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The Attorney's Ethical Obligations When Faced With Client Perjury

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THE ATTORNEY'S ETHICAL OBLIGATIONS WHEN FACED WITH CLIENT PERJURY

I. INTRODUCTION

What are the attorney's ethical obligations when confronting actual or potential client perjury? This topic is the theme of many articles[1] and the focus of much discussion. Several reasons exist to reexamine this subject.[2] First, many of the articles on client perjury predate *Nix v. Whiteside*,[3] a case that has had an important impact on this topic. Moreover, many of the articles that consider *Nix* predate an opinion issued by the American Bar Association (ABA) concerning the

1. *See, e.g.*, Appel, *The Limited Impact of* Nix v. Whiteside *on Attorney-Client Relations*, 136 U. PA. L. REV. 1913 (1988); Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988); Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, GEO. J. LEGAL ETHICS 521 (1988).

2. Presenting this topic to the South Carolina Bar is particularly important because, effective September 1, 1990, the South Carolina Supreme Court adopted the Model Rules of Professional Conduct.

3. 475 U.S. 157 (1986).

attorney's obligations when presented with client perjury.[4] The ABA provides the attorney with practical guidance and meaningful insight into the perjury question. The notable articles examining client perjury primarily point out inconsistencies and problems with the ABA's orientation and with *Nix*, along with advancing the authors' theories as to how an attorney should proceed. The purposes of this Note are to examine the impact of the Supreme Court's decision, the ABA's formal opinion, and the history of the treatment of this problem, and to give attorneys an understanding of their obligations when faced with client perjury. This Note also presents arguments in support of the ABA's approach to this dilemma.

II. THE BASIC CONFLICT

The lawyer owes duties to both the client and to the court. When the lawyer acquires information that indicates a client committed or intends to commit perjury, the lawyer is confronted with a conflict between his responsibilities to the client and his responsibilities to the court. To the client, the lawyer owes a duty of confidentiality.[5] The attorney also has an obligation to act on the client's behalf with loyalty and zeal.[6] To the court, the attorney owes the duty to be honest and to disclose all material facts.[7] Moreover, the lawyer cannot assist a client in criminal or fraudulent conduct, including perjury.[8]

But what exactly is perjury? *Black's Law Dictionary* provides the following definition: "In criminal law, the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath . . . ."[9]

The first question attorneys must answer is whether they actually

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4. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980).

6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

9. BLACK'S LAW DICTIONARY 1139 (6th ed. 1990). In South Carolina, a person convicted of perjury shall be fined $100 and imprisoned for six months, "and the oath of such person shall not be received in any court of record within this state." S.C. CODE ANN. § 16-9-10 (Law. Co-op. 1976). In addition, the judge imposing the sentence "may order and send such person to the state penitentiary, there to be kept to hard labor for any term or time not exceeding the term of seven years." *Id.*

have encountered perjury. The answer to this question depends largely on when the attorney "knows" that the client is committing perjury, and the attorney's obligations to investigate suspicions of perjury. It is human nature to shade the facts to one's benefit. An attorney must determine at what point opinion and belief become so unreasonable and untrue that they become perjury. Clients may have good faith beliefs in their points of view, while their perceptions actually are erroneous. Thus, attorneys should not decide hastily, or without informed and deliberate consideration, that they are confronted with perjury.

III. THE HISTORY OF THE ATTORNEY'S ETHICAL OBLIGATIONS

A. The Original Ethical Canons

The attorney's ethical obligations first were codified in 1908 in the ABA Canons of Professional Ethics (Canons).[10] The Canons thereafter were replaced by the Model Code of Professional Responsibility (Model Code). The Model Code now is superseded in most states by the Model Rules of Professional Conduct (Model Rules). The ABA Committee on Ethics and Professional Responsibility, along with its predecessors and state-level counterparts, have delivered opinions interpreting all three ethical systems.

The original Canons emphasized the lawyer's obligations to his client.[11] For instance, Canon 37 stressed the duty to maintain the client's confidences.[12] ABA formal opinion 287, which interprets Canon 37 in the perjury context, is an illustration of this.[13] The formal opinion outlined two factual situations and demonstrated the lawyer's ethical obligations under each illustration. The first example concerned a divorce proceeding in which the husband testified falsely in order to obtain a divorce in his favor. After his perjury, the husband informed his lawyer that he had testified falsely. The second example consisted of a criminal case in which the judge was misinformed that the defendant had no criminal record. The judge asked the defendant whether he had a record. The defendant replied that he did not. The judge then asked the defendant's lawyer, who knew the truth, whether or not the defendant had a criminal record. The formal opinion concluded that in both instances the lawyer had a duty to preserve the client's confidences and to not disclose the perjury.[14]

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10. CANONS OF PROFESSIONAL ETHICS (1908).
11. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).
12. *Id.*
13. *Id.*, Formal Op. 287 (1953).
14. *Id.*

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B. *The Model Code*

The ABA's adoption of the Model Code heralded a major change in ethical standards.[15] Several provisions of the Model Code touch on the attorney's ethical obligations with respect to client perjury. DR 7-102 imposes on the attorney the requirement that representation be "[w]ithin the [b]ounds of the [l]aw."[16] As originally promulgated, DR 7-102 required a lawyer who discovered that a client had committed perjury to counsel the client to rectify the perjury and, if this did not succeed, to reveal the perjury. Consistent with this rule, DR 4-101(C)(3) grants a lawyer the discretion to reveal information in order to prevent a crime.[17]

As originally written, DR 7-102 conflicted with DR 4-101(B)(1), which admonishes attorneys to preserve their clients' confidences and secrets.[18] The ABA later altered DR 7-102 to exclude privileged communications from the disclosure requirement.[19] The modification reflected the Model Code's preference for preserving client confidences.

This state of affairs left the lawyer in a dilemma. The Model Code and ABA interpretations still required that a lawyer not make false statements of fact to the court.[20] What should an attorney do if he knows a client gave false testimony when such knowledge came from confidential communications? Should the attorney ignore the perjury and permit, even assist, the presentation of false statements? Formal Opinion 287 suggests that the lawyer seek to withdraw. If the lawyer seeks to withdraw, however, the court will likely inquire into the reasons for his request. Because the attorney is precluded from revealing the reasons for his request, the court will likely deny withdrawal.[21] In that event, the lawyer must determine how to proceed, how to question the client, and whether to use that testimony in the final argument.

The ABA attempted to formulate a solution to this dilemma when it promulgated standards of conduct relating to various criminal func-

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15. *Id.*, Formal Op. 353 (1987).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

17. *Id.* DR 4-101(C)(3).

18. *Id.* DR 4-101(B)(1); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980). *See also* CODE OF PROFESSIONAL RESPONSIBILITY BY STATE, 761L, 763L, 771L, 777L, 781L, 790L, 791L (National Center for Prof. Resp.) (1980). Many states adopted the change excluding privileged communications. However, some states never have required revealing privileged communications. As of 1980, these states were Alabama, the District of Columbia, Iowa, Maine, New York, and North Carolina. *Id.*

20. *See supra* notes 13, 16 and accompanying text.

21. *Id.*

tions.[22] Standard 7.7, a part of that promulgation, initially parallels the Model Code. Standard 7.7 first admonishes a lawyer to counsel the client against testifying falsely if the client admits facts which establish guilt, and these facts are corroborated by the lawyer's independent investigation. The standard further requires a lawyer to seek to withdraw if the defendant insists on taking the stand and testifying falsely.[23] At this point, standard 7.7 proceeds into new territory. Standard 7.7 indicates that although the lawyer cannot withdraw, he cannot assist in the perjury. The client has the constitutional right to take the stand and testify; however, the lawyer must limit questioning of the client only to establish identity. The client may then make a narrative statement. Pursuant to standard 7.7, the lawyer is not permitted to examine the client and may not rely upon the perjurious testimony in closing argument.[24] Standard 7.7 also requires the lawyer to "make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court."[25] The standard does not indicate how the lawyer is to accomplish this.

The so-called "narrative approach" was endorsed by many states, including South Carolina.[26] The South Carolina Supreme Court stated that:

> [T]he defendant who intends to commit perjury may take the stand and deliver his statement in narrative form, the lawyer does not examine the defendant or use the false testimony in his closing argument . . . . [W]e approve this procedure as an acceptable method of balancing the conflicting interests, as it allows the lawyer to refrain from actively participating in the presentation of the false testimony while affording the defendant the assistance of counsel.[27]

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22. ABA STANDARDS FOR CRIMINAL JUSTICE (THE DEFENSE FUNCTION) 4-7.7 (2d ed. 1980 & Supp. 1986) (standard 7.7); *see also* Moser, *Client Perjury: The Lawyer's Dilemma*, 29 S. TEX. L. REV. 263, 270 (1987) (analysis of *Nix* and implications for attorneys).

23. Moser, *supra* note 22, at 271 (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (approved draft 1971)).

24. *Id.*

25. Standard 7.7, *supra* note 22. It should be noted that standard 7.7 applies only to criminal trials. In civil trials clients have no constitutional right to testify. Lawyers may be able to prevent perjury in civil cases by refusing to let clients take the stand. *See infra* note 140 and accompanying text.

26. *See In re* Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983).

27. *Id.* at 277, 305 S.E.2d at 580. The South Carolina Supreme Court may not continue to approve the narrative approach given the adoption of the Model Rules and the holding in *Nix v. Whiteside*, 475 U.S. 157 (1986). Under the Model Rules, the attorney cannot take even a passive role in the perjury of the client. *See infra* note 37 and accompanying text. Also, *Nix* makes it clear that the defendant's constitutional rights are not

The South Carolina Supreme Court recognized problems with standard 7.7. The court cautioned that criminal defendants have a constitutional right to representation by counsel that is adversely affected if the attorney is permitted to withdraw.[28] Although the South Carolina Supreme Court's reasoning was discredited in *Nix*, the narrative approach does have several other inherent problems. When an attorney permits the client to testify falsely, the lawyer sacrifices the duty of candor to the tribunal. The attorney may even be guilty of subornation of perjury.[29] Furthermore, the narrative approach may deny effective representation to a greater degree than a lawyer's withdrawing from the case. This is because the narrative approach does not permit the attorney to assist the client in narrating a statement. It is unclear to what extent the lawyer can even respond to objections made by the prosecutor. Also, a client's giving testimony in a narrative fashion, without the assistance of counsel, may signal the finder of fact that the defendant's attorney believes the client is committing perjury.[30] If the trial is by the bench, the judge undoubtedly will know what is happening.

The ABA considered modifications to standard 7.7. The proposed revisions were never adopted. Instead the ABA promulgated the Model Rules in 1983. The Model Rules discarded the narrative approach.[31]

C. The Model Rules

Under the Model Rules, the lawyer must continue to maintain the confidentiality of information imparted by the client.[32] However, a lawyer can not knowingly "make a false statement of material fact to a tribunal . . . [or] fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal . . . act,"[33] or offer false evidence. If after the fact the lawyer discovers that false evidence was presented, the lawyer is called upon to take "reasonable remedial measures."[34] Rule 3.3 further provides that these duties exist until the

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impaired. *See infra* notes 66-69 and accompanying text. Nevertheless, the narrative approach is used widely by trial courts that encounter perjury situations when the lawyer seeks to, but is denied, withdrawal. *See* United States v. Long, 857 F.2d 436, 446 (8th Cir. 1988) (narrative approach is appropriate when trial judges have been notified of perjury and have instructed the attorney to proceed in this fashion); Shockley v. State, 565 A.2d 1373, 1379-80 (Del. 1989); Lefstein, *supra* note 1, at 523.

28. *Goodwin*, 279 S.C. at 277, 305 S.E.2d at 580.

29. *See* People v. Shultheis, 638 P.2d 8, 11 (Colo. 1981).

30. Moser, *supra* note 22, at 272.

31. *See* standard 7.7, *supra* note 22.

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

33. *Id.* Rule 3.3. The South Carolina Rules are identical to the Model Rules.

34. *Id.*

end of the proceeding and must be obeyed even if compliance violates the confidentiality provisions of Rule 1.6. Rule 3.3, therefore, seems to be logically inconsistent with the narrative approach adopted in standard 7.7, which allows the false evidence to be presented.[35] Indeed, the ABA acknowledged that an attorney "can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury."[36] Moreover, the ABA's statement that standard 7.7 is "no longer applicable"[37] clearly indicates that standard 7.7 is incompatible with Rule 3.3. Likewise, the comment to Rule 3.3 states, "if necessary to rectify the situation, an advocate must disclose the existence of the client's deception . . . ."[38]

The Model Rules also require a lawyer to seek withdrawal if representation of a client would result in a violation of the rules of professional ethics. The lawyer must withdraw unless ordered to continue by the tribunal.[39] The lawyer also must consult with the client when he discovers that the client expects assistance not permitted by the Model Rules.[40]

If the attorney knows that the client gave false testimony during the on-going proceeding in which the attorney is representing the client, the attorney must counsel the client to correct the false testimony.[41] If the client refuses, the attorney is required to disclose the perjury to the tribunal if the attorney knows of the perjury before the conclusion of the proceedings. The lawyer must disclose his knowledge of the perjury despite his obligation to maintain confidential communications.[42]

Alternatively, if the lawyer discovers that the client intends to commit perjury during the proceeding, the attorney similarly must counsel the client not to do so. The attorney must advise the client of the consequences of giving perjurious testimony, including the attorney's duty to disclose the perjury.[43] Formal opinion 353 states that:

> Ordinarily, the lawyer can reasonably believe that such advice will dissuade the client from giving false testimony and, therefore, may examine the client in the normal manner. However, if the lawyer knows, from the client's clearly stated intention, that the client will

35. It is for this reason that the South Carolina Supreme Court, given its adoption of the Model Rules, may not endorse the narrative approach. *See supra* note 27.
36. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).
37. *Id.*
38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).
39. *Id.* Rule 1.16(a).
40. *Id.* Rule 1.2(e).
41. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).
42. *Id.*
43. *Id.*

> testify falsely, and the lawyer cannot effectively withdraw from 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.[44]

In sum, the attorney first should counsel the client against committing perjury. Second, if counselling does not result in the client's consent not to commit the perjury or in keeping the client off the stand, the attorney should seek to withdraw. If the court orders the attorney to proceed, the attorney must obey.[45] Last, if the attorney cannot withdraw and cannot limit the client's testimony to truthful matters, the perjury must be revealed to the tribunal.

Disclosure is not to be made unless other remedial measures are attempted and are ineffective.[46] The disclosure requirement is effective only until the end of the proceedings. If the lawyer discovers after the proceedings are closed that the client committed perjury, the rule on confidentiality prohibits disclosure.[47]

The ABA also interpreted the outcomes of the two examples originally discussed in formal opinion 287 in light of the Model Rules.[48] In the first situation, a husband disclosed to the lawyer that he committed perjury after the termination of a divorce proceeding. Formal opinion 353 notes that the confidentiality rule prevents the attorney in that illustration from disclosing the perjury because the client did not inform the attorney of the perjury until three months after the close of the proceedings.[49] The second situation involved perjury in a criminal setting. Formal opinion 353 observes that if the judge is misinformed that the defendant has no criminal record, the lawyer is not required to correct the mistake because no client perjury took place. If the client lies to the judge about his criminal record, however, the lawyer must seek to withdraw, and if this is not possible, the lawyer must reveal the perjury.[50] If the judge directly asks the attorney about his client's criminal record, the lawyer may not respond falsely. But since client perjury has occurred, the confidentiality rules preclude the lawyer from answering.[51] The lawyer could ask to withdraw, but this is likely to

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44. *Id.*

45. *See* Rubin v. State, 490 So. 2d 1001 (Fla. Dist. Ct. App. 1986), *cert. denied*, 483 U.S. 1005 (1987) (attorney held in contempt for refusing order to proceed).

46. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

47. *Id.*; *but see infra* notes 151-55 and accompanying text.

48. *See supra* note 11 and accompanying text.

49. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

50. *Id.*

51. *Id.*

generate further questions by the court. Unfortunately, the ABA "can offer no better guidance under the Model Rules . . . ."[52]

Thus, the modern view shifts the ethical emphasis toward the importance of the lawyer's duty to the court. The lawyer is required to disclose the perjury to the court if it cannot be remedied.[53] The Model Rules emphasize the lawyer's role as an officer of the court. Improperly assisting client perjury, therefore,

> is not limited to the criminal law concepts of aiding and abetting or subornation. Rather, it seems clear that this language 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 committed perjury, disclosure to the tribunal is necessary under Rule 3.3(a)(2) to avoid assisting the client's criminal act.[54]

IV. THE DEFENDANT'S CONSTITUTIONAL RIGHTS

As alluded to earlier,[55] the criminal attorney faces complications that the civil attorney does not.[56] In criminal trials, defendants have a fundamental right to testify in their own behalf.[57] This right may be violated if clients are coerced into not testifying or cannot testify effectively. In addition, the defendant has a Sixth Amendment right to effective assistance of counsel. This right is violated if the attorney's actions undermine the trial process to the extent that the trial cannot be relied upon to produce a just result.[58] The comment to Model Rule 3.3 acknowledges that constitutional considerations may control and subordinate the counsel's obligation under the rule.[59]

In 1986 the Supreme Court addressed the effect of perjury on these constitutional considerations. In *Nix v. Whiteside*[60] the defend-

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52. *Id.*

53. *Id.*

54. *Id.*

55. *See supra* note 25.

56. This difference is explored later. *See infra* notes 140-50 and accompanying text.

57. Rock v. Arkansas, 483 U.S. 44, 51 (1987) (right to testify protected by Fifth, Sixth, and Fourteenth Amendments); Harris v. New York, 401 U.S. 222, 225 (1971) (every criminal defendant has a right to testify in own defense). *But cf.* United States v. Curtis, 742 F.2d 1070, 1076 (1984), *cert. denied*, 475 U.S. 1064 (1986) (defendant's constitutional rights were not violated when counsel refused to put him on the stand so he could perjure himself).

58. Strickland v. Washington, 466 U.S. 668, 686 (1984).

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

60. 475 U.S. 157, 157 (1986).

ant was charged with murder. Until shortly before the trial, the defendant "told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun."[61] Shortly before the defendant testified at trial, he changed his story and said that what he actually had seen was "something metallic"[62] in the victim's hand. "When asked about this, [the defendant] said: 'if I don't say I saw a gun, I'm dead.' "[63] Whiteside's attorney told Whiteside that if he testified in this manner, the attorney would reveal to the court that Whiteside was committing perjury. The attorney also stated that he could take the stand to testify against Whiteside. Thus, the admonished defendant testified truthfully and was convicted. The defendant thereafter sought federal habeas corpus relief, claiming that he had been denied effective assistance of counsel.[64] The court of appeals reversed the district court and held that the attorney's threat to disclose the perjury violated the defendant's Sixth Amendment right to effective counsel.[65] The Supreme Court, however, could "discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel."[66] The Court remarked that the right to counsel does not go so far as to require the attorney to participate in perjury. The court further reiterated its holding in *Harris v. New York*[67] that the defendant has no constitutional right to testify falsely.[68]

The Supreme Court's limited holding, written by former Chief Justice Warren Burger, is embedded in rather broad statements concerning the lawyer's ethical responsibility when faced with client perjury.[69] The majority opinion in *Nix* makes several statements that should not be read as imparting mandatory obligations. The Court observed that "the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure."[70] The Court also declared that any "system of justice worthy of the name" would require mandatory disclosure.[71] These statements are contrary to an amended version of DR 7-102(B)(1) providing that

61. *Id.*
62. *Id.* at 161.
63. *Id.*
64. *Id.* at 162.
65. *Id.*
66. *Id.* at 171.
67. 401 U.S. 222, 225 (1971).
68. *Id.*
69. *See* Appel, *supra* note 1, at 1914.
70. *Nix*, 475 U.S. at 168 (emphasis in original).
71. *Id.* at 174.

the attorney cannot reveal the client's fraud when the attorney discovers the information from confidential communications that must be preserved under DR 4-101.[72] Also, although the Model Rules do require disclosure,[73] a minority of states have yet to adopt fully the Model Rules.[74] In addition, the Model Rules prohibit disclosure after the close of the proceedings.[75]

As the majority and the minority opinions in *Nix* noted, it is the province of the state to determine the appropriate standards of professional conduct. The majority opinion observed that "a court must be careful not to narrow the wide range of attorney conduct acceptable under the sixth amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into a state's proper authority to define and apply the standards of professional conduct . . . ."[76] Justice Brennan commented in his concurrence that "[t]his court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the court enjoy any statutory grant of jurisdiction over legal ethics."[77]

A number of later decisions erroneously assumed that the dicta in the *Nix* decision mandates certain conduct.[78] This may be due to the Chief Justice's broad discourse on the perjury issue[79] in *Nix* although Chief Justice Burger's statements are not unexpected given his long and early involvement with this subject.[80] Dean Monroe Freedman fueled the debate on the perjury with his assertion that attorneys should present perjurious testimony in the same manner that truthful testimony is presented.[81] The Chief Justice was quick to denounce Dean Freedman's view and to propose other solutions.[82] Although Freedman's notion largely was rejected by the courts and academia, treating perjury in the same manner as truth may be the way perjury is most often treated in practice.[83]

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72. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

73. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2), (4) (1983).

74. *See* Appendix, *infra*.

75. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1989). *But see infra* notes 151-55 and accompanying text.

76. *Nix*, 475 U.S. at 165.

77. *Id.* at 178.

78. Appel, *The Limited Impact of* Nix v. Whiteside *on Attorney/Client Relations*, 136 U. PA. L. REV. 1913, 1933-37 (1988).

79. *Nix*, 475 U.S. at 165.

80. *See, e.g.*, Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11 (1966).

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

82. *See* Burger, *supra* note 80, at 13-14.

83. *See* Freedman, *supra* note 81, at 1472; *see also* Reichstein, *The Criminal Law*

The only question *Nix* clearly resolves is the role the Sixth Amendment plays in the perjury question in criminal cases. As discussed earlier,[84] the problem the criminal lawyer faces is whether the criminal defendant's right to effective counsel is offended if the attorney takes action to prevent the client from testifying falsely. The majority in *Nix* held that the conduct of Whiteside's attorney was within the permitted "range of reasonable professional assistance," and therefore did not violate the defendant's Sixth Amendment right to effective counsel.[85]

The ABA takes the position that Model Rule 3.3 is not inconsistent with any constitutional requirements.[86] Rather, an attorney's conduct was always limited by "the bounds of law."[87] The client cannot utilize the attorney to further illegal conduct.[88] Moreover, the attorney was always obligated to preserve the integrity and incorruptibility of the judicial system.[89]

Some commentators suggest that if Whiteside chose not to testify because counsel threatened him with revealing the perjury, Whiteside's fundamental right to testify in his behalf was denied.[90] The attorney's threatening to disclose client perjury pursuant to the attorney's duty to the court, however, is not the same as prohibiting the client from taking the stand. Clearly, if the defendant wishes to testify, he must be allowed to do so.[91] The attorney, however, cannot question the client regarding the false testimony and must divulge any perjury that the client commits.[92] The Model Rules prohibit narrative testimony.[93]

Nix holds that the right to testify does not include the right to testify falsely.[94] The attorney always played a legitimate role in advis-

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Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1, 8 n.79 (1970). Both articles discuss surveys which indicate that a substantial number of attorneys ignore or acquiesce in the presentation of client perjury.

84. *See supra* note 24 and accompanying text.

85. *Nix*, 475 U.S. at 165 (citing with approval Strickland v. Washington, 466 U.S. 668, 689 (1984)).

86. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

87. *Id.*

88. *See, e.g.*, United States v. Zolin, 905 F.2d 1344 (9th Cir. 1990); *In re* Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987); *In re* Grand Jury Subpoenas Duces Tecum, 773 F.2d 204 (8th Cir. 1985); Pollack v. United States, 202 F.2d 281 (5th Cir.), *cert. denied*, 345 U.S. 993 (1953).

89. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

90. Lefstein, *supra* note 1, at 539.

91. *See* Faretta v. California, 422 U.S. 806 (1975).

92. *See supra* note 53 and accompanying text.

93. *See supra* note 36 and accompanying text; *see also supra* note 27.

94. Nix v. Whiteside, 475 U.S. 157, 173 (1986); *see also* Harris v. New York, 401 U.S. 222, 225 (1971).

ing the client whether to testify.[95] If the client reveals an intent to commit perjury, the attorney must advise the client that the attorney has an obligation to reveal the perjury. In a criminal matter, the client ultimately decides whether to testify and whether to testify truthfully. If the client chooses to proceed, the attorney must allow the client to do so.[96] The ABA also asserts that the attorney's ethical obligation is not to prevent clients from testifying in their own behalf, but only to prevent clients from testifying falsely.[97] Thus, if clients choose not to take the stand based on their attorneys' threats to disclose, the court should conclude that the clients' voluntary decisions not to testify in their own behalf is not a violation of their right to testify.[98]

One commentator suggested that disclosure of perjury in a criminal trial violates the client's Fifth Amendment right against self-incrimination.[99] The author's argument is based on *Fisher v. United States*.[100] In *Fisher* the Court held that when the Fifth Amendment protects a defendant from producing incriminating documents, the attorney-client privilege also prevents compelling the defendant's attorney to produce the documents.[101] The author fails to mention, however, that the attorney-client privilege never can be invoked to advance a client's criminal act.[102] Furthermore, the right against self-incrimination is not absolute, but is subject to exceptions and waiver.[103]

The argument that the client's rights will be violated by disclosure is also unconvincing because of the roles of the judge and the jury. Usually disclosure will be to the judge, not to the finder of fact. Even in a bench trial, however, the judge often resolves similar conflicts without tainting the trial. For example, the judge in a bench trial may hear arguments to admit damaging evidence. If the evidence is suppressed, it also must be excluded from the judge's deliberations.[104] This is much like asking the judge to exclude from consideration the fact that perjury has been committed.

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95. *See* Ison v. State, 284 Ark. 426, 682 S.W.2d 755 (1985).

96. *See* Farreta v. California, 422 U.S. 806, 820 (1975); *see also supra* note 57.

97. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

98. *But see* United States v. Scott, 909 F.2d 488 (11th Cir. 1990) (defendant's right to testify was violated when he was forced to choose between proceeding with counsel and not testifying, or proceeding without counsel).

99. Freedman, *supra* note 1, at 1946.

100. 425 U.S. 391 (1976).

101. *Id.* at 404.

102. *See supra* note 88 and accompanying text.

103. 21A AM. JUR. 2D *Criminal Law* § 710 (1981).

104. Butler v. United States, 414 A.2d 844, 854 (D.C. 1980) (Ferren, J., concurring in part and dissenting in part).

V. STATE CONSTITUTIONAL REQUIREMENTS

The constitution of a particular state may demand or may be interpreted to require more deference to the attorney's obligation to the client than model professional standards propose. The ABA recognizes that a state may preclude, constitutionally, disclosure under any circumstances.[105] Therefore, the Model Rule requirement of disclosure yields to any state constitutional mandate to the contrary.[106]

VI. WHY THE PROBLEM MAY BE A SHEEP IN WOLF'S CLOTHING

A. What is Knowledge?

The sheer volume of writing on this subject may make the problem of defining "knowing assistance" of client perjury appear to be much larger than it is. Most witnesses probably fashion their testimony to their own advantage. However, we may never know how many witnesses lie about material matters to a material extent. The nature of lying does not lend itself to discovery if the liar can prevent it. The author's informal questioning of attorneys reveals that many attorneys believe perjury occurs frequently. The ethical issue at hand concerns the attorney's knowing assistance of perjury, however, not the eradication of perjury, because an attorney's obligations arise only if the attorney has knowledge of the perjury.[107] If attorneys are aware of the false testimony, they have methods by which to deal with it effectively. Thus, the question becomes when does the lawyer possess sufficient information to constitute knowledge of perjury.

The ABA provides little direction beyond its statement that knowledge is "ordinarily based on admissions the client has made to the lawyer."[108] Some guidance can be derived from a reading of Model Rule 3.3. Rule 3.3(c) provides that "[a] lawyer may refuse to offer evi-

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105. "The lawyer is obligated, of course, to comply with the [state] constitutional requirement rather than the ethical one." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987). The *Nix* decision is less direct, but leaves the door open to state preemption. *Nix*, 475 U.S. at 165.

106. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987). Currently, no state court holds that the state's constitutional requirements preserve client confidences that serve to prohibit the disclosure of perjury to a court. As with any constitutional issue, a state court can interpret its constitution to provide a higher level of protection for the defendant than available under the federal constitution. *See, e.g.*, California v. Ramos, 463 U.S. 992, 1014 (1983) (states are free to offer greater protection in their criminal justice systems than the federal constitution requires).

107. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983).

108. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

dence that the lawyer reasonably believes is false."[109] If lawyers have discretion to refuse to offer testimony they reasonably believe is false, something more than reasonable belief must compel lawyers to disclose suspected perjury. The majority view supports a standard of a "firm factual basis" to justify a lawyer's seeking to withdraw on the grounds of client perjury.[110] This standard of proof is in accord with the ABA's instruction that the lawyer must be convinced beyond a reasonable doubt that his client will commit a crime before he can breach confidentiality in order to disclose.[111]

It is clear that the requisite knowledge mandating disclosure need not be derived from the client's expressed announcement of the perjury. The Model Rules provide that "knowledge may be inferred from circumstances."[112] The lawyer must have more than a mere belief or opinion about whether the client is committing perjury before the lawyer must disclose. Indeed, perhaps the lawyer should never disclose the perjury or refuse to offer evidence based on a mere suspicion, despite the permissive language of Rule 3.3.[113] Some authorities suggest that before a lawyer may refuse to offer evidence under Rule 3.3(c), the lawyer must conduct an independent investigation or ground the refusal upon direct statements of the client.[114] At any rate, the lawyer must have some definite basis for mistrust before revealing suspected client perjury to the court.[115]

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109. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1983).

110. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 174 (1986) (Stevens, J., concurring); United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977); Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989); Kimball, *When Does a Lawyer "Know" Her Client Will Commit Perjury?*, 2 GEO. J. LEGAL ETHICS 579 (1988); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 149 (1985). *Contra* People v. Bartee, 208 Ill. App. 3d 105, 566 N.E.2d 855 (1991) (court rejects firm factual basis in favor of good faith determination of defense counsel).

111. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1965). *Contra* People v. Bartee, 208 Ill. App. 3d 105, 566 N.E.2d 855 (1991).

112. MODEL RULES OF PROFESSIONAL CONDUCT terminology (1983).

113. *See, e.g.*, United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977); State v. Lloyd, 48 Md. App. 535, 429 A.2d 244 (1981); Brogan, *Responding to Client Perjury Under the New Pennsylvania Rules of Professional Conduct: The Lawyer's Continuing Dilemma*, 34 VILL. L. REV. 63, 69 (1989) (the attorney may not disclose perjury without some factual grounds).

114. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 475 U.S. 157 (1986); People v. Schultheis, 638 P.2d 8, 11 (Colo. 1981); *In re* Callan, 122 N.J. Super. 479, 300 A.2d 868 (1973), *rev'd on other grounds*, 66 N.J. 401, 331 A.2d 612 (1975); [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 61:408 (Nov. 14, 1987) (citing Nix v. Whiteside, 475 U.S. 157 (1986)).

115. *See supra* note 108 and accompanying text.

B. *The Bottom Line*

If the client decides to testify after being counselled on the consequences of perjury, the lawyer ordinarily reasonably can anticipate that his advice will have dissuaded the client from giving false testimony. Therefore, the attorney may examine the client in the normal manner.[116] Only if the client proceeds to testify falsely or reveals a clear intent to do so should the lawyer reveal the fraud.[117] Therefore, the attorney need not, and should not, inform the court of a client's mere intent to testify falsely. More is needed before the attorney arrives at the decision to disclose.

If the client maintains an intent to testify falsely, the lawyer should seek to withdraw. If withdrawal is not possible, and it probably will not be, the lawyer should tailor the examination to those areas about which the lawyer believes the client will testify truthfully.[118] In this manner, the attorney may be able to avert the client from presenting perjurious testimony. Thus, the truthful portions of the client's testimony can be preserved. If an attorney is ordered to proceed, he must do so.[119]

What should the attorney do when the client commits perjury during cross-examination? This perjury may occur as a surprise, particularly after the attorney admonished the client to testify truthfully during direct examination.[120]

The safest course of action is to request a recess immediately. As with any other prospective perjury, the attorney first should counsel the client to recant the testimony.[121] If the client refuses, the lawyer should move to withdraw.[122] If withdrawal is not permitted, the only option available under the Model Rules is to reveal the perjury.[123]

In *In re Goodwin*[124] a South Carolina Circuit Court Judge heard a motion to request withdrawal *in camera*. The South Carolina Supreme Court, while not specifically approving this method, did not disapprove

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116. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987); *see also* Shockley v. State, 565 A.2d 1373, 1378-79 (Del. 1989).

117. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

118. *Id.*

119. *See, e.g.*, Rubin v. Florida, 490 So.2d 1001 (1986), *cert. denied*, 483 U.S. 1005 (1987) (attorney held in contempt for refusing order to proceed).

120. *See supra* note 116 and accompanying text.

121. *Id.*

122. *Id.*

123. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983); *see also In re* King, 7 Utah 2d 258, 322 P.2d 1095 (1958).

124. 279 S.C. 274, 305 S.E.2d 578 (1983). A similar method evidently was used by the trial courts in United States v. Scott, 909 F.2d 488 (11th Cir. 1990), United States v. Long, 857 F.2d 436 (8th Cir. 1988), and Shockley v. State, 565 A.2d 1373 (Del. 1989).

of it, either. Various commentators suggested other methods by which a trial court can determine if the attorney is justified in requesting withdrawal, such as a separate evidentiary hearing or board hearing to resolve the ethical dilemma.[125]

The prudent lawyer should follow the same procedure for perjury in a deposition. Such false testimony appears to be perjury on the tribunal within the meaning of Model Rule 3.3.[126] Perjury at a deposition may be recanted at both the trial or at a supplementary deposition.

C. Steps to Rectify the Perjury

An ounce of prevention can and probably should be applied when lawyers discuss cases with their clients, especially if the attorney has any reason to suspect that perjury might occur. If preventive steps were standard practice, the problem of attorneys unknowingly assisting perjury could diminish. For example, a lawyer should inform clients initially of the limits of representation and the lawyer's duty to reveal perjury. An attorney could simply discuss the necessity for honesty with the client. However, no ethical requirements compel the attorney to discuss truthfulness with the client. In some circumstances, however, this discussion would be inappropriate if it might chill the attorney-client relationship.

If the client reveals an intent to commit perjury, the attorney must attempt to dissuade the client from doing so.[127] A lawyer can present several highly persuasive arguments to the client. First, liars frequently are caught, particularly in an adversarial setting; at a minimum, their stories are doubted. The opposing attorney is likely to seize upon inconsistencies and discrepancies in the client's testimony.[128] Also, the opposing attorney may be able to offer evidence which exposes the testimony as untrue.[129] A client's position suffers great damage once the perjury is revealed or the contradictions become obvious. Most significantly, the lawyer can tell the client that if the client commits perjury, the lawyer must report the client's perjury to the court.[130]

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125. *See* Rieger, *supra* note 110; Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 88-91 (1981).

126. Michigan State Bar Comm. on Professional and Judicial Ethics, Op. RI-13 (1989), *reported in* [5 Current Reports] Law Man. on Prof. Conduct (ABA/BNA) 155 (May 24, 1989) ("If a client has presented false testimony at a deposition, the lawyer's duty is clear. Under Rule 3.3(a)(4), the lawyer must take remedial measures . . . ." *Id.*).

127. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

128. Brogan, *supra* note 113, at 70.

129. *Id.*

130. *Id.*

The lawyer's warning should cause most clients to recognize the gravity of presenting honest testimony.

Some commentators cry that such threats operate to destroy the relationship between the lawyer and the client.[131] If a client insists on committing perjury, despite the lawyer's admonishments, there never was an effective attorney-client relationship. Also, little can remain of the attorney-client relationship after the lawyer discloses the client's false testimony. An attorney cannot be asked to abandon his obligations to the court just to preserve what is left of a dubious relationship.

If the lawyer can avert perjury before the fact, the lawyer can avoid the harsh duty of disclosure. Indeed, it is good advocacy for both the lawyer and the client to be fully informed of the client's proposed testimony and the basis for that testimony. The lawyer may not deliberately avoid investigation in order to refrain from knowingly assisting the client in giving false testimony.[132] Evading close inquiry is poor practice and also may be a violation of the lawyer's other ethical obligation to provide competent representation.[133] Even though the ethical dilemma arises once the attorney knows of the perjury or the intention to commit perjury, the lawyer should never attempt to avoid knowledge when perjury is suspected.[134]

D. Withdrawal

A lawyer may attempt to withdraw from a case in order to avoid participating in the presentation of perjury.[135] If trial is imminent, the court probably will not permit the attorney to withdraw.[136] Conversely, if the court does allow the attorney to withdraw, or if the withdrawal is within the discretion of the attorney, the client will not be deterred from the intent to testify falsely. Rather, the client may be able to deceive another attorney successfully, or shop for an attorney willing to condone the perjury, or the dilemma simply may be passed to a different lawyer.[137] For these reasons, the ABA has concluded that "withdrawal can rarely serve as a remedy for client's perjury."[138] Neverthe-

131. *See* Lefstein, *supra* note 1, at 541.

132. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

133. *Id.*

134. *See supra* note 107 and accompanying text. *See also* United States v. Scott, 909 F.2d 488, 492 n.4 (1990) (trial judge's remark that defendant does not have a constitutional right to get another lawyer in the hope he hopes he does not discover the truth).

135. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

136. Lefstein, *supra* note 1, at 525.

137. *Id.* at 526. *See also Scott*, 909 F.2d at 492 n.4 (discussion between defendant's attorney and trial judge).

138. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

less, the lawyer is obligated to request permission to withdraw before revealing a client's potential or actual perjury.[139]

VII. PERJURY IN CIVIL CASES

The ethical obligations with respect to perjury generally are the same in criminal or civil actions.[140] However, perjury in civil cases is cast in a slightly different light from perjury in criminal cases. Only a criminal defendant has a constitutionally-protected right to testify in his own defense.[141] The attorney in a civil matter may preclude a perjurious client from taking the stand.[142] A civil attorney also can withdraw from representation more easily than can a criminal attorney because the Sixth Amendment right to effective counsel does not extend its constitutional protection to civil cases.[143] The lawyer still should try to dissuade the client from committing perjury.[144] As discussed earlier,[145] the lawyer justifiably may expect the client to testify truthfully after the attorney counsels the client concerning the consequences of committing perjury.[146] Therefore, it seems preferable, and may be required, for a civil attorney to counsel a client before refusing to permit the client to testify, or before withdrawing.

At least one commentator has suggested that a civil lawyer can employ remedial measures other than disclosure to impede perjury.[147] The commentator suggests that "[t]he civil lawyer can withdraw exhibits, stipulate to facts, withdraw an issue from jury consideration, [and] agree to a new trial . . . ."[148] Model Rule 3.3 enjoins such remedial measures.[149] When a lawyer manipulates the trial in an effort to balance out the wrongdoing of his client, he fails to fulfill his duty to represent the client competently.[150]

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139. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a) (1983).

140. *See supra* notes 116-26 and accompanying text.

141. Rock v. Arkansas, 483 U.S. 44, 49 (1987).

142. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

143. Dunetz, *Surprise Client Perjury: Some Questions and Proposed Solutions to an Old Problem*, 29 N.Y.L. SCH. L. REV. 407, 436 (1984).

144. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

145. *See supra* note 44 and accompanying text.

146. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

147. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885, 896 (1989).

148. *Id.*

149. This author finds no support for the position that any ethical guidelines ever permitted such measures.

150. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1983).

VIII. TERMINATION OF THE OBLIGATION TO DISCLOSE

Under the Model Rules, the obligation to reveal client perjury ends with the closing of the proceeding.[151] But when does the proceeding end? Is it at the end of the actual trial? Many trial verdicts are subject to reversal or remand. Some states deleted language from the Rule limiting the duration of the duty to disclose, or have specifically indicated that the duty continues beyond termination of the proceeding.[152]

Recall the example presented in formal opinion 353. In that scenario, the client informed his attorney three months after termination of the proceeding that he had committed perjury. Therefore, the attorney was no longer under an obligation to reveal the perjury.[153] On reexamination of the opinion, the committee notes that it assumes that "there were no further proceedings and that this was a final decree."[154] Therefore, we can conclude from this comment that the obligation exists at least until the issuance of the final decree of the tribunal. We can also conclude that the duty endures through all subsequent proceedings. It is less clear whether the responsibility continues until the possibility of further adjudication is eliminated. If so, the duty to disclose arguably persists until appeals become time barred.

Tying the attorney's obligation to the termination of the trial, and then to subsequent proceedings which in fact occur, seems most reasonable. The goals of the duty to disclose are effected if the attorney's obligation is limited to the actual proceedings. Most matters are concluded at trial. If the attorney learns of the perjury after termination of the trial, the damage is done and the matter is closed. The attorney does not knowingly participate in the fraud, and attorney-client confidentiality is protected. If, however, an appeal is filed, the damage would continue and arise anew. The duty, likewise, should arise again. Requiring the obligation to continue until the potentiality of appeal is exhausted unreasonably enlarges the responsibility to disclose. An extended duty could constrain an attorney to inform on a client when the attorney did not knowingly assist in the perjury during trial. An extended duty makes the attorney an officer of the court at the expense of the attorney's duties to clients. This interpretation also erodes the ability of the client to obtain counsel after committing perjury.

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151. *Id.* Rule 3.3(b).

152. *See* Appendix *infra*; *see also* Kuhlman, *When Clients Lie*, A.B.A. J. 88 (July 1990) (some states have adopted Rule 3.3(b) while others have specified a different time limit or remain silent about the duration of attorney obligation).

153. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

154. *Id.*

Many commentators hold that the obligation should continue until the time period for appeal expires.[155] The prudent lawyer therefore should consider the possibility that the duty to disclose exists as long as the possibility of appeal exists.

IX. Conclusion

Rule 3.3 and formal opinion 353 go as far as possible to preserve the attorney's obligations to his client without permitting the attorney to participate in a fraud upon the court. Many commentators are critical of Rule 3.3 and the ABA interpretation of that rule. However, as one commentator noted:

> We must accede to the reality that there is no perfect solution. It is precisely because there is none that so many pages, scholarly and otherwise, have been written and published on the subject. The dilemma is one of those classic problems for which there are no 'good' answers, problems for which we must choose among competing values to arrive at 'least bad' answers.[156]

One must not lose sight of the basic reality. It is the client who wishes to commit the crime of perjury with the attorney's assistance. The attorney is torn between obligations to the client and a duty to a judicial system which requires presentation of truthful evidence in order to reach a just result. The lawyer also must consider that the legal profession and the judicial system, which historically are vulnerable to criticism, are damaged when an attorney willingly participates in presenting lies and false evidence in order to obtain an undeserved, favorable result. Given these competing interests and considerations, the ABA has chartered a course that is both reasonable and just.

Charles F. Thompson, Jr.

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155. *See, e.g.*, 1 G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 617 (1990).

156. Franck, *Letter to the Editor: Response to Lefstein*, 2 Geo. J. Legal Ethics 585, 586 (1988).

APPENDIX

Alabama	M	Alaska	C	Arizona	R, A
Arkansas	R, A	California	N	Colorado	C
Connecticut	R	Delaware	R, A	Dist. of Col.	R, A
Florida	R, 9	Georgia	C	Hawaii	C
Idaho	R, A	Illinois	M	Indiana	R, A
Iowa	C	Kansas	R, A	Kentucky	R, 8
Louisiana	R, 3	Maine	C	Maryland	R, 5
Massachusetts	C	Michigan	R, A	Minnesota	R, 9
Mississippi	R, A	Missouri	R, A	Montana	R, A
Nebraska	C	Nevada	R, A	New Hampshire	R, A
New Jersey	R, 1	New Mexico	R, A	New York	R, C
North Carolina	M, 4	North Dakota	R, A	Ohio	C
Oklahoma	R, 6	Oregon	R, C, 4	Pennsylvania	R, A
Rhode Island	R, A	South Carolina	R	South Dakota	R, A
Tennessee	C	Texas	R, 7	Utah	R, A
Vermont	C	Virginia	R, C, 2	Washington	R, 3
West Virginia	R, A	Wisconsin	R, A	Wyoming	R, A

R — Adopted the Model Rules of Professional Conduct.
C — Retains the Model Code of Professional Responsibility.
N — Has neither the Model Code nor the Model Rules.
R, C — Adopted limited provisions of the Model Rules.
M — Has a mix of the Model Rules and Model Code.
A — Adopted Model Rule 3.3 as written or a version substantially the same.
1 — Requires revealing all material facts in addition to perjury.
2 — Requires revelation of intention to commit a crime, but attorney must warn client before revealing information to the court.
3 — The duty to disclose is subordinated to the duty of confidentiality.
4 — Duties not substantially different from the Model Code.
5 — Duties substantially the same as the Model Rules except the lawyer is permitted to refrain from disclosure if disclosure would violate the client's constitutional rights.
6 — Mirrors the Model Rules in many respects but requires all perjury, rather than material perjury, to be disclosed.
7 — Same duty as Model Rules but expands that duty until such time as disclosure is no longer reasonably possible.
8 — Substantially the same as the Model Rules except focuses on the duty to tribunal rather than the duty to avoid knowingly assisting perjury.
9 — Substantially the same as the Model Rules except drops language limiting the obligation to the end of the proceeding.

Chart based on Law. Man. on Prof. Conduct (ABA/BNA) 01:3-01:41 (Jan. 21, 1987-December 19, 1990).