledge may be inferred from circumstances.”

The Formal Opinion’s position that a lawyer should disclose potential client perjury to the tribunal rests on the assumption that a lawyer can “know” the future. Whatever might have been the appropriate definition of “know” in the context of the *Model Code of Professional Responsibility*, with its prohibition on divulging a client confidence to remedy completed client perjury, there is no justification for including future client conduct within what a lawyer can “know” under Model Rule 3.3. “Knowing” from circumstances is one thing; prediction is quite another. Formal Opinion 87-353 interprets the comment to Model Rule 3.3 as recognizing that the only justification for subordinating client confidences to candor toward the tribunal is to “prevent the judgment from being corrupted by the client’s unlawful conduct.”¹⁴¹ In a world in which the client confidentiality rule prevents a lawyer from remedying completed client perjury, the goal of “prevent[ing] the judgment from being corrupted by the client’s unlawful conduct” might justify a definition of what a lawyer “knows” that would lead to a rule requiring a lawyer to refuse to allow a client to testify, when the lawyer “knows” ahead of time that the client will lie.¹⁴² But in the world of the *Model Rules*, where the lawyer not only may, but must, remedy discovered client perjury, there is no systematic reason for asking a lawyer to “know” the future at the peril of keeping a client from testifying and unilaterally keeping information from the trier of fact.

141. See Formal Op. 353, *supra* note 5. Formal Opinion 87-353 characterizes the comment as follows:

From the Comment to Rule 3.3, it would appear that the Rule’s disclosure requirement was meant to apply only in those situations where the lawyer’s knowledge of the client’s fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client’s unlawful conduct.

Id.

142. In his comprehensive article on client perjury under the *Model Code*, Professor Wolfram asserts and cites authority for the proposition that a lawyer can “know” of potential perjury under the *Model Code*. Wolfram, *supra* note 4, at 842-848.

The subsection 3.3(a)(4) admonition that “a lawyer shall not knowingly offer evidence that the lawyer knows to be false,”¹⁴³ directs conduct only in the very narrow situation in which the lawyer has an active role in creating the false evidence. It prohibits a lawyer from helping a client to concoct a story, from taking action that helps a client to solicit the false testimony of a witness, and from helping a client to create a false exhibit. In each of those situations the lawyer “knows” of the nature of the proposed testimony in a way that the adversary system wants to control — the lawyer has helped to create it. By contrast, a lawyer cannot “know” a future in which the lawyer has no creative part. The lawyer cannot “know” whether testimony of a witness is false — even after a client’s admission of intention — until after the lawyer hears the testimony. The cost of a lawyer’s pre-testimony speculation, no matter how good the guess, is too high. It will keep evidence from the trier of fact under circumstances in which the lawyer might be wrong about the lie and in which the lawyer is obligated to later remedy the falsehood, including, if necessary, by giving the trier of fact the information that leads the lawyer to know the testimony is false. There is no adversary system reason for “know” to mean something that the advocate must determine ahead of time. The adversary assumption tells the lawyer to leave the resolution of uncertainty — any uncertainty — to the trier of fact. This narrow view of what the lawyer can “know” about future testimony is consistent with what the adversary system has determined a tribunal can “know” about the credibility of any testimony. The adversarial dispute resolution system insists that only a trier of fact, after hearing the testimony, can “know” whether testimony is credible. It does not allow either court or counsel to prejudge the credibility of evidence, if the prejudgment will deprive the trier of fact of the evidence.¹⁴⁴

A simple criminal law example demonstrates the general adversary point. A criminal defendant admits a robbery to the defense lawyer, but insists on putting the government to its proof. The police investigation turns up three eyewitnesses. At the lineup, the most credible of the three credible witnesses identifies another individual — one with a long record of similar robberies — as the one who committed the crime. Is the defense lawyer prohibited by subsection 3.3(a)(4) from offering the witness’ testimony because the lawyer “knows” that the witness is wrong — that the evidence is false? If the lawyer can “know” about the veracity of evidence by the client’s admission of guilt the answer must be yes. The client has told the lawyer that the client committed the crime. Our system, however, does not either grant the privilege nor impose the burden of knowledge on the defense lawyer. The defense lawyer who knows of the evidence and does not offer that witness’ testimony

143. MODEL RULES Rule 3.3(a)(4).

144. See *supra* text accompanying notes 53-70.

to the jury has both done a disservice to the client¹⁴⁵ and has usurped the jury's right to find the facts and render the verdict. The lawyer has no more right to substitute the lawyer's verdict of guilty for the jury's than to substitute the lawyer's verdict of not guilty for the jury's acquittal.

Section 3.3(c), a revolutionary change from the *Model Code of Professional Responsibility*, supports this narrow adversary system view of what a lawyer can "know" and explains the previous eyewitness example in which a lawyer presents evidence that, in any other context, the lawyer would "know" to be false.¹⁴⁶ In reaction to the *Model Code of Professional Responsibility's* rule that a lawyer could exclude only evidence the lawyer "knows" to be false,¹⁴⁷ section 3.3(c) of the *Model Rules* creates a rare exception to the mandate that neither court nor counsel can put potential evidence through a credibility screen. It allows a civil lawyer to "refuse to offer evidence that the lawyer reasonably believes is false."¹⁴⁸ In the civil context, the lawyer need not present the testimony of a witness who is later discovered by the opponent. This is not because the lawyer "knows" that the evidence is false, but because the lawyer "reasonably believes" it to be false. Section 3.3(c) and Model Rule 1.2 give the lawyer control over whether a witness will testify and contemplate that the lawyer might refuse to offer the testimony. It is equally clear that section 3.3(c) anticipates that a lawyer may ethically present testimony that the lawyer "reasonably believes" to be false, and leave it to the trier of fact to find the "truth." The civil lawyer is not required to resolve the difference between the client's admission and the eyewitness' contrary assertion. If "know" in subsection 3.3(a)(4) means more than the certainty that arises when the lawyer helps to create the false testimony, the civil lawyer could not present the mistaken eyewitness testimony and section 3.3(c) would be superfluous.¹⁴⁹

145. Although the language of Canon 7 of the *Model Code of Professional Responsibility* — "represent[ing] a client zealously" — does not appear in any of the *Model Rules*, the comment to Model Rule 1.3 maintains that the concept remains in the ethics of the profession. See MODEL RULES 1.3 comment (a lawyer should act "with zeal in advocacy in the client's behalf").

146. MODEL RULES Rule 3.3(c).

147. DR 7-102 (A)(4) reads in part:

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

....
(4) Knowingly use perjured testimony or false evidence.

MODEL CODE DR 7-102(A)(4).

148. MODEL RULES Rule 3.3(c).

149. Although Model Rule 3.3(c) is not limited to civil lawyers by its language nor buy any adversary system value, the Constitution probably prevents a criminal defense lawyer from screening evidence for credibility. The comment to section 3.3(c) acknowledges the likely constitutional limitation by suggesting that "[i]n criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel." MODEL RULES Rule 3.3(c).

The civil lawyer's client has no right to testify; the criminal defense lawyer's client does. *Rock v.*

B. HOW TO HANDLE A LIAR

The Committee's failure to appreciate the important systematic differences between civil and criminal matters led to its embrace of the rigid disclosure requirement of subsection 3.3(a)(2) for client perjury, instead of the flexible remedial approach in subsection 3.3(a)(4).

The rigid disclosure requirement that causes unnecessary headaches for the civil lawyer, ironically, may remove the defense lawyer's dilemma, at the cost of reducing the validity of criminal trial results. If Formal Opinion 87-353 endures, the civil lawyer's disclosure to the tribunal, as the reasonable remedial measure for perjury, will not reduce the "truth" before the trier of fact. A civil tribunal, though it may have no more power than a criminal tribunal to exclude witnesses or to direct a verdict based on credibility, can encourage the lawyer to testify before the trier of fact or suggest that the opponent call the opposing lawyer. Once a criminal defense lawyer discloses potential client perjury to the tribunal, both the tribunal and the lawyer may be prohibited from taking any action to put the information before the trier of fact. If the lawyer has complied with subsection 3.3(a)(2) and disclosed the potential perjury to the tribunal, Model Rule 1.6 and the defendant's bundle of constitutional rights both may prohibit the lawyer from taking further action.

Model Rule 1.6 confidentiality is not subject to override by section 3.3(b), if subsection 3.3(a)(4) does not, by itself, impose a disclosure duty on the lawyer. If the analysis in Formal Opinion 87-353 is correct, subsection 3.3(a)(4) does not by itself impose that duty. Indeed, if it does, there is no justification for the Opinion's resort to subsection 3.3(a)(2). The lawyer, without a subsection 3.3(a)(4) duty to justify violating the defendant's confidence pursuant to section 3.3(b), probably cannot notify the prosecutor nor testify before the trier of fact. Although the lawyer could attempt to withdraw, most commentators agree that courts would often deny it.¹⁵⁰

Arkansas, 107 S.Ct. 2704 (1987). The civil client has no right to compel the testimony of others; the criminal defendant has a personal right to compulsory process. *Washington v. Texas*, 388 U.S. 14 (1967). The civil client has no right to insist upon proceeding *pro se*; the criminal defendant may exercise that right when he voluntarily and intelligently elects to do so. *Faretta v. California*, 422 U.S. 806 (1975).

150. See, e.g., Lefstein, *supra* note 4, at 525-27. Withdrawal is almost impossible in the middle of a criminal trial and does not provide a realistic remedy. Dean Lefstein and Professor Freedman, who disagree about what a lawyer ought to do when faced with the prospect of putting a lying client on the witness stand, agree and present powerful arguments for the proposition that withdrawal should never be a solution for the lawyer's client perjury dilemma. *Id.*; Freedman, *supra* note 23, at 1475-77. Withdrawal pushes the perjury problem to the next lawyer and may allow the defendant to manipulate the system inappropriately. Lefstein, *supra* note 4, at 525-27. It may also carry some double jeopardy risks and may send what may be an unconstitutional message to the jury.

Ironically, withdrawal in a civil matter may be an effective tool against client perjury. Although lawyer withdrawal is not popular with courts in civil matters either, changes in lawyers during the

If the lawyer discloses to the tribunal pursuant to subsection 3.3(a)(2), the tribunal may be equally stymied without ever reaching the constitutional rights that are unique to the criminal defendant. The tribunal cannot act on the lawyer's disclosure without hearing the defendant's version. When the tribunal questions the defendant outside the presence of the jury, the defendant is likely to contradict the lawyer, leaving the tribunal with no basis upon which to prefer the lawyer's testimony to the defendant's other than the tribunal's judgment of comparative credibility. Even if the tribunal prefers the lawyer to the defendant beyond a reasonable doubt, it is making a judgment beyond its jurisdiction.¹⁵¹ The constitutional limitations on criminal prosecutions prevent the completion of the defendant's perjury from adding anything to the tribunal's power to deal with the problem. The Constitution prohibits a court from requiring a criminal defendant to produce a witness, let alone the defendant's lawyer, and prevents the court from telling the prosecutor to call the defense lawyer.

All trial lawyers, the courts, and most importantly, the adversary system will be better served by ignoring subsection 3.3(a)(2), in matters before a trier of fact, and by following the procedure contemplated by subsection 3.3(a)(4), at least so long as the adversary system maintains an ethical rule of confidentiality, the attorney/client privilege, and the criminal defendant's constitutional rights to testify and to counsel. Subsection 3.3(a)(4) prohibits the lawyer from creating false testimony, but does not *require* the lawyer to hazard the full presentation of the client's case by predicting the quality of the witness' testimony and withholding suspicious testimony.¹⁵² At the same time, it protects the adversary result by requiring remedial action when the lawyer's suspicion becomes reality. The lawyer faced with the client's intention to lie should warn the client of the consequences, including the lawyer's obligation to testify to the fact that lead the lawyer to conclude that the client will lie. If the client persists, the lawyer should present the testimony,¹⁵³

course of civil litigation is becoming an increasingly common phenomenon. See Goldberg, *The Former Client Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227 (1987)(exploring successive conflict disqualification). Courts that will suffer thin inconvenience of lawyer disqualification to protect the marginal risk of confidence disclosure in successive conflict cases ought to have no problem with withdrawal to avoid presenting perjury. Withdrawal in a civil case presents no problems of double jeopardy, no irresolvable manipulation issues, and no risk that withdrawal will merely shift the perjury problem to another lawyer. Further, in a civil case, the threat of withdrawal, even if a tribunal might not grant it, is more effective than it is in a criminal case. In most criminal cases, the criminal defendant has nothing to lose by the cost and the delay that result from withdrawal. Indeed, it may be the best result for which the defendant realistically can hope. In all civil cases, one of the parties stands to lose a potential victory by withdrawal and all of the parties will incur financial cost from the delay.

151. See *supra* text accompanying note 53-70.

152. Section 3.3(c), of course, permits the civil trial lawyer to refuse to present a part of the client's case that the lawyer reasonably believes is false. See MODEL RULES Rule 3.3(c).

153. The civil lawyer has the alternate possibility of refusing to present the testimony under

rather than burden the court with information it cannot use,¹⁵⁴ ask for a withdrawal that the court will not grant, or allow the witness to testify without the control of the lawyer's questions.

The advice to present the testimony applies to all trial lawyers, but the criminal defense lawyer may have no choice.¹⁵⁵ Without the benefit of section 3.3(c) and the right to exclude evidence the lawyer reasonably believes to be false, the criminal defense lawyer's best opportunity to prevent the perjury is to maintain interrogation control over the quality of evidence that goes to the trier of fact. By presenting the witness and asking the questions, the lawyer maintains a chance to avoid the perjury by the skillful manner of interrogation. If the lawyer refuses to conduct the interrogation, the lawyer only encourages the defendant to exercise the *Faretta* right of self-representation.¹⁵⁶ In that event, the lawyer loses all opportunity to direct the client's testimony, to control the defense, and to call witnesses — which, after the client perjury, might include the lawyer. The lawyer who interrogates the client who intends to lie, in addition to having a chance to control the testimony and make the client's perjury more difficult, has the power to impeach the defendant. Because the lawyer will not be encumbered by the Model Rule 3.7 prohibition against lawyer testimony,¹⁵⁷ the lawyer can ask the kind of "didn't you tell me" question that would normally be unavailable to a cross examining lawyer who is unable to produce the lawyer's own impeaching testimony that justifies the question.

V. CONCLUSION

In a system of justice that depends upon a trier of fact's judgment about truth, all lawyers should act in a way that is consistent with that goal. That does not allow a lawyer to unilaterally deny to a trier of fact what the lawyer believes will be perjurious, no matter the certainty nor the rectitude of the

section 3.3(c). See MODEL RULES Rule 3.3(c). The problem with that as a practical solution is that lawyers have very little experience with the exercise of eliminating or censuring a client's testimony. If civil lawyers ought to begin refusing to present testimony they believe to be false, rather than use the "wait and see" approach, there is much to be discussed about the nature of the standard, the method for determining a lawyer's reasonable belief, and the method for handling the consequences to the lawyer, the client and the system if the lawyer is wrong.

154. The tribunal's inability to use the information to stop the perjury may increase the risk that the tribunal will use the information inappropriately. Disclosure of completed perjury creates the risk that the court will use the knowledge in sentencing if the defendant is convicted. Perjury is punishable by a term set by the legislature and only after a finding of guilty beyond a reasonable doubt. The lawyer has no right nor reason for risking increased penalty for the client. Disclosure does not nullify the perjury in reaching an adversary result. Indeed, because the jury convicted, it is clear that no "remedial measure" is needed. The lawyer has no permit to breach confidence and there is great risk the tribunal will use it to inappropriately penalize the client.

155. See *supra* note 95.

156. See *id.*

157. See MODEL RULES Rule 3.7 and *supra* note 62.

belief. Similarly, it does not require a lawyer to take action that may assist a tribunal and a prosecutor in a perjury prosecution, but will be futile in correcting the current record before the trier of fact on the merits. It is the lawyer's task to try to keep perjury out of the system, to get the client to correct perjury if it becomes part of the proceedings, and if nothing else will work, to make the record before the trier of fact sufficiently complete so that the trier of fact can exercise its obligation to make a judgment.

Model Rule 3.3 can be a valuable aid for civil lawyers faced with the too common problem of client perjury. Its flexible approach to a real problem ought not be ignored in pursuit of a rigid answer to a rare hypothetical — particularly when the rigid answer does not solve the real problem. Formal Opinion 87-353 ought to be withdrawn. It creates interpretive chaos in the place of straightforward text. Model Rule 3.3 does not have to be bent out of shape to protect the system from the evil of perjury. It ought not be bent out of shape to increase the system's ability to prosecute perjury. So long as we operate an adversary system of justice in which truth is what a jury finds, courts cannot prejudge credibility and lawyers ought not be put in a position to attempt what the courts are powerless to accomplish.