

# ETHICS ADVISORY OPINION

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## The Ethics Advisory Committee of NACDL Formal Opinion 92-2

### **Ethics Opinion Will Reduce Perjury and Uphold Defendants' Rights**

A new ethics opinion relating to the issue of client perjury was adopted by a near-unanimous NACDL Board of Directors at its meeting on November 7, 1992, in Newport, Rhode Island. The opinion had been debated before the NACDL Board at two previous meetings, leading to refinements in an earlier draft.

The unusually long and closely reasoned opinion concludes that the constitutional privilege against self-incrimination and the constitutional right to the effective assistance of counsel prohibit a lawyer from revealing a client's perjury to the court, regardless of ethical rules that appear to require disclosure.

The opinion expressly rejects the "narrative solution," in which the lawyer forces the client to testify without the assistance of counsel, and in which the lawyer then omits reference to the client's testimony in closing argument. As is generally recognized, this kind of conduct by the lawyer effectively reveals client confidences and secrets to the judge and jury.

Also rejected was the suggestion that a lawyer intentionally maintain ignorance of client perjury by giving the client a lawyer-client *Miranda* warning. One disadvantage of this approach is that the lawyer frequently fails to obtain important information about the case. Another is that the lawyer who purposefully remains ignorant of the client's perjury is not in a position to dissuade the client. In addition, the lawyer may unwittingly help the client to improve upon the perjury in the normal course of preparing the client to testify.

By contrast, the NACDL ethics opinion expressly forbids the lawyer to assist the client in improving the perjury, and it requires the lawyer to make good faith efforts to dissuade the client from testifying falsely. Even those who argue against this position generally concede that it will result in less perjury rather than more.

In the rare case in which the lawyer is unable to dissuade the client from testifying falsely, the opinion requires the lawyer to examine the client in the usual way and, to the extent tactically desirable, to argue the client's testimony to the jury.

The opinion also adopts the dominant view that the lawyer should not act on the belief that a client intends to commit perjury unless the lawyer has "actual knowledge" that the testimony will be false or, at least, knows this to be so beyond a reasonable doubt. Under *Strickland v. Washington*, 466 U.S. 668 (1984), the lawyer's judgment that there is a reasonable doubt should be accepted as falling within the "wide range of reasonable professional assistance." See, e.g., *State v. Skjonsby* 417 N.W.2d 818 (No. Dak. 1987).

The NACDL ethics opinion notes, however, that no ethics opinion can guarantee a safe harbor in difficult cases. In close cases, lawyers should proceed carefully, with full knowledge of the applicable ethical rules of the jurisdiction and, ideally, with the advice of counsel.

### **QUESTION PRESENTED**

What is the proper course for a criminal defense attorney to follow if the defendant proposes to commit perjury?

### **DIGEST**

(1) The constitutional privilege against self-incrimination and the constitutional right to the effective assistance of counsel prohibit a lawyer from disclosing a client's perjury to the court, even though such conduct is in conflict with ethical rules, such as Rule 3.3(a)(2) and (4) of the American Bar Association's (ABA's) Model Rules of Professional Conduct, that call for disclosure.

(2) A lawyer should not betray a client's confidences and



secrets by conveying to the judge and/or jury that the lawyer believes that the client intends to commit perjury or that the client is doing so. This means that the lawyer should not inform the judge obliquely of "ethical problems," force the client to testify in narrative fashion, or fail to argue the client's testimony to the jury for other than tactical reasons.

(3) A lawyer may act on the belief that a client intends to commit perjury only if the lawyer knows this beyond a reasonable doubt.

(4) If a lawyer believes beyond a reasonable doubt that the client intends to commit perjury, the lawyer must make a strong, continuing, good faith effort to dissuade the client from that course. The lawyer may withdraw, but only if this can be accomplished without either directly or indirectly revealing the client's confidences or secrets, or otherwise prejudicing the client's rights.

(5) If the lawyer is unable to dissuade the client or to withdraw, the lawyer may not assist the client to improve upon the perjury, but must maintain the client's confidences and secrets, examine the client in the ordinary way, and, to the extent tactically desirable, argue the client's testimony to the jury as evidence in the case.

(6) In pursuing the course outlined in paragraph (5) above, attorneys should proceed carefully, with full knowledge of the applicable ethical rules of the jurisdiction, and with the advice, if possible, of counsel.

### Opinion<sup>1</sup>

The Board of Directors has been presented with the question of whether a criminal defense lawyer may put a client on the stand to testify when the lawyer believes that the client will give materially false testimony in whole or part, and, if so, how the client's testimony should be presented. The issue has arisen recently because Rule 3.3(a)(2) and (4) of the Model Rules of Professional Conduct, requiring the lawyer to prevent or disclose client perjury to the court, are inconsistent with the client's Fifth and Sixth Amendment rights.

Our opinion is based upon an analysis of the constitutional rights to counsel and the privilege against self-incrimination, the attorney-client privilege, and ethical protection of clients' confidences and secrets. When, as in this case, ethical rules conflict with constitutional rights, the ethical rules must give way.

## I. Ethical Rules Involved

The ethical rules take differing approaches to the question of client perjury. The Model Code of Professional Responsibility (1969) continues to govern in a minority of states. Under the Model Code, the lawyer is either forbidden to reveal foreknowledge of client perjury,<sup>2</sup> or has discretion whether to reveal foreknowledge of client perjury.<sup>3</sup> In no event is the lawyer permitted to reveal knowledge of client perjury that is learned after the fact.<sup>4</sup>

In a "major policy change,"<sup>5</sup> however, the Model Rules of Professional Conduct (1983) make it mandatory for the lawyer to reveal a client's fraud on the court if the lawyer cannot persuade the client to rectify the fraud.

### A. Model Code of Professional Responsibility

#### EC 4-1

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system....

#### DR 4-101

##### *Preservation of Confidences and Secrets of a Client.*

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(C) A lawyer may reveal:

.....

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

.....

#### EC 7-6

...In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

#### DR 7-101

##### *Representing a Client Zealously*

(A) A lawyer shall not intentionally:

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

#### DR 7-102

##### *Representing a Client Within the Bounds of the Law.*

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

.....

(4) Knowingly use perjured testimony or false evidence.

.....

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.  
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

.....

(B) A lawyer who receives information clearly establishing that:

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

### B. Model Rules of Professional Conduct

#### Rule 1.6

##### *Confidentiality of Information*

(a) A lawyer shall not reveal information relating to representation of a client....



**Rule 3.3**  
**Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

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(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;

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(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.

**C. ABA Standards for Criminal Justice: The Defense Function (3d ed. 1991)**

**Standard 4-3.1**  
**Establishment of Relationship**

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused....

**Standard 4-3.2**  
**Interviewing the Client**

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused....

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

**D. ABA Standards for Criminal Justice: The Defense Function (1st ed. 1971).<sup>6</sup>**

**7.7 Testimony by the Defendant.**

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify false-

ly, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, it is unprofessional conduct for the lawyer to lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

**II. DISCUSSION**

**A. The Privilege Against Self-Incrimination and the Right to Counsel**

In *Nix v. Whiteside*,<sup>7</sup> the Supreme Court decided that the Sixth Amendment right to counsel was not violated when the defense lawyer prevented his client from committing perjury by threatening to reveal the truth to the court. As the Court noted, the lawyer "divulged no client communications" until he was compelled to do so in post-conviction proceedings.<sup>8</sup> It is still an open question, therefore, whether the constitutional right to counsel would be violated if the lawyer were actually to divulge client communications to the court, particularly if this were to be done after the perjury had already been committed.<sup>9</sup>

Even more clearly, the defendant's Fifth Amendment privilege against self-incrimination has not been foreclosed by *Nix* because the issue was neither argued to the Court nor discussed in the opinions. As pointed out by Professors Hazard and Hodes:<sup>10</sup>

The defendant or suspect in a criminal case usually will reveal to his lawyer information that would be protected by the Fifth Amendment if sought by the government. Because of the attorney-client privilege, the government plainly cannot obtain this information

from the lawyer.... Indeed, the government conceded this preliminary point in *Fisher v. United States*, 425 U.S. 391 (1976), and the Supreme Court considered it to be obvious.

The lawyer, of course, has no Fifth Amendment privilege with regard to information that would incriminate only the client. Nevertheless:<sup>11</sup>

[T]he attorney-client privilege *must* apply to communications by an accused to his lawyer, for otherwise, a criminal defendant would *de facto* lose his Fifth Amendment protection merely by speaking candidly to his lawyer. In this sense, the attorney-client privilege stands in for the constitutional protection.

Thus, in *Fisher v. United States*, "the Supreme Court...extended Fifth Amendment protection to the attorney-client privilege for the express purpose of encouraging the uninhibited exchange of information between citizens and their attorneys."<sup>12</sup>

The continuing importance of the privilege against self-incrimination to the client perjury issue is therefore obvious. Because the lawyer-client privilege "*must* apply to communications by an accused to his lawyer" in order to maintain the client's Fifth Amendment protection,<sup>13</sup> and because the government "plainly cannot obtain this information from the lawyer,"<sup>14</sup> it follows that the government cannot enforce a rule requiring a lawyer to reveal his/her client's confidences regarding the client's perjury.

As noted, the case in which Fifth Amendment protection was extended to the lawyer-client privilege was *Fisher v. United States*. The Court reasoned in *Fisher* that "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."<sup>15</sup> Because the Fifth Amendment was not raised in *Nix*, however, *Fisher* was neither cited to the Court nor mentioned in the *Nix* opinions.

Another relevant Fifth Amendment case that was not raised in *Nix* is *Estelle v. Smith*,<sup>16</sup> which involved a psychiatrist's examination of a defendant's competency to stand trial. The defendant was not advised of his privilege against self-incrimination, nor was his lawyer informed of the examination. The psychiatrist did not testify at trial



regarding the crime at issue. At the post-trial sentencing hearing, however, the psychiatrist gave his opinion that the defendant was likely to commit future crimes.

Writing for the Court, Chief Justice Burger noted that, during the psychiatric evaluation, the defendant "assuredly... was 'not in the presence of [a person] acting solely in his interest.'" "Rather, the psychiatrist's apparent neutrality changed, and he became at the sentencing trial essentially "an agent of the State recounting unwarned statements made in a post-arrest custodial setting." "Accordingly, the defendant's Fifth and Sixth Amendment rights had been violated, and the sentence was vacated.

Another case not cited in *Nix* is *United States v. Henry*.<sup>19</sup> In that case, a government informant who had been placed in the same cell with Henry established a relationship of trust and confidence with him. As a result, Henry revealed incriminating information to the informer. Again, Chief Justice Burger wrote the opinion for the Court, vacating Henry's conviction because it had been based in part on the admissions elicited through a false relationship of trust and confidence.<sup>20</sup>

It is difficult to understand how a defendant's own lawyer can properly do what the psychiatrist in *Estelle* or the cellmate in *Henry* could not do—that is, establish a relationship of trust and confidence and then "become an agent of the State" by disclosing to the court the incriminating information gained in the relationship.<sup>21</sup> In fact, the case of the lawyer is a more serious one than that of the cellmate.<sup>22</sup> The Supreme Court has never described trust and confidence between cellmates as "imperative," but it has used that word in describing the relationship of trust and confidence between lawyer and client.<sup>23</sup> That relationship has also been lauded as the "cornerstone of the adversary system and effective assistance of counsel,"<sup>24</sup> and fidelity to that trust has been called "the glory of our profession."<sup>25</sup>

Accordingly, the Fifth Amendment privilege against self-incrimination incorporates the lawyer-client privilege, giving constitutional protection to information that a lawyer has received from his/her client. Conversely, however, if the lawyer's information is outside the lawyer-client privilege, it is not protected by the Fifth Amendment. It is important to consider, therefore, whether a lawyer's knowledge of a client's intention to commit perjury is within the future crime exception to the

lawyer-client privilege.

In fact, perjury has been construed as falling outside of the future crime exception. One reason is that it is "intrinsicly and inextricably" related to the crime for which the defendant is being tried.<sup>26</sup> In this respect, it is like the future crime of concealing the proceeds of a theft—that is, to reveal the future crime (ongoing concealment) is to implicate the client in the past crime (theft).<sup>27</sup> This is not true, of course, of the future crime of bribing a juror. To reveal the client's intent to commit the bribery does not require revealing any confidences regarding his guilt of the past crime that is being tried.

The majority in *Nix* does equate perjury with bribing a witness or juror.<sup>28</sup> However, this was part of what the four concurring justices criticized as the majority's inappropriate *dictum* on professional ethics.<sup>29</sup> As Justice Brennan said, that part of the majority opinion was "pure discourse without force of law."<sup>30</sup> Moreover, as is characteristic of the most unreliable *dictum*, counsel failed adequately to argue the point,<sup>31</sup> and the majority opinion does not consider any of the significant differences between perjury and bribing a witness or juror.

Also, bribery of a juror is "structural," sabotaging the adversary system at its foundation.<sup>32</sup> By contrast, the adversary system takes perjury into account and is designed to deal with it. As Déan Wigmore has written, cross-examination is "the greatest legal engine ever invented for the discovery of truth."<sup>33</sup> A panel on lawyers' ethics was once asked what the defense lawyer should do when a client proposes to commit perjury. "Do me a favor," a United States Attorney on the panel replied, "Let him try it."<sup>34</sup> If the question had related to bribing a juror, however, the United States Attorney would not have responded, "Do me a favor. Let him try it."

In the same paragraph in which it concludes that perjury is "essentially the same" as bribing a juror, the *Nix* majority says that a defendant would have no "right" to insist upon his lawyer's silence regarding bribery of a juror or witness. The analogy cuts the other way, however, because the Court has permitted a defendant to insist upon silence regarding his perjury, and, significantly, the context involved the defendant's Fifth Amendment privilege.

In *New Jersey v. Portash*,<sup>35</sup> Portash had been granted use immunity<sup>36</sup> for grand jury testimony. When he was subsequently prosecuted, the trial court ruled that if he presented an alibi that was inconsistent

with his grand jury testimony, the prosecution would be able to use the grand jury testimony to impeach him. The Supreme Court reversed, holding that Portash had a constitutional right to present his alibi (which was assumed to be perjured)<sup>37</sup> without being impeached with his inconsistent grand jury testimony.

Obviously, Portash did not acquire a "right" to commit perjury. The Supreme Court did hold, however, that forfeiture of his Fifth Amendment privilege was not one of the consequences of his perjury.<sup>38</sup> Moreover, although the lawyer is "an officer of the court and a key component" of a system that is "dedicated to a search for truth,"<sup>39</sup> there was no suggestion that Portash's lawyer had acted improperly in offering the perjurious alibi.<sup>40</sup>

Also bearing upon the future crime exception in the context of the Fifth Amendment privilege is *Estelle v. Smith*,<sup>41</sup> where the psychiatrist interviewed the defendant without warning him that his statements could be used against him in court. The psychiatrist was therefore barred from using the defendant's communications as the basis for testifying in the sentencing phase about the likelihood that the defendant would commit future crimes. If the future crime exception did in fact nullify the defendant's privilege with respect to communications to his lawyer, surely the Court would have allowed the psychiatrist to testify about the defendant's future criminality. Put otherwise, if the psychiatrist cannot reveal in court the defendant's unwarned communications bearing upon future crimes without violating the defendant's Fifth Amendment privilege, the defendant's lawyer cannot do so either.

### ***B. Proposed Solutions That Violate the Privilege Against Self-Incrimination and the Right to Counsel***

The foregoing discussion makes clear that no solution to the client perjury problem is constitutional that requires the lawyer to reveal a client communication to the court that incriminates the client.

One proposal that cannot survive this test is that the lawyer seek leave to withdraw in circumstances in which the lawyer will be required to give the court an explanation for doing so. There is general agreement that even an equivocal answer inevitably incriminates the client. For example, in *Lowery v. Cardwell*,<sup>42</sup> the lawyer said only, "I cannot state the reason." This was recognized by the court as being an "unequivocal announcement"



of the defendant's perjury.<sup>45</sup> Similarly, in *United States v. Henkel*,<sup>44</sup> the court inferred the client's perjury when the defense lawyer simply said that he could not "professionally...proceed."<sup>45</sup>

Another proposal appeared in Section 7.7 of the 1971 version of the ABA Defense Function Standards. Under Section 7.7 of the 1971 Standards, the lawyer was required to "confine his examination to identifying the witness as the defendant and permitting him to make his statement." That is, the lawyer has the client present his testimony in narrative form, rather than in the normal question-and-answer manner. The result is that the client's perjury will become part of the record, although without the attorney's assistance through questioning.

The Supreme Court has held, however, that denying a defendant the right to be questioned by counsel is tantamount to a deprivation of the Sixth Amendment right to the effective assistance of counsel.<sup>46</sup>

One might rejoin that, by lying, the defendant waives this right. But the Supreme Court... "has always set high standards of proof for the waiver of constitutional rights,"<sup>47</sup> and to presume such waiver from the mere fact of his lying is imposing upon the defendant [the deprivation of a constitutional right as] an added perjury punishment.<sup>48</sup>

As the Ninth Circuit has held, "If in truth the defendant has committed perjury...she does not by that falsehood forfeit her right to fair trial."<sup>49</sup>

Assuming, however, that the client's perjury has been put in evidence in narrative form, what should the lawyer do about his/her closing argument to the jury? The general rule, of course, is that "the lawyer may argue all reasonable inferences from the evidence in the record,"<sup>50</sup> and the client's story is now part of the record.<sup>51</sup> Indeed, it is a deprivation of the right to counsel to prevent the defense lawyer from marshalling the evidence in closing argument.<sup>52</sup> Nevertheless, Section 7.7 provides that the defense lawyer is forbidden to make any reference in closing argument to the defendant's testimony.

Beyond any question, the procedure envisioned by Section 7.7 divulges the client's confidences. The judge is certain to understand what is going on, and it is generally agreed that the jury usually will as well.<sup>53</sup> Even if the jury does not realize the significance of the unusual manner in which the defendant is testifying, the jury is sure to catch on when the defense lawyer

in closing argument makes no reference to the defendant's exculpatory testimony.

Section 7.7 was deleted from the Standards by the ABA in 1979, with reference to the emerging Model Rules. In 1983, the Model Rules explicitly rejected Section 7.7, in part because it is "an implicit disclosure of information imparted to counsel." Also, Chief Justice Burger, who was the first to promote the idea, repudiated Section 7.7 in *Nix v. Whiteside*.<sup>54</sup>

Obviously, Model Rule 3.3, which requires that the lawyer reveal client perjury by using information derived from client confidences or secrets, is subject to similar objections as is Section 7.7. In particular, under MR 3.3 the lawyer is placed in the position of "waiving" the defendant's privilege against self-incrimination. As Dean Norman Lefstein has pointed out, the decision to waive a client's constitutional right "should not be permitted to be made unilaterally by defense counsel."<sup>55</sup> "We permit no other constitutional right of a defendant...to be stripped away in this fashion."<sup>56</sup> The defendant is entitled, at the least, to an "on-the-record judicial hearing."<sup>57</sup>

That procedure, however, only serves to create further difficulties. If such a hearing is held, "[i]t is virtually unthinkable that a defendant would acknowledge that he or she planned to lie."<sup>58</sup> In addition to involving the trial court in lawyer-client confidences, therefore, the hearing "will...almost certainly be unsatisfactory."<sup>59</sup> In the process, moreover, the attorney-client relationship will have been "torn asunder."<sup>60</sup> As Dean Lefstein demonstrates, therefore, the solution proposed by MR 3.3 (as interpreted by Opinion 87-353) is a shambles.

An additional problem with MR 3.3 is that it would require a lawyer-client *Miranda* warning.<sup>61</sup> In fact, in the 1980 Discussion Draft of the Model Rules, which contained a rule virtually identical to 3.3,<sup>62</sup> the Comment explained the need for giving the warning at the outset of the lawyer-client relationship:

A new client should be given a general explanation of the client-lawyer relationship. A client should understand the lawyer's ethical obligations, such as the prohibitions against assisting a client in committing a fraud or presenting perjured evidence.

The Comment candidly acknowledged that "[t]he warning may lead the client to withhold or falsify relevant facts, thereby making the lawyer's representation...less

effective...." When it was pointed out that this amounts to instructing the client to be less than candid with the lawyer<sup>63</sup>—which is forbidden by the Defense Function Standards<sup>64</sup>—the Kutak Commission simply deleted the comment, thereby eliminating the candor but not the problem.

Finally, the prejudice to the client is clear when the lawyer puts on the record that the client is going to try to lie his way out of a conviction. Even the proponents of Section 7.7 acknowledged that "if the trial judge is informed of the situation, the defendant may be unduly prejudiced."<sup>65</sup> Today, with the extraordinary expansion of the harmless error doctrine,<sup>66</sup> the lawyer's divulgence of the client's confidences could well negate what would otherwise be reversible error.<sup>67</sup>

### C. The Recommended Solution

We recommend the following means of resolving the problem of client perjury, maintaining the traditional model of lawyer-client trust and confidence, protecting the constitutional rights to which that relationship gives expression, and putting lawyers in a position to dissuade the client from committing perjury.

As provided in the Defense Function Standards, defense counsel should "seek to establish a relationship of trust and confidence with the accused."<sup>68</sup> Counsel should also "probe for all legally relevant information,"<sup>69</sup> explaining to the client "the necessity of full disclosure of all facts known to the client for an effective defense," and the extent to which ethical rules protect the client's confidences and secrets.<sup>70</sup>

If the lawyer believes that the client intends to commit perjury, the lawyer should not act on that belief unless it is beyond a reasonable doubt.<sup>71</sup> Surely the lawyer should not convict his/her client on a lesser standard than the jury would have to use. Also, as noted in EC 7-6 of the Model Code, whenever the lawyer is not "certain" as to the client's state of mind, the lawyer should "resolve reasonable doubts in favor of his client."

If, on that standard, the lawyer determines that the client is contemplating perjury, he/she should make continuing, good faith efforts to dissuade the client from that course.<sup>72</sup> The lawyer is permitted to withdraw, as long as withdrawal would not prejudice the client; it is preferable, however, that the lawyer not withdraw, but that he/she continue to use his/her relationship of trust and confidence with the client, "up to the very hour of the client's...testimony,"<sup>73</sup> to dissuade the client from committing the perjury.



The client, faced with the threat of prison, may or may not be impressed with the fact that perjury is immoral and illegal, but may well be persuaded by the fact that the judge has the power to increase the sentence if he/she concludes that the defendant has given false testimony.<sup>74</sup> In any event, there is a professional consensus that lawyers are frequently successful in dissuading client perjury.<sup>75</sup> Note again, however, that lawyers can serve this function—to the benefit of society as well as their clients—only if their clients are willing to entrust them with their confidences and to accept their advice. That is not likely to happen if a lawyer-client *Miranda* warning is given.<sup>76</sup>

In the relatively small number of cases in which the client who has contemplated perjury rejects the lawyer's advice and decides to proceed to trial, to take the stand, and to give false testimony, the lawyer should go forward at trial in the ordinary way.<sup>77</sup> That is, the lawyer should examine the client in the normal professional manner and should argue the client's testimony to the jury in summation to the extent that sound tactics justify doing so.

### D. When Does a Lawyer "Know" That a Client Is Going to Commit Perjury?

Within weeks of the decision in *Nix v. Whiteside*, the American Bar Association (ABA), in conjunction with the American Law Institute (ALI), produced a videotape on which several experts on the ethics of criminal defense lawyers commented on the case and on MR 3.3. The ABA/ALI commentators make it clear that the trial lawyer's conduct approved by the majority in *Nix* represented a radical departure from traditional, standard practice.

Defense counsel in *Nix* is described as having gone "bonkers" in inferring that his client was going to commit perjury and in his "brutal" reaction. Further, the notion that a criminal defense lawyer might be required to divulge his client's perjury is characterized as "startling," "unworkable," and out-of-touch with the dynamics of the lawyer-client relationship.

Thus, one commentator on the ABA/ALI videotape says that a lawyer has an obligation to reveal client perjury only if the lawyer has "absolutely no doubt whatsoever" that the client will commit a "serious" fraud on the court. (The perjury in *Nix* is defined as falling short of "serious" fraud.) Also, soon after *Nix*, the

Deputy Attorney General who won the case was quoted in the *ABA Journal* as saying that if the lawyer does not "know for sure" that a witness' evidence is false, the lawyer should put the evidence on.<sup>78</sup> In the same article a former prosecutor said that a client may stick to a story that "you know in your heart of hearts is false." As long as the client "never admits that it is false," however, most lawyers "suspend judgment and do the best they can." He added that any different standard of "knowing" would be "at war with the duty to represent the client zealously."<sup>79</sup> Similarly, ABA Formal Opinion 87-353 makes sure that it will be "the unusual case where the lawyer does know." The opinion requires that knowing be established only by the client's "clearly stated intention" that he will commit perjury at trial.

The insistence upon a direct client admission of perjury to establish "knowing" or "actual knowledge" has also been adopted by the Eighth Circuit.<sup>80</sup> The court held that an attorney must use "extreme caution" in deciding that a client intends to commit perjury, and that nothing but "a clear expression of intent" will justify the attorney's disclosure to the judge.<sup>81</sup>

The Second Circuit has similarly insisted upon a "clearly established" or "actual knowledge" standard.<sup>82</sup> In doing so, the court approved a definition providing that information is "clearly established" only when the client "acknowledges" the perjury to the attorney.<sup>83</sup> The court observed that under any standard less than actual knowledge, courts would be "inundated" with lawyers' reports of perjury.<sup>84</sup>

At another point in its opinion, the Second Circuit went further, indicating that an admission alone will not be sufficient to justify disclosure by a lawyer. After explaining that knowledge by the lawyer means "actual knowledge," the court went on to say that the lawyer should disclose "only that information which [1] the attorney reasonably knows to be a fact and which, [2] when combined with other facts in his knowledge, would [3] clearly establish the existence of a fraud on the tribunal."<sup>85</sup> Thus, the client's admission does not suffice unless corroborated by "other facts" that "clearly establish" the perjury.

This development was forecast in *Nix* itself. The majority opinion characterizes the case as one in which the defendant's "intent to commit perjury [was] communicated to counsel."<sup>86</sup> The concurring justices add that "[e]xcept in the rarest of cases" attorneys who "adopt 'the role of the judge or jury to determine the facts'...pose a danger of depriving their clients of the zeal-

ous and loyal advocacy required by the Sixth Amendment."<sup>87</sup> Also, Justice Stevens appropriately observes that:<sup>88</sup>

A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked.

Finally, when the defense lawyer makes the decision that the client's inconsistent stories do not mean that he intends to commit perjury, the standard of review is likely to be that established by *Strickland v. Washington*.<sup>89</sup> That is, the court must "indulge a strong presumption" that counsel's conduct falls within the "wide range of reasonable professional assistance."<sup>90</sup>

For example, in *Strickland* itself, the defense lawyer employed tactics deliberately designed to cover up the client's false statements to the court that he had no significant criminal record and that he had committed the crime under emotional stress. The lawyer then argued to the court what he knew to be false statements made by the client. Nevertheless, the Supreme Court held that the lawyer's conduct fell within the "wide range of reasonable professional assistance," and no member of the Court suggested that the lawyer had acted improperly in any way in using these tactics.<sup>91</sup>

In almost all of the cases discussing client perjury, the issue has been raised by a defense lawyer who has concluded that the client is committing perjury and has revealed that conclusion to the court.<sup>92</sup> In *State v. Skionsby*,<sup>93</sup> however, the client raised the issue, complaining that the lawyer rendered ineffective assistance of counsel by failing to recognize that the client's self-defense testimony was perjurious and ineffectual.<sup>94</sup>

In rejecting that claim, the court followed a line of analysis paralleling that suggested here. "[O]ur scrutiny of counsel's performance must be highly deferential," the court said, "and must be evaluated from counsel's perspective at the time."<sup>95</sup> Continuing to quote from *Strickland*, the court added that "every effort [must] be made to eliminate the distorting effects of hindsight" and to recognize "the difficulties inherent in making the evaluation."<sup>96</sup> The court concluded that it "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable profes-



sional assistance."<sup>97</sup>

The court in *Skjongsby* also noted that "[l]awyers are not to perform the functions of judges or jurors,"<sup>98</sup> adding:<sup>99</sup>

To compel attorneys to monitor their clients' behavior, to pursue vigorously any suspicions that might occur to them about possible wrongdoing by the clients, and to develop evidence against the people they represent, would undermine the fundamental character of the attorney-client relationship and bastardize the role of defense counsel. Imposing such obligations on attorneys also would create pressure on clients to conceal information from their lawyers and to try to make the tactical judgments about the use of evidence that only attorneys are fully equipped to make.

In view of these authorities, including the ABA, the ALI, and the Supreme Court, a very high standard must be met—"actual knowledge" or "proof beyond a reasonable doubt"—before a lawyer "knows" a client intends to commit perjury. A lawyer who relies upon such a high standard should not be charged with violating Model Rule 3.3 or a similar rule. ■

## Notes

1. CAVEAT: The Committee cautions that, regardless of which model code of ethical rules has been adopted in a given state, the language, interpretation, and enforcement of the rules may vary from one jurisdiction to another. In each instance, therefore, local law must be consulted.

This opinion is based upon the language of the ABA's Model Code (1969) and Model Rules (1983), as they have been amended by the ABA and interpreted in opinions of the ABA Standing Committee on Ethics and Professional Responsibility.

2. DR 7-101(A) (3) forbids the lawyer to "[p]rejudice or damage his client...except as required under DR 7102 (B)." DR 7-102 (B) deals with perjury, but only when the lawyer learns about it after the fact. In the case of foreknowledge of perjury, therefore, there is no exception to DR 7-101(A) (3) that would permit the lawyer to reveal perjury.

3. ABA Informal Opinion 1314 (1975) stated that a lawyer who knows in advance of client perjury has an obligation either to withdraw or to report the false testimony to the court. Inf. Opin. 1314 has been expressly disapproved on this point in ABA Formal Opin. 87-353, which recognizes that no provision of the Model Code requires disclosure of the client's intention to commit perjury but, rather, that the Model Code makes disclosure discretionary on the part of the lawyer.

4. When the lawyer learns of the client's perjury only after the fact (which is not the principal focus of this opinion), the Model Code forbids the lawyer to reveal the truth. ABA Inf. Opin. 1314 (1975), Formal Opin. 341 (1975), Formal Opin. 87-353.

5. ABA Formal Opin. 87-353.

6. Section 7.7 was adopted as part of the Defense Function Standards in 1971. However, it was withdrawn in 1979, was not adopted as part of the Standards in 1980, was expressly repudiated by the ABA in the Model Rules in 1983, and has been omitted in the current, 1991 edition.

7. 475 U.S. 157, 106 S.Ct. 988 (1986).

8. 106 S.Ct. at 997.

9. See, e.g., Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1954-1955 (1988).

10. G.C. Hazard and W.W. Hodes, *THE LAW OF LAWYERING* vol. 1, p. 90.1 (1987 Supp.).

11. *Ibid.* (emphasis in the original).

12. C. Whitebread, *Criminal Procedure* 257 (1976). See also Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOFSTRA L. REV. 693 (1978).

13. G.C. Hazard and W.W. Hodes, *THE LAW OF LAWYERING* 90.1 (1987 Supp.).

14. *Ibid.*

15. 425 U.S. at 403.

16. 451 U.S. 454, 101 S.Ct. 1866 (1981). An additional ground of the decision in *Estelle v. Smith* was the right to counsel under the Sixth Amendment. In a similar case, *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792 (1988), the Court applied the harmless error doctrine to the Sixth Amendment right, but found that the psychiatrist's testimony had not been harmless.

17. *Id.* at 467 (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)).

18. *Ibid.*

19. 447 U.S. 264 (1980).

20. *Henry* was decided under the Sixth Amendment, but its relevance to the Fifth Amendment aspect of client perjury is plain.

21. A private attorney becomes a government agent if she serves as a "conduit for information elicited from defendant and used by the authorities in the prosecution of defendant." *People v. Baugh*, 19 Ill. App.3d 448, 311 N.E.2d 607, 609 (1974).

22. The lawyer who elicits a client's confidences and then reveals them to the court has been analogized to Jeff in the "Mutt and Jeff" interrogation technique. See *Legal Ethics, Client Perjury and the Privilege Against Self-Incrimination*, 13 HASTINGS CONST. L.Q. 545, 571 (1986).

23. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

24. *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981), quoted with approval, *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 1621, n. 4 (1983) (Brennan, J., concurring).

25. *United States v. Costen*, 38 Fed. 24 (1889) (upholding the disbarment of a lawyer for violating his client's confidences). The author of the opinion was Justice David J. Brewer, who was appointed to the Supreme Court shortly thereafter, and who later served on the committee that drafted the ABA Canons of Professional Ethics (1908).

26. Exum, *the Perjurious Criminal Defendant: A Solution to His Lawyer's Dilemma*, VI SOCIAL RESPONSIBILITY 16, 22 (1980).

27. See, e.g., N.Y.S. Bar Opin. 405 (1975).

28. 106 S.Ct. at 998.

29. 106 S.Ct. at 1000.

30. *Ibid.*

31. See Freedman, *Client Confidence and Client Perjury: Some Unanswered Questions*, 136 PA. L. REV. 1939, 1949-1951 (1988).

32. *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) (coerced confessions are subject to harmless error rule, but distinguishing "structural" flaws which are never subject to harmless error).

33. 5 J. WIGMORE, WIGMORE ON EVIDENCE SEC. 1367 (Chadbourn rev. ed., 1974).

34. Remarks by S. Martoche at the Seminar on "Ethics in an Adversary System" (Buffalo, N.Y., Feb 11, 1984).

35. 440 U.S. 450 (1979).

36. Use immunity is given so that testimony can be compelled from a witness who has invoked her Fifth Amendment privilege. The testimony cannot be used against the witness, but can be used against others.

37. See 440 U.S. at 452-453.

38. Compare the earlier case of *Harris v. New York*, 401 U.S. 222 (1971). *Harris* held that if the defendant takes the stand, he must testify truthfully or "suffer the consequences." The consequences include "the risk of confrontation with prior inconsistent utterances," which is "the traditional truth-testing [device] of the adversary system." 401 U.S. at 225-226. (The impeaching matter in *Harris* was evidence obtained in violation of *Miranda*, which is not of constitutional status.) The Court did not suggest, however, that one of the consequences of the defendant's perjury would be disclosure of lawyer-client confidences.

39. *Nix v. Whiteside*, 106 S.Ct. at 998.

40. See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), discussed in the text at n. 91 *infra*.

41. 451 U.S. 454 (1981).

42. 575 F.2d 727 (9th Cir. 1978).

43. *Id.* at 729.

44. 799 F.2d 369 (7th Cir. 1986).

45. *Id.* at 370.

46. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

47. Citing *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

48. Silving, *The Morality of Advocacy*, in S. Shoham (ed.), *OF LAW AND MAN* 209, 212 (1971).

49. *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir., 1978). The Ninth Circuit then endorsed the 7.7 solution, but did so on the assumption that the Standards represent "an authoritative consensus" of the organized bar. 575 F.2d at 730 n.1. A year later, however, the ABA rejected Section 7.7, and then did so again in the *Model Rules* in 1983.

50. ABA Defense Function Standards 4-7.7(a) (3d ed.)

51. "[H]ighly respected counsel have told this writer that they would feel obligated to argue the defendant's case fully, including his perjured testimony." Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 FORDHAM L. REV. 1097, 1106 (1976). (The author was a United States District Court Judge for the Eastern District of New York.)

52. *Herring v. New York*, 422 U.S. 853 (1975). See also *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va., 1959) (emphasis added):

The failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney's conscience. It is as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement. The right to an attorney embraces effective representation throughout all stages of the trial, and where



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the representation is of such low caliber as to amount to no representation, *the guarantee of due process has been violated.*

53. See, e.g., *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976). Juries would become increasingly aware of the significance of narrative testimony if Section 7.7 were to become institutionalized. Among other things, it would provide some dramatic material for television and movie treatment, and the public would not long remain ignorant of the reason for the lawyer's conduct.

54. 106 S.Ct. 988, 996 n.6 (1986). The Chief Justice chaired the committee that originally drafted Section 7.7.

55. Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 537 (1988).

56. *Id.* at 539.

57. *Ibid.*

58. *Id.* at 540.

59. *Ibid.*

60. *Id.* at 541.

61. See MR 1.2(e).

62. It was then MR 1.4(b), and was the same except that the clauses were in reverse order and there were minor variations in phrasing.

63. Freedman, *The Kutak Model Rules v. The American Lawyer's Code of Conduct*, 26 VILL. L. REV. 1165, 1174-1175 (1980-1981).

64. Defense Function Standard 4-3.2:

Defense counsel should not instruct the client

or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

65. Defense Function Standards, 7.7, Comment (1971).

66. E.g., *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991).

67. See, e.g., *Holmes v. United States*, 370 F.2d 209, 212 (D.C. Cir. 1966), where the dissenting judge argued that there was no prejudice because the defense lawyer had stated on the trial record that the defendant's testimony was inconsistent with numerous interviews and was therefore a surprise to counsel.

68. Standard 4-3.1(a) (1991).

69. Standard 4-3.2(a) (1991).

70. Standard 4-3.1(a) (1991).

71. Kimbell, *When Does a Lawyer 'Know' Her Client Will Commit Perjury?* 2 GEO. J. LEGAL ETHICS 579, 581 (1988); Reiger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 149 (1985); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 608-609 (1970); Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 528 (1988) ("absolutely no doubt about the matter").

72. The lawyer who makes good faith efforts to dissuade the client, but who unwillingly goes forward if she is unsuccessful, is not guilty of subornation of perjury. Subornation is the corrupt induce-

ment of perjury, or "procuring another to commit perjury by inciting, instigating, or persuading the guilty party to do so." Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 548 (1988), citing 68 Am. Jur. 2d, *Perjury* sec. 67 (1972). Clearly that is not what happens when the idea of perjury originates with the client, the lawyer uses her knowledge of the perjury to make ongoing, good faith efforts to dissuade the client, and the lawyer then proceeds only under the compulsion of her systemic role.

73. See Exum at n.26, *supra*.

74. *United States v. Grayson*, 438 U.S. 41 (1978). Prosecution for perjury is also possible.

75. See, e.g., Model Rule 1.6, Comment: "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."

76. Because the lawyer will be ignorant of the incriminating facts, there will be no occasion for the lawyer to attempt to dissuade the client from committing perjury, the client will give the perjurious testimony, the lawyer will elicit it in the ordinary way, and the lawyer will argue it to the jury. In systemic terms, therefore, there will be more perjury than under the traditional model.

77. However, in preparing the client for trial, the lawyer should not help the client to improve upon the perjury. See, e.g., DR 7-102(A)(6), forbidding the lawyer to participate in the creation of evidence known to be false.

78. ABA JOUR. 84, 88 (May 1, 1986).

79. *Ibid.*

80. *United States v. Long*, 857 F. 2d 436 (8th Cir., 1988).

81. *Id.* at 445, 447.

82. *Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir., 1988).

83. *Id.* at 62.

84. *Id.* at 63.

85. *Id.* at 63.

86. 106 S.Ct. at 993

87. 106 S.Ct. at 1006, quoting in part from *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir., 1977).

88. *Id.* at 1007.

89. 466 U.S. 668, 104 S.Ct. 2052, 2066 (1984).

90. *Nix v. Whiteside* 106 S.Ct. at 994, quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2066 (1984).

91. See also *New Jersey v. Portash*, *supra*, n.35.

92. Apparently, fee-paying clients never commit perjury. Virtually all cases of this sort involve public defenders and court-appointed lawyers. An exception is *State v. Fleck*, 744 P.2d 628 (Cl. App., Wash. 1987). Retained counsel in that case learned that his client was boasting at the jail that he was guilty but that he was successfully conning his "Christian attorney." The lawyer then had the client take a lie detector test; the client failed the test and tacitly admitted its accuracy.

93. 417 N.W.2d 818 (No. Dak. 1987).

94. A similar case is *Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985).

95. 417 N.W.2d at 828.

96. *Id.*

97. *Id.*

98. 417 N.W.2d at 827, quoting Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 614 (1979).

99. *Id.*

# Polygraph

## PRIOR TO TRIAL

- Corroboration through polygraph of your client's truthfulness can DISMISS CHARGES
- Detection through polygraph of your client's untruthfulness can PREVENT SURPRISES



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