

12-1-1979

The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury

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Recommended Citation

Joni H. Ostergaard, Comment, *The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 Wash. L. Rev. 211 (1979).

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THE FAILURE OF SITUATION-ORIENTED PROFESSIONAL RULES TO GUIDE CONDUCT: CONFLICTING RESPONSIBILITIES OF THE CRIMINAL DEFENSE ATTORNEY WHOSE CLIENT COMMITS OR INTENDS TO COMMIT PERJURY

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I. INTRODUCTION

The legal profession has long promulgated rules in an effort to guide attorneys toward appropriate ethical behavior.¹ By formulating such rules and by enforcing them through professional discipline, the profession has undertaken the admirable task of policing its own members.² The past decade has seen a proliferation of different standards for attorney conduct,³ in part because of common law developments in the areas of legal malpractice and ineffective assistance of counsel.⁴ In addition, the bar has contributed to the proliferation of conduct rules by establishing standing committees that have promulgated advisory ethical standards in certain specialized fields.⁵ Despite the increasing number of rules, however, their situation-oriented⁶ character has resulted in omissions and inconsistencies which leave attorneys without guidance in many situations.

More importantly, the proliferation of ethical conduct rules has served to emphasize a long-standing problem inherent in those rules: They embody two essentially contradictory views of the lawyer's role—the "lawyer as an officer of the court" and the "lawyer as a zealous representative of the client"—but fail to articulate a basis for deciding which view

1. The current American Bar Association Code of Professional Responsibility [hereinafter cited as ABA CODE], for example, was preceded by the ABA Canons of Professional Ethics, adopted in 1908 and amended numerous times between 1928 and 1951. The original ABA Canons had been based primarily on the Alabama Bar Association's Code of Ethics, adopted in 1887; that Alabama code, in turn, had been inspired by the lectures of Judge George Sharswood and by David Hoffman's essay on professional deportment. H. DRINKER, *LEGAL ETHICS* 23-26 (1953). See generally 2 D. HOFFMAN, *A COURSE OF LEGAL STUDY* 752-75 (2d ed. Baltimore 1830) (1st ed. Baltimore 1817); G. SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (4th ed. Philadelphia 1876) (1st ed. Philadelphia 1854).

2. Whether the legal profession is meeting that admirable goal is another matter. See, e.g., ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT I* (Final Draft, 1970) (Clark Committee Report). Except to the extent that its operation is impeded by the rules themselves, professional discipline is not considered in this comment.

3. In this comment, "conduct" will be defined as "the behavior of lawyers" which "assumes both community and professional standards." Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 196. Marks and Cathcart's statement, however, that "agreement about norms [for conduct] exists, whether they be criminal laws or professional ethics" is not here endorsed. *Id.* Indeed, this comment details the professional *disagreement* about the appropriate ethical conduct for a criminal defense attorney whose client is committing perjury.

4. See Part III-A-4 *infra* (summary of recent developments in the common law ineffective assistance of counsel doctrine).

5. Through a special standing committee, for example, the ABA has promulgated criminal justice standards for the prosecution and defense functions. E.g., ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE DEFENSE FUNCTION* (Approved Draft, 1971) [hereinafter cited as ABA DEFENSE STANDARDS]. See Part III-A-3 *infra* (discussion of ABA Defense Standards relating to perjury of a criminal defendant).

6. See notes 7-13 and accompanying text *infra* (definition of the situation-oriented model of professional responsibility).

should govern his conduct in specific situations. Through an examination of the professional conduct rules that govern the controversial situation of a criminal defense attorney whose client intends to commit or is committing perjury, this comment analyzes the failure of those rules to guide attorney conduct and presents an alternative approach to their formulation.

II. THE DISTINCTION BETWEEN SITUATION-ORIENTED AND SYSTEM-ORIENTED RULES FOR PROFESSIONAL CONDUCT

A situation-oriented model of professional responsibility treats each factual situation as unique.⁷ Under this approach, “[i]nstitutional rule-makers”⁸ balance the competing policies that support different possible rules and then formulate a rule or standard of conduct for a particular set of facts.⁹ In addition to the difficulty of the rulemakers’ task in deciding what factors should be considered and what weight should be given to each,¹⁰ the situation-oriented model results in a lack of coherence between the discrete rules formulated.¹¹ Further, situation-oriented rules provide attorneys with minimal guidance in those factual situations not anticipated by the rules¹² and, because of their discrete nature, do not allow easy extrapolation to unique sets of facts.¹³

The various ethical rules that govern attorney conduct have been characterized as “situation-oriented”¹⁴ and exhibit the ambiguity typical of such rules.¹⁵ The American Bar Association Code of Professional Re-

7. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 287 (1976). “The essence of this model is that each situation in which an ethical question is presented is unique. . . . A uniform goal orientation is subordinated to reaching the ‘right’ result in each case.” *Id.*

8. Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 31 n.22 (1976). Examples of rulemaking bodies in the area of professional responsibility are the American Bar Association committees that drafted the Code of Professional Responsibility and the Standards Relating to the Defense Function. *See, e.g.*, notes 51, 82 & 89 *infra*.

9. Aronson, *supra* note 7, at 288.

10. *Id.*

11. *Id.* at 319. Compare ABA CODE, DR 7-102(A)(7), reproduced in note 75 *infra*, and ABA DEFENSE STANDARDS, *supra* note 5, § 3.7(b), at 15 with *id.* § 7.7, at 17, 167, reproduced in note 89 *infra*.

12. For example, ABA Defense Standard § 7.7, reproduced in note 89 *infra*, did not specifically anticipate the situation in which a case is tried to the court without a jury. *See, e.g.*, note 131 *infra*.

13. “The mapping problem occurs because rules do not always translate . . . perfectly the policies which generated them into results in individual cases.” Powers, *supra* note 8, at 30–31. In the case of rules for conduct of a criminal defense attorney confronted with client perjury, an additional problem is created because the policies that generated the rules are contradictory. *See* notes 23–33 and accompanying text *infra*.

14. Aronson, *supra* note 7, at 287.

15. *Id.* at 284 (“As a section of a criminal code, [the ABA Code] would be stricken because

sponsibility (ABA Code),¹⁶ supposedly the authoritative source of standards for attorney conduct, has been roundly criticized for its lack of guidance,¹⁷ especially in difficult cases,¹⁸ and for its lack of discrimination between the various capacities that attorneys may serve in the legal system.¹⁹ Although the ABA Standards Relating to the Defense Function (ABA Defense Standards)²⁰ have been applauded as a more specific set of guidelines for defense attorneys,²¹ they have also been criticized for their choice of certain ethical ideals over others.²²

A major reason for the inadequacy of current situation-oriented ethical rules is that they embody two incompatible views of the lawyer's role: the "lawyer as an officer of the court" and the "lawyer as a zealous representative of the client."²³ The "lawyer as an officer of the court" view is based on the premise that the trial process is the optimum truth-finding device.²⁴ Accordingly, the lawyer's role is to aid in ensuring in-

'men of common intelligence must necessarily guess at its meaning' . . .'). See Sutton, *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 508 (1979). See also Marks & Cathcart, *supra* note 3, at 229 ("A vague rule is like no rule at all.').

16. See Part III-A-2 *infra* (discussion of ABA Code provisions relating to client perjury).

17. E.g., Aronson, *supra* note 7, at 274 ("a series of ambiguous and only tangentially related rules which are often contradictory or misleading"); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 737 (1977) ("The lawyers' interest is in maximum flexibility: the more latitude lawyers have, the less bother the Code is for them Taken separately or together, these sections [of the ABA Code] allow an attorney maximum flexibility to justify almost any course which he or she has chosen.'). ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, ETHICS AND ADVOCACY, Commentary to Recommendation C, at 12 (Final Report, 1978) [hereinafter cited as ANNUAL WARREN CONFERENCE]. See also Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1484 (1966) ("[I]t is precisely when one tries to act on abstract ethical advice that the practicalities intrude, often rendering unethical the well-intended act.'). (footnote omitted). See generally Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671 (1979).

18. E.g., Aronson, *supra* note 7, at 289 ("A system [such as the ABA Code] purporting to affect self-discipline which exerts little or no influence in difficult cases is inadequate.'). Sutton, *supra* note 15, at 514 ("Paradoxically, the Code is at once too complex and too simplistic. . . . [M]ost difficulties encountered in the use of the Code are attributable [*sic*] to provisions that all too often create a false sense of simplicity by ignoring complicating factors.').

19. E.g., ANNUAL WARREN CONFERENCE, *supra* note 17, Recommendation B, at 10.

20. See Part III-A-3 *infra* (discussion of ABA Defense Standards relating to client perjury).

21. E.g., Bazelon, *The Defective Assistance of Counsel*, 42 CIN. L. REV. 1, 33 (1973). See *Thornton v. United States*, 357 A.2d 429, 437 n.14 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (The content of ABA Defense Standard § 7.7 "is eminently sound" and the ABA Defense Standards "collectively . . . have made an extraordinary contribution to the criminal justice process.').

22. Bazelon, *supra* note 21, at 33.

23. E.g., *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) ("[D]efense counsel in a criminal case assumes a dual role as a 'zealous advocate' and as an 'officer of the court'"); *Dike v. Dike*, 75 Wn. 2d 1, 5-6, 448 P.2d 490, 493 (1968) ("[A]n attorney has a dual role—he is both an advocate for his client and an officer of the court. . . . Neither duty can be meaningfully considered independent from the other.').

24. The competing views of professional responsibility have been characterized as "truth-oriented" and "adversary-oriented." The "lawyer as an officer of the court" view exemplifies the

formed judicial decisions.²⁵ Under this truth-oriented view, for example, a prosecutor is required to disclose evidence tending to negate or mitigate the defendant's guilt²⁶ and to seek "justice" rather than conviction.²⁷

The second major view—the "lawyer as a zealous representative of the client"—is supported by the principle that the clash of adversaries contributes to sound judicial decisionmaking and requires each side to present its best possible case.²⁸ Within this adversary-oriented view, special protections, such as the attorney-client privilege,²⁹ are provided to ensure

truth-oriented model. Aronson, *supra* note 7, at 295. Within this characterization, the "equal adversaries alternative" and the "innocence-oriented alternative" are subsets of the "adversary-oriented" view. *Id.* at 295–318.

25. Representative of this view is the Report of the Joint Conference on Professional Responsibility, in which a trial is seen as an attempt to obtain an impartial judgment, and the lawyer's role is to assist in promoting a "wise and informed decision." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160–61 (1958). In this view of the trial process,

[t]o permit a client who will commit perjury to take the stand does not contribute to a wise and informed decision. It is difficult to differentiate among forging documents, suborning another witness, and calling one's own client with the knowledge that he will lie. An impartial, informed, and wise decision presupposes that the person deciding a case has been given the truth. To furnish him with a lie is to mock impartiality, to mislead rather than to inform, and to stultify the decisional process rather than to make it an exploration leading to mature judgment.

Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1488 (1966). Accord, Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 23, 24–25 (1966) ("All lawyers must remember that the basic purpose of the trial is the determination of truth."); Drinker, *Some Remarks on Mr. Curtis' 'The Ethics of Advocacy'*, 4 STAN. L. REV. 349, 350 (1952) ("Of course no one could say that an occasion might not possibly arise when there was no alternative except the truth or a lie and when the consequences of the truth were such that the lawyer might be tempted to lie. This, however, would not make it right for him to do so."); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057–58 (1975) (proposed redrafting of ABA Code, DR 7–102 to increase instances of disclosure of client's making of untrue statements); Morgan, *supra* note 17, at 738 (protection of confidences and secrets under the ABA Code "must be balanced against the perversion of justice a lawyer can justify in the name of the 'client's' privilege."). See also ABA DEFENSE STANDARDS, *supra* note 5, Introduction, at 142 ("It has even been suggested, but universally rejected by the legal profession, that a lawyer may be excused for acquiescing in the use of known perjured testimony on the transparently spurious thesis that the principle of confidentiality requires this. . . . [N]o honorable lawyer would accept this notion . . . [T]he mere advocacy of such fraud demeans the profession and tends to drag it to the level of gangsters and their 'mouthpiece' lawyers in the public eye.").

26. ABA Code, DR 7–103(B).

27. *Id.* EC 7–13.

28. This view is the "equal adversaries alternative," Aronson, *supra* note 7, at 303, within the "adversary-oriented model" of professional responsibility, *id.* at 300. See note 24 *supra*. The equal adversaries view anticipates that the rules for prosecutors' and defense counsel's conduct will be identical.

29. The attorney-client privilege, which renders inadmissible otherwise valid testimony and permits the withholding of certain evidence from the court, has been justified on the following bases: The relationship between attorney and client approaches a "sacred trust," *e.g.*, *United States v. Costen*, 38 F. 2d, 24 (C.C.D. Colo. 1889); it is necessary in the "interest and administration of justice," *e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); it encourages freedom of consultation between attorney and client, *e.g.*, *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960), which is necessary for full development of the facts and adequate representation, *e.g.*, *Fisher v. United States*, 425 U.S.

the maintenance of confidentiality in lawyer-client communications.³⁰ In addition, the criminal defendant is presumed innocent until proven guilty, and the burden is on the prosecution to prove guilt beyond a reasonable doubt.³¹ Consequently, the role of defense counsel is defined differently than that of the prosecutor.³² A defense attorney, for example, need present no evidence even if she knows the truth.³³

While any given situation-oriented rule embodies one of these two views of a lawyer's role to a greater or lesser degree, the application of these views to specific situations is unsystematic. Consequently, rules of ethical conduct as a whole are not guided by a single, unifying principle that could provide coherence and direction in situations not covered by the specific rules. Although the two competing views of the attorney's role both reflect valid ideals for a system of ethical rules, their continued coexistence within the situation-oriented model serves only to perpetuate professional confusion and permits attorneys to justify virtually any course of conduct as ethical.

One commentator has suggested that, to be workable, professional rules must be "system-oriented" or "define the lawyer's role in terms of

391, 403 (1976); and, absent the privilege and the prohibition of attorney disclosure of client confidences, the client would be subject to an indirect form of self-incrimination, Noonan, *supra* note 25, at 1485. Also, it has been suggested that client confidences must be maintained in order to avoid greater mischiefs, *e.g.*, *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), including the possibility that an opposing party might prevail in a lawsuit merely by calling the client's attorney to testify against her, Noonan, *supra*, at 1485.

The application of the privilege may result in shielding the client's guilt, although that is not its purpose. *E.g.*, *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960). In this respect, the attorney-client privilege and the exclusionary rule in criminal procedure function similarly: On the basis of overriding policy considerations, otherwise truthful evidence is kept from the fact-finder. *See Freedman, supra* note 17, at 1482. *See also* note 43 *infra*.

30. *See* Parts III-A-1 and III-A-2 *infra*. The common law attorney-client privilege and the provisions of Canon 4 of the ABA Code both serve to protect the confidentiality of the attorney-client relationship and are in many respects duplicative. *But see* notes 57-58 and accompanying text *infra*.

31. *E.g.*, *Freedman, supra* note 17, at 1471. Other special protections are also afforded to the criminal defendant in the trial process. *See, e.g.*, Noonan, *supra* note 25, at 1490. These protections represent the "innocence-oriented alternative" within the adversary-oriented model, Aronson, *supra* note 7, at 314, which anticipates different rules of conduct for prosecutor and criminal defense counsel. *See* notes 24 & 28 *supra*.

32. *E.g.*, ABA CODE, EC 7-13 (special ethical duties required for prosecutors).

33. [D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. . . . Defense counsel need present nothing, even if he knows what the truth is. . . . Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part) (footnotes omitted). *See* ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 1.1, at 177.

the legal system's overall goals."³⁴ Under this model of professional responsibility, the primary duty of the lawyer "would be to serve those goals to the best of his or her ability regardless of personal ethics."³⁵ The system-oriented model could avoid the problems inherent in the traditional, situation-oriented model of professional responsibility by defining the specific guiding principle that the attorney should follow in cases not otherwise governed by discrete rules.³⁶

Instituting a system-oriented model would require, however, that "the Bar achieve consensus as to the overall goal of each subpart of our system of justice."³⁷ Since the current situation-oriented rules have emanated from an attempt to acknowledge two competing views of the attorney's role,³⁸ achieving such a consensual goal would be difficult. But if the purpose of a code of conduct is to provide uniformity and to control conduct, the legal profession can no longer afford the luxury of avoiding the choice between these two views of the attorney's role.

The choice between these views need not, however, be absolute in order to be worthwhile. Attorneys serve in many different capacities in the legal system, including those of criminal defense lawyer and prosecutor. Each different capacity may indeed merit a different guiding principle. The situation of a criminal defense attorney whose client is committing or intending to commit perjury on the witness stand, analyzed below, may warrant adversary-oriented ethical rules that allow him to represent his client with zeal and without constraint. The situation of the prosecutor, on the other hand, might require innocence-oriented³⁹ rules that would prohibit his use of false evidence to secure a conviction. The choices to be made by the professional rulemakers, while difficult, are essential if the

34. Aronson, *supra* note 7, at 293–94 (emphasis added). A system-oriented model would avoid "mapping" problems. See note 13 *supra* (discussion of "mapping").

35. Aronson, *supra* note 7, at 293–94.

36. In a system-oriented model, if no specific rule mandated particular conduct in a given situation, the attorney would determine the appropriate ethical conduct by looking to the guiding principle underlying the rules. *Id.* at 294–95 n.54. A system-oriented model would be more likely to have the advantages of a "formal" decision, which "uses less than all available relevant information by following a rule which screens from the decisionmaker's consideration all information not specifically invoked by the rule." Powers, *supra* note 8, at 28. Formal rules are advantageous because they: (1) are predictable, (2) are easier to apply, (3) shift responsibility from decisionmakers to rulemakers, (4) transmit rulemakers' values to decisionmakers who might not be trusted, and (5) contribute to the possibility that like decisions will be made alike. *Id.* at 29–30.

37. Aronson, *supra* note 7, at 294. The coexistence for centuries in the Anglo-American legal system of the roles of "lawyer as an officer of the court" and "lawyer as a zealous representative of the client" illustrates the difficulty of instituting a system-oriented model. See notes 23–33 and accompanying text *supra*.

38. The formulation of any situation-oriented rules to guide attorney conduct is merely an effort to balance the several values inherent in the adversary system. See Aronson, *supra* note 7, at 319.

39. See notes 24 & 31 *supra*.

ethical rules are to serve their purpose. The situation of the criminal defense attorney whose client commits perjury demonstrates the necessity of such choices.

III. A SITUATION-ORIENTED EXAMPLE: THE CRIMINAL DEFENSE ATTORNEY WHOSE CLIENT COMMITS OR INTENDS TO COMMIT PERJURY

The conduct of defense counsel in criminal cases is governed by diverse and frequently contradictory rules. Criminal defense lawyers, like all lawyers, are guided in their conduct by statutes, common law, and ethical rules. In addition, criminal defense lawyers are controlled in part by the procedural protections afforded to their clients, including the developing doctrine of the defendant's right to effective assistance of counsel. All of these sources of conduct rules may bear on an attorney in a given situation—for example, a criminal defense attorney is required to conduct himself ethically, as measured against applicable ethical rules, and competently, as measured against ineffective assistance of counsel standards. The appropriate ethical conduct for a criminal defense attorney in any situation is therefore difficult to determine.⁴⁰ In no area are the rules of ethical conduct more confusing or controversial than when a criminal defendant intends to commit or commits perjury on the witness stand.⁴¹

The situation of the criminal lawyer whose client is presenting perjured testimony brings into bold relief the contradictory norms and values inherent within the various rules, and makes especially clear the conflict between the rights of a criminal defendant and the professional responsibilities of her attorney. Even more importantly, the situation reflects the

40. The criminal defense attorney is often confronted with conflicting and overlapping duties: If the lawyer is faced with a close ethical question and resolves it in favor of his client, he quite often still feels that somehow he has violated a duty owed to the court or profession. This most often occurs where the lawyer feels bound to non-disclosure by reason of the attorney-client privilege but bothered by disclosure as possibly demanded in the duty of candor and fairness to the court and profession.

Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties*, 3 DUQ. L. REV. 239, 239 (1965) [hereinafter cited as *Fruits of the Attorney-Client Privilege*]. The criminal defense attorney is particularly likely to confront these conflicting duties because of a general professional duty to provide representation for those accused of crime, including those known to be guilty. *E.g.*, Freedman, *supra* note 17, at 1469.

41. See, *e.g.*, Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 391-93 (1976); Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 666 (1978). See, *e.g.*, notes 89-97 and accompanying text *infra* (discussion of one controversial rule that governed attorney conduct in the face of client perjury).

larger problems—of ambiguity, incompleteness, and a general failure to guide—engendered by a situation-oriented approach to professional responsibility.

A brief examination of the controlling situation-oriented rules is necessary to an understanding of the ethical dilemmas which they fail to resolve.

A. *Traditional Rules for Defense Counsel's Conduct*

1. *The common law attorney-client privilege and the future crime exception*

The attorney-client privilege⁴² protects communications made in confidence by the client to her lawyer for the purpose of obtaining legal advice.⁴³ Like other common law testimonial privileges, it is intended to foster a relationship that would be harmed by compelled disclosure of confidential communications.⁴⁴ Underlying the privilege is the assump-

42. The common law attorney-client privilege is of ancient origin, *e.g.*, *Prichard v. United States*, 181 F.2d 326, 328 (6th Cir.), *aff'd per curiam*, 339 U.S. 974 (1950), and is one of a limited number of exceptions to the general rule that the public has a right to every person's evidence, *e.g.*, *United States v. Bryan*, 339 U.S. 323, 331 (1950). The privileged nature of a given communication is a matter of law, not ethics, and is judicially determined. *E.g.*, *Schwimmer v. United States*, 232 F.2d 855, 864 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). *See also* Part III-A-2 *infra* (discussion of the more broadly defined ethical duty to maintain client confidences and secrets).

43. The general principle of the attorney-client privilege has been stated by Wigmore:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 J. WIGMORE, *EVIDENCE* § 2292, at 554 (McNaughton rev.1961) (emphasis omitted). The attorney-client privilege is justified on the basis of policy considerations, however, and may sometimes give way to competing policies. *E.g.*, *Magida ex rel. Vulcan Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (expanded pretrial discovery as competing policy). *See also* note 29 *supra* (discussion of policy considerations supporting attorney-client privilege).

Although it is "merely declaratory of the common law," *State v. Emmanuel*, 42 Wn. 2d 799, 815, 259 P.2d 845, 854 (1953), the attorney-client privilege in Washington is statutorily defined. R.C.W. § 5.60.060(2) provides that "[a]n attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." WASH. REV. CODE § 5.60.060(2) (1978). Also, "the mental impressions, conclusions, opinions, or legal theories of an attorney" are protected. WASH. CIV. R. SUPER. CT. 26(b)(3). Under Criminal Rule 4.7(f)(1), "legal research or . . . records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies" are protected. WASH. CRIM. R. SUPER. CT. 4.7(f)(1). The exceptions to the attorney-client privilege have been defined in Washington by the courts. *E.g.*, *Dike v. Dike*, 75 Wn. 2d 1, 14, 448 P.2d 490, 498 (1968) (whereabouts of client who violated child custody order not privileged).

44. 8 J. WIGMORE, *supra* note 43, § 2285.

Wigmore has outlined four conditions necessary for the existence of any privileged communication:

tion that, in its absence, clients might be less than fully candid with their attorneys and consequently fail to obtain the full benefits of legal assistance.⁴⁵

The law of the attorney-client privilege is, however, as much defined by its exceptions as by its affirmative protections.⁴⁶ The future crime exception allows disclosure of confidential communications made by a client who seeks legal advice to further a criminal plan⁴⁷ or who reveals

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. at 527 (emphasis in original). Wigmore has observed that only the fourth condition is open to dispute under a claim of the attorney-client privilege. *Id.* at 528.

45. 8 J. WIGMORE, *supra* note 43, § 2291. See *State ex rel. Sowers v. Olwell*, 64 Wn. 2d 828, 832, 394 P.2d 681, 684 (1964); *Hartness v. Brown*, 21 Wash. 655, 668, 59 P. 491, 495 (1899). See also *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) ("When an attorney unnecessarily discloses the confidences of his client, he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation."). As Wigmore noted, "the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth." 8 J. WIGMORE, *supra*, § 2291, at 554.

46. All exceptions to the attorney-client privilege are based on the notion of client waiver, either actual or constructive. Consequently, the privilege is personal to the client, *e.g.*, *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), and cannot be waived by her attorney, *e.g.*, *Magida ex rel. Vulcan Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 78 (S.D.N.Y. 1951).

47. *E.g.*, *Garner v. Wolfinbarger*, 430 F.2d 1093, 1102-03 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *State v. Richards*, 97 Wash. 587, 592, 167 P. 47, 49 (1917). Justice Cardozo's language is often invoked to describe the exception:

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

Clark v. United States, 289 U.S. 1, 15 (1933) (dictum). *Accord*, 8 J. WIGMORE, *supra* note 43, § 2298, at 573 ("[The] reasons [for the privilege] all cease to operate . . . where the desired advice refers not to prior wrongdoing, but to future wrongdoing.") (emphasis omitted).

The rationale behind the future crime exception to the attorney-client privilege was articulated in a leading English case:

In order that the rule [of privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.

The Queen v. Cox, 14 Q.B.D. 153, 168 (1884), *quoted in State v. Phelps*, 24 Or. App. 329, 545

an intention to commit a crime from which the attorney is unable to dissuade him.⁴⁸ Thus, the exception applies to client communications of intent to testify falsely.⁴⁹ Before the attorney-client privilege will fall under the future crime exception, a prima facie showing of intent to commit a crime must be made by evidence extrinsic to the attorney-client relationship.⁵⁰

2. The ABA Code of Professional Responsibility

The ABA Code,⁵¹ adopted in some form by forty-nine states,⁵² pro-

P.2d 901, 904 (1976).

The exception to the attorney-client privilege extends as well to "continuing" crimes. *E.g.*, *Dike v. Dike*, 75 Wn. 2d 1, 14, 448 P.2d 490, 498 (1968).

48. *E.g.*, *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939); *In re Sawyer*, 229 F.2d 805, 808-09 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956).

49. *E.g.*, *State v. Phelps*, 24 Or. App. 329, 545 P.2d 901, 904-05 (1976) (client's communication to attorney that he could present false witnesses not privileged). The rationale behind the exception is that a client cannot

employ an attorney for the purpose of aiding and abetting him in the commission of a future crime or fraud, and thereby seal the lips of his lawyer to secrecy and thus prevent the exposure or detection of such crime or fraud. The privileged communication may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society. The law does not make a law office a nest of vipers in which to hatch out frauds and perjuries.

Gebhardt v. United Rys. of St. Louis, 220 S.W. 677, 679 (Mo. 1920).

50. *E.g.*, *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939). See 8 J. WIGMORE, *supra* note 43, § 2299. A mere assertion by the attorney that the client intends to commit a crime or fraud is not sufficient to destroy the privilege. *United States v. Bob*, 106 F.2d at 40.

51. The ABA Code was the product of five years' work by the Special Committee on Evaluation of Ethical Standards. It was adopted by the ABA's House of Delegates in 1969, became effective on January 1, 1970, *Preface to ABA CODE* at i, and has been amended seven times since its adoption, *id.* at ii; ABA CODE, DR 2-102(C) app. Since late 1977, an ABA Commission on the Evaluation of Professional Standards, headed by Robert Kutak, has been rewriting the Code of Professional Responsibility in response to its critics within and without the profession. *Say Revised Ethics Code Will Be 'Enforceable'*, 65 A.B.A.J. 1283, 1283 (1979) [hereinafter cited as *Revised Code 'Enforceable'*]. The Kutak Commission is scheduled to release a discussion draft of the revised code at the February 1980 ABA meeting, *id.*, and to submit a final draft to the ABA in August 1980, *Commission Bites Bullet on Ethics Code Issues*, 65 A.B.A.J. 887, 888 (1979). The House of Delegates is expected to consider the final draft at the February 1981 ABA meeting. *Id.*

The current ABA Code is comprised of nine canons, which are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." *Preliminary Statement to ABA CODE* at 1. The Code also includes 138 ethical considerations, which "are aspirational in character and represent the objectives toward which every member of the profession should strive," and 41 disciplinary rules, which "are mandatory in character. . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* The ABA Code has, however, been criticized for not conforming to its own plan for distinguishing between canons, disciplinary rules, and ethical considerations. Sutton, *supra* note 15, at 508, 516.

52. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY,

vides rules for attorney conduct in a variety of professional situations. The ABA Code's utility as a source of definitive standards for lawyer conduct, however, is seriously impeded by its inconsistencies and omissions.⁵³ In particular, the Code embodies both views of the lawyer's professional role discussed above,⁵⁴ but provides no method for resolving these contradictory roles when an attorney is faced with client perjury.⁵⁵

Canon 4⁵⁶ of the ABA Code mandates the preservation of client confidences and "secrets"⁵⁷ by the attorney. Since it includes secrets within its scope, Canon 4 is broader than the common law attorney-client privilege.⁵⁸ The disciplinary rules of Canon 4 generally prohibit knowing revelation of a client's confidences or secrets⁵⁹ and prohibit their use to the disadvantage of the client.⁶⁰ Under Canon 4, therefore, an attorney

CODE OF PROFESSIONAL RESPONSIBILITY BY STATE 1 (1977) [hereinafter cited as ABA CODE BY STATE]. The 49 states include those which adopted the ABA Code in its entirety without amendments, those which later amended it, and those which adopted amended versions. PROFESSIONAL RESPONSIBILITY OF THE LAWYER 221-25 app. (N. Galston ed. 1977). The standards are compulsory in some states and advisory in others. ABA CODE BY STATE, *supra*, at 1. The ABA Code has not been adopted by California, but even there it is considered authoritative in many respects. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 823 n.50 (1977).

The Washington Supreme Court adopted its Code of Professional Responsibility on December 7, 1971, to be effective on January 1, 1972, WASHINGTON CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as WASH. CODE], and has amended it twice since adoption, with the majority of amendments relating to lawyer advertising, *see* 91 Wn. 2d 1102-16 (1978); 88 Wn. 2d 1110 (1977); 80 Wn. 2d 1119-81 (1971). *See also* notes 76-77 *infra* (discussion of one major substantive difference, relating to client perjury, between the ABA and Washington versions of the Code).

53. *See* notes 7-19 and accompanying text *supra* (discussion of problems with the ABA Code generally).

54. *See* notes 23-33 and accompanying text *supra* (discussion of these two views).

55. The ABA Code applies to all attorneys and generally fails to discriminate between different ethical problems presented in civil and criminal representation. *See, e.g.*, ANNUAL WARREN CONFERENCE, *supra* note 17, Commentary to Recommendation B, at 10. *See* Part III-B *infra* (analysis of the alternative courses of conduct available to the criminal defense attorney confronted with client perjury and of the ethical problems with each).

56. "A Lawyer Should Preserve the Confidences and Secrets of a Client." ABA CODE, CANON 4.

57. Disciplinary Rule 4-101(A) defines "[c]onfidence" as "information protected by the attorney-client privilege under applicable law" and "secret" as "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." *Id.* DR 4-101(A).

58. *Id.* EC 4-4. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341 (1975), *discussed in* note 79 *infra*.

59. ABA CODE, DR 4-101(B)(1). The attorney may, however, reveal client confidences and secrets in limited circumstances. *Id.* DR 4-101(C). *See* notes 63-68 and accompanying text *infra* (discussion of the future crime exception to the ethical duty to maintain confidences and secrets).

The Washington version of DR 4-101(B) was amended at the time of adoption to specify that client confidences and secrets cannot be disclosed during or after termination of the professional relationship. WASH. CODE, *supra* note 52, DR 4-101(B). This amendment merely reflects a rule contained elsewhere in the ABA Code. *See* ABA CODE, EC 4-6.

60. ABA CODE, DR 4-101(B)(2).

may not reveal a client's admission to past criminal acts⁶¹ nor her knowledge that the client has committed perjury.⁶²

The ethical duty to maintain client confidences and secrets contains a future crime exception,⁶³ as does the attorney-client privilege.⁶⁴ Under DR 4-101(C)(3), a lawyer may reveal a client's criminal intent and the information necessary to prevent the crime.⁶⁵ An ABA ethical advisory opinion⁶⁶ goes further, and requires an attorney to disclose such information to the court whenever facts within his knowledge indicate beyond a reasonable doubt that a crime will be committed by his client.⁶⁷ Also, the Code allows an attorney to request permission to withdraw from representation when a client "[p]ersonally seeks to pursue an illegal course of conduct."⁶⁸

Canon 7⁶⁹ of the ABA Code advises the attorney to represent his client with zeal but within the bounds of the law.⁷⁰ The lawyer is reminded that,

61. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1318 (1975) (past perjury in related proceeding in another jurisdiction and in course of representation by another attorney is confidential). See also C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 95, at 200 (2d ed. E. Cleary 1972); 8 J. WIGMORE, *supra* note 43, § 2292.

62. See, e.g., ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1416 (1978) (plan by clients in civil case to obtain verdict by fraud, when subverted through attorney's discovery and remonstrance, is privileged); *id.* No. 1318 (1975) (client's admission to attorney that he committed perjury in a related matter in another jurisdiction is protected as confidential); *id.* No. 1314 (1975) (when attorney finds in course of criminal trial that his client has already committed perjury, his primary duty is to protect the confidentiality of that privileged communication).

63. ABA CODE, DR 4-101(C)(3), reproduced in note 65 *infra*.

64. See notes 47-50 and accompanying text *supra*.

65. Specifically, DR 4-101(C)(3) provides that "[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." ABA CODE, DR 4-101(C)(3) (footnotes omitted). See also *id.* EC 7-5 ("A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.").

66. ABA advisory opinions, promulgated by the Standing Committee on Ethics and Professional Responsibility to interpret and clarify the ABA Code, are persuasive but not mandatory authority. As with the Code itself, the state courts having jurisdiction over lawyer discipline are free to endorse or to refuse to endorse the advisory opinions. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1420 (1978). See also H. DRINKER, *supra* note 1, at 32.

67. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 314 (1965).

68. ABA CODE, DR 2-110(C)(1)(b). DR 2-110(C)(1)(b) provides that "[i]f [the preceding provisions for mandatory withdrawal are] not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because . . . [h]is client . . . [p]ersonally seeks to pursue an illegal course of conduct." *Id.*

69. "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." *Id.* CANON 7.

70. The ethical considerations supporting Canon 7 encourage the attorney to avoid arguments to the trier of fact of personal opinion as to the guilt or innocence of an accused, *id.* EC 7-24, to avoid out-of-court statements that may improperly affect the impartiality of the tribunal, *id.* EC 7-33, and to resolve doubts as to the bounds of the law in favor of his client when serving as an advocate, *id.* EC

except for decisions not affecting the merits of a case or substantially prejudicing the rights of a client, "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."⁷¹ Of special relevance to client perjury is the admonition that an attorney who knowingly participates in the introduction of false, fraudulent, or perjured testimony or evidence is subject to professional discipline.⁷²

The disciplinary rules of Canon 7 expressly prohibit an attorney from knowingly using perjured testimony or false evidence,⁷³ from participating in the creation or preservation of evidence known to be or obviously false,⁷⁴ or from counseling or assisting client conduct known to be fraudulent or illegal.⁷⁵ One specific rule, embodied in an amended DR 7-102(B)(1),⁷⁶ provides that an attorney with information clearly establishing client fraud on a person or tribunal shall request her client to rectify the fraud; if the client refuses, the attorney must reveal it to the affected person or tribunal. The rule does not provide as much guidance as might first appear, however, because revelation is not required when the information is privileged.⁷⁷ Further, despite its strong wording, the rule

7-3. An "advocate" is defined as an attorney dealing with past acts and an "adviser" as an attorney dealing with future acts of the client. *Id.* A lawyer acting in the latter capacity should advise the client on the basis of "what the ultimate decisions of the courts would likely be as to the applicable law." *Id.*

71. *Id.* EC 7-7. See note 124 and accompanying text *infra* (discussion of whether a criminal defendant has an absolute right to testify, irrespective of the advice of his attorney).

72. ABA CODE, EC 7-26. EC 7-26 provides:

The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

Id. (footnotes omitted).

73. *Id.* DR 7-102(A)(4). The disciplinary rule provides that "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence." *Id.*

74. *Id.* DR 7-102(A)(6). The disciplinary rule provides that "[i]n his representation of a client, a lawyer shall not . . . [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." *Id.*

75. *Id.* DR 7-102(A)(7). The disciplinary rule provides that "[i]n his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." *Id.*

76. DR 7-102(B)(1) was amended by the ABA House of Delegates, effective March 1, 1974. ABA CODE BY STATE, *supra* note 52, CANON 7, at 17. See note 77 *infra* (full text of amended DR 7-102(B)(1)). See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341 (1975) (detailed history of the evolution of DR 7-102(B)(1)).

Washington has not adopted the ABA's amendment of DR 7-102(B)(1). WASH. CODE, *supra* note 52, DR 7-102(B)(1), reproduced in note 77 *infra*.

77. The amended ABA version of DR 7-102(B)(1) provides:

A lawyer who receives information clearly establishing that . . . [h]is client has, in the course

leaves much room for attorney discretion: The fraud must be “clearly establish[ed]” and must occur in “the course of the representation.”⁷⁸ Although the amendment merely resolves past client perjury in favor of attorney silence,⁷⁹ and thus parallels the attorney-client privilege,⁸⁰ its adoption by only eight states within three years after its promulgation by the ABA⁸¹ indicates its controversial nature.

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.*

ABA CODE, DR 7-102(B)(1) (emphasis indicating 1974 amendatory language added). *See also* note 79 *infra*.

Washington’s version of DR 7-102(B)(1) is significantly different. In addition to making the attorney’s revelation to an affected person merely permissive, the Washington disciplinary rule does not contain the 1974 ABA amendment. Specifically, DR 7-102(B)(1) in Washington provides:

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

WASH. CODE, *supra* note 52, DR 7-102(B)(1). Consequently, it appears that the Washington Supreme Court would require attorney revelation of client perjury committed during trial.

78. ABA CODE, DR 7-102(B)(1), *reproduced in* note 77 *supra*.

79. Prior to the amendment to DR 7-102(B)(1), *see* notes 76-77 and accompanying text *supra*, an attorney was faced with contradictory duties under the ABA Code—both to maintain the confidentiality of “privileged communications” and to reveal them. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 341 (1975). Washington, by not adopting the amendment, *see* notes 76-77 *supra*, retains the contradiction.

ABA Opinion 341, in language that is cautious and confusing, acknowledges that “there has long been an accommodation in favor of preserving confidences either through practice or interpretation” and concludes that “[t]he tradition . . . that permits a lawyer to assure a client that information . . . given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).” The “most serious cases” are not defined by the opinion and, as with the rule itself, the ambiguous terminology leaves much room for attorney discretion.

The opinion does elaborate on the “privileged communication” language of DR 7-102(B)(1), stating that “[t]he balancing of the lawyer’s duty to preserve confidences and to reveal frauds is best made by interpreting the phrase ‘privileged communication’ in the 1974 amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101.” Opinion 341 rejects a common law definition of the “privileged communication” language of DR 7-102(B)(1) as “undesirable because the lawyer’s ethical duty would depend upon the rules of evidence in a particular jurisdiction.” *See* ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 7.7(c), at 18 (“It should be noted that DR 7-102(B), which requires a lawyer to reveal a ‘fraud’ perpetrated by his client on a tribunal, is construed as not embracing the giving of false testimony in a criminal case.”). *See also* M. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 29 (1975) (reading the above Commentary to imply that, even in those jurisdictions not adopting DR 7-102(B)(1) as amended, the provision does not apply to criminal defense attorneys); Wolfram, *supra* note 52, at 837 n.105 (“Opinion 341 is the latest in a bewildering series of opinions of the ABA ethics committee dealing with disclosure of client perjury The opinions give an array of inconsistent options and rarely cite each other or note the increasing confusion.”). *See also* note 139 *infra*.

80. *See* notes 42-45 *supra*.

81. ABA CODE BY STATE, *supra* note 52, CANON 7, at 17.

3. *The ABA Standards Relating to the Defense Function*

The ABA Defense Standards⁸² concede the uncertainty of professional standards in criminal defense work⁸³ and explicitly address the duties of a criminal lawyer whose client commits perjury.⁸⁴ In obtaining information, the attorney is advised to encourage her client to disclose fully;⁸⁵ indeed, it is unprofessional conduct under the Defense Standards for the attorney to suggest that the client be less than candid.⁸⁶ Generally, an attorney may reveal a client's intention to commit a crime,⁸⁷ but must do so if she believes that her revelation is necessary to prevent a contemplated crime that would seriously endanger life or personal safety or would corrupt court processes.⁸⁸

82. The ABA's Advisory Committee on the Prosecution and Defense Functions, chaired until mid-1969 by then United States Circuit Judge Warren E. Burger of the District of Columbia Circuit Court of Appeals, worked on the standards from 1964 to 1971. The committee's report on the defense function was circulated in tentative draft form in March 1970. The draft was approved, with amendments dated March 1971, by the ABA House of Delegates in February 1971. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION, 481-82 app. (1974). In August 1977 the Standing Committee on Association Standards for Criminal Justice was authorized to update the Defense Standards. ABA STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, REPORT OF THE STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 27 app. (February 1979) [hereinafter cited as FEBRUARY 1979 STANDING COMMITTEE REPORT] (on file with *Washington Law Review*). The Prosecution and Defense Function Standards were finally adopted, with some revisions, by the ABA House of Delegates at its February 1979 meeting. ABA DIVISION OF COMMUNICATIONS, SUMMARY OF ACTION OF HOUSE OF DELEGATES AT FEBRUARY 1979 MEETING 4 (1979) (on file with *Washington Law Review*). See note 89 and accompanying text *infra* (discussion of the special history of ABA Defense Standard § 7.7).

The ABA Defense Standards are designed to supplement and to be compatible with the ABA Code. Wolfram, *supra* note 52, at 824. They are, however, merely advisory and do not have the force either of law or of the ABA Code when adopted by statute or by court rule. Bazelon, *supra* note 21, at 17. In contrast to the ABA Code, the Defense Standards attempt to distinguish clearly between regulatory minimums and standard practice. Sutton, *supra* note 15, at 505. See also note 51 *supra*. They employ the term "unprofessional" to signify conduct that should result in disciplinary action. ABA DEFENSE STANDARDS, *supra* note 5, § 1.1(f), at 10.

83. "[A] large obstacle to making criminal defense work more attractive as a career is the ambiguity of the defense lawyer's role [and] the uncertainty surrounding the standards of professional conduct applicable to its performance" ABA DEFENSE STANDARDS, *supra* note 5, Introduction, at 143.

84. With respect to perjury by witnesses other than his accused client, "[i]t is unprofessional conduct for a lawyer knowingly to offer false evidence . . . by . . . testimony of witnesses, or fail to seek withdrawal therefrom upon discovery of its falsity." *Id.* § 7.5(a), at 16 (emphasis omitted). See also ABA CODE, DR 7-102(B)(2) (an attorney discovering fraud on a tribunal by one other than his client must promptly report the fraud to the tribunal).

85. ABA DEFENSE STANDARDS, *supra* note 5, § 3.1(a), at 157.

86. *Id.* § 3.2(b), at 158. The standard discourages the attorney from simply counseling the client to withhold evidence of guilt from him in order to avoid the attorney's duty to disclose. This practice, envisioned by Freedman, *supra* note 17, at 1472, is discussed in more detail in Part III-B-1 *infra*.

87. ABA DEFENSE STANDARDS, *supra* note 5, § 3.7(d), at 160. An exception to the rule was provided by ABA Defense Standard § 7.7. See notes 89-97 and accompanying text *infra*.

88. ABA DEFENSE STANDARDS, *supra* note 5, § 3.7(d), at 160. A client's intention to bribe or co-

Failure of Professional Conduct Rules

Defense Standard § 7.7, effective from 1971 to 1979,⁸⁹ suggested that the criminal defense attorney respond to client perjury with “passive

erce a juror or witness is illustrative of “corrupting court processes.” *Id.* Commentary to § 3.7, at 222.

89. The Standing Committee on Association Standards for Criminal Justice was commissioned in August 1977 by the ABA House of Delegates to revise all 18 volumes of the criminal justice standards. FEBRUARY 1979 STANDING COMMITTEE REPORT, *supra* note 82, at 27 app. The Committee recommended to the House of Delegates in February 1979 that the following “stylistic and minor clarifying changes,” *id.* at 25, be made to Standard § 7.7:

(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 *strongly discourage* his client against taking the witness stand to testify ~~falsely perjuriously~~.

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

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises *immediately preceding trial or during the trial* and the defendant insists upon testifying ~~falsely perjuriously~~ 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 may identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; may ask appropriate questions of the defendant when it is believed that his answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer may not engage in should seek to avoid direct examination of the defendant as a witness in the conventional manner; instead, the lawyer should ask the defendant if he wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer and may not later argue the defendant’s known false version of the facts to the jury as worthy of belief, and he may not recite or rely upon the false testimony in his closing argument.~~

Id. at 26 (emphasis added to proposed changes; original language stricken). The proposed revisions would have substantively affected § 7.7 by making permissive many of the novel aspects of the standard which previously had been mandatory. The Council of the Section of Criminal Justice proposed, instead, the following revision of ABA Defense Function Standard § 7.7:

(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 falsely and his right to testify in his own behalf is guaranteed by Constitution or statute, the lawyer must continue to advise the defendant against taking the witness stand to testify falsely.

(c) During trial if the defendant insists that he will take the stand to testify falsely against the advice of counsel and his right to testify in his own behalf is guaranteed by Constitution or statute, the lawyer shall treat his client’s testimony as any other evidence.

Id. at 25.

At the February 1979 midyear meeting, however, the House of Delegates deferred the proposed revision of § 7.7 and referred the issue of client perjury in criminal cases to the Kutak Commission, which is rewriting the ABA Code. *New Criminal Standards Drop Update on Perjury*, 65 A.B.A.J. 336, 336 (1979). See generally note 51 *supra*. “In the interim, the Association will have no policy on the client perjury issue.” *Courtroom Cameras Squelched—Perjury Guideline Deferred*, 6 CRIM. JUST. 2, 2 (1979). For indications of what policy will be, see note 143 *infra*.

refusal to lend aid.”⁹⁰ Standard § 7.7 presented a novel attempt to balance the competing interests of a client to testify falsely and of an attorney to conduct himself ethically.⁹¹

Acknowledging that the decision whether to testify rested ultimately with the accused,⁹² Standard § 7.7(b) required the attorney to withdraw from representation, if feasible, when the defendant insisted before trial that she would testify falsely.⁹³ If withdrawal was unfeasible, or if the attorney first became aware at trial of his client’s intent to commit perjury, Standard § 7.7(c) expressly prohibited the attorney’s active participation in the client’s perjury but did not require withdrawal.⁹⁴ Instead, he was restricted under § 7.7(c) to identifying his client as the defendant and allowing her to make a narrative statement to the court and the jury;⁹⁵ further, the attorney could not rely on the client’s perjured testimony either in later or in closing argument.⁹⁶ The attorney was also advised to record that the client was taking the stand against the advice of counsel.⁹⁷

90. See Part III–B–6 *infra* (discussion of the problems with the “passive refusal to lend aid” approach).

91. The Commentary to Defense Standard § 7.7 noted that this novel solution offered “the most reasonable accommodation of the competing demands of the lawyer’s absolute obligation to refrain from introducing or aiding presentation of false testimony, on the one hand, and the defendant’s absolute right on the other hand to testify in his own behalf, however ill-advised that course.” ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 7.7, at 275. The Commentary observed that “if the trial judge is informed of the situation, the defendant may be unduly prejudiced . . . and the lawyer may feel that he is caught in a dilemma between protecting himself . . . and prejudicing his client’s case” *Id.* at 277.

92. *Id.* § 5.2(a)(iii), at 163. Whether a criminal defendant has a constitutional right to take the witness stand in her own behalf is a question currently being considered by the federal courts. See note 124 and accompanying text *infra*. See, e.g., Wolfram, *supra* note 52, at 848–49 n.154.

93. ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(b), at 167, reproduced in note 89 *supra*. The knowledge required to trigger the attorney’s duties under Standard § 7.7 was that “the defendant has admitted to his lawyer facts which establish guilt and the lawyer’s independent investigation establishes that the admissions are true.” *Id.* § 7.7(a), at 167, reproduced in note 89 *supra*.

94. *Id.* § 7.7(c), at 17, reproduced in note 89 *supra*. See also note 160 *infra* (consideration of what attorney conduct might constitute subornation of perjury).

95. ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(c), at 17–18, reproduced in note 89 *supra*. Defense Standard § 7.7 anticipated that the accused would be allowed to testify in a narrative fashion. *Id.*, Commentary to § 7.7, at 276. The narrative form was criticized as unrealistic, e.g., M. FREEDMAN, *supra* note 79, at 37, and as unconventional, e.g., Wolfram, *supra* note 52, at 827 (“This ‘free narrative’ arrangement appears to have been constructed by the ABA committee entirely out of its own bolt of cloth. No judicial or regulatory authority was, or could have been, cited in support of it.”).

96. ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(c), at 17–18, reproduced in note 89 *supra*.

97. *Id.* at 17, reproduced in note 89 *supra*. The accompanying Commentary recommended that the lawyer make a record by having the defendant subscribe to a file notation, witnessed by a second attorney. *Id.*, Commentary to § 7.7, at 277. Defense Standard § 5.2(c) elaborated that the attorney should record the circumstances, his advice and reasons, and the conclusion reached in a manner that protected the confidentiality of the lawyer-client relationship. *Id.* § 5.2(c), at 163.

4. *The common law ineffective assistance of counsel doctrine*

The development of a constitutional right to counsel, based on the sixth amendment,⁹⁸ is of recent origin⁹⁹ but of fundamental importance to the rights of the accused.¹⁰⁰ The United States Supreme Court has suggested that the right to counsel includes the right to *effective* counsel.¹⁰¹ At the present time, appellate courts apply several different standards to evaluate the effectiveness of defense counsel's performance.¹⁰² Traditionally, the "farce and mockery of justice" standard was employed.¹⁰³ Under this standard, representation was deemed ineffective only when the trial was such a sham that it shocked the conscience of the court.¹⁰⁴ The majority

98. The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

99. Prior to 1938, the sixth amendment was viewed as affording only a right to retain counsel. In 1938 the United States Supreme Court found the sixth amendment to grant the right to appointed counsel in all federal criminal cases. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The past 15 years have seen a great extension in the reach of the sixth amendment right to counsel. In the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to counsel was found to be required for all state felony proceedings. The *Gideon* Court characterized the right to counsel as "fundamental," *id.* at 342, and set the stage for a series of decisions which granted the right to counsel at various stages of criminal proceedings. Nine years after *Gideon*, the right to counsel was mandated in trials for any offense, "whether classified as petty, misdemeanor, or felony," for which the penalty involved the loss of liberty. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Subsequent cases have developed a "critical stage" analysis to determine the necessity for representation by counsel in criminal proceedings. Under this analysis, the right to counsel now attaches at line-ups if the accused has been charged, *United States v. Wade*, 388 U.S. 218 (1967), at interrogations, *Escobedo v. Illinois*, 378 U.S. 478 (1964), at preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970), at arraignments, *Hamilton v. Alabama*, 368 U.S. 52 (1961), and at appeals granted as a matter of right, *Douglas v. California*, 372 U.S. 353 (1963). Neither presence nor effectiveness of counsel is mandated at "non-critical stages," however. *See, e.g., Brown v. United States*, 551 F.2d 619, 620-21 (5th Cir. 1977) (custody does not trigger right to counsel; claim of ineffective assistance without merit).

100. The centrality of the right to counsel has been articulated by Justice Schaefer of the Illinois Supreme Court: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

101. The ineffective assistance doctrine began with the *Scottsboro Boys'* case. *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell*, the Court held that assignment of counsel at a time and under circumstances precluding effective aid violated the sixth amendment, applicable to the states through the due process clause of the fourteenth amendment. *Id.* at 68-71. If the purpose of the right to counsel is to ensure the adversary nature of the legal system, such a right must comprehend the effectiveness of counsel. Bazelon, *supra* note 21, at 1-2. This position has been recently recognized by the United States Supreme Court. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (dictum) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . .").

102. A variety of standards for judging the ineffectiveness of criminal defense counsel exists in part because of the uneven historical development of the constitutional right to counsel. *See* notes 99 & 101 *supra*. *See also* note 106 *infra*.

103. The farce and mockery standard was first enunciated by the Court of Appeals for the District of Columbia. *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

104. *Id.* at 670.

of courts have abandoned the farce and mockery standard,¹⁰⁵ adopting instead a broad range of more stringent requirements for criminal defense attorneys.¹⁰⁶ While the ineffective assistance doctrine has expanded the rights of criminal defendants, it has added another dimension to the ethical problem of the criminal defense attorney confronted with client perjury.¹⁰⁷

B. Defense Counsel's Dilemma Under the Traditional Rules

Each of the professional rules discussed above governs, to some extent, the conduct of a criminal defense attorney. To indicate clearly his dilemma when faced with a client who presents or intends to present perjured testimony, the alternative courses of conduct that he might follow will be examined.¹⁰⁸

1. Selective ignorance

One alternative for a criminal defense attorney is to suggest at the first interview that he does not want to know if his client is guilty.¹⁰⁹ By such "selective ignorance"¹¹⁰ the attorney avoids being confronted with the potential duty to report later perjury, since he has no conflicting informa-

105. Oakes, *Lawyer and Judge: The Ethical Duty of Competency*, in ANNUAL WARREN CONFERENCE, *supra* note 17, at 57, 64.

106. For instance, the Court of Appeals for the District of Columbia, which originated the farce and mockery standard, *see* note 103 *supra*, adopted a standard of effectiveness that requires "reasonably competent assistance of an attorney acting as [the defendant's] diligent and conscientious advocate." *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The Court of Appeals for the Third Circuit defines effectiveness as "the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) (footnote omitted). The Court of Appeals for the Fourth Circuit has announced more specific standards for effectiveness of defense counsel, similar to those of the ABA Defense Standards. *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

107. *See, e.g.*, note 122 *infra* (discussion of a case in which attorney's efforts to deal ethically with client perjury resulted in an infringement on her client's right to counsel).

108. As one court has noted, the ethical responsibilities of a criminal defense attorney confronted with client perjury "raise serious questions . . . which have not received an abundance of judicial scrutiny." *United States ex rel. Smith v. Fogel*, 403 F. Supp. 104, 106 (N.D. Ill. 1975). In addition, the attorney-client privilege shrouds the attorney's resolution of his ethical dilemmas in secrecy. *See* note 172 and accompanying text *infra*. Consequently, the analysis undertaken here of those alternatives pursued outside the courtroom is based on a synthesis of the rules of professional conduct and the opinions of various commentators.

109. *E.g.*, Freedman, *supra* note 17, at 1472. The alternative of counseling the client to lie, either to the attorney himself or at trial, is so clearly beyond the realm of permissible conduct that it will not be considered here. *See, e.g.*, *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959). *See also* ABA CODE, DR 7-102(A)(7), reproduced in note 75 *supra*.

110. Freedman, *supra* note 17, at 1472.

tion from which to infer its existence. This course of conduct, however, presents serious problems since one role of defense counsel is that of zealous representative.¹¹¹ It is difficult to conceive of a zealous representative who fails to anticipate weaknesses in the client's case due to a lack of full disclosure.¹¹² Such selective ignorance might also constitute ineffective assistance of counsel¹¹³ and has been condemned as unethical by the ABA Defense Standards.¹¹⁴

2. *Avoiding knowledge*

To be presented with the dilemma of a client's perjury, the defense attorney must first "know" that the client's testimony is or will be perjured.¹¹⁵ The ABA Code defines this required knowledge in both subjective and objective terms.¹¹⁶ ABA Defense Standard § 7.7(b) also contained a "double knowledge"¹¹⁷ requirement: The attorney must have learned facts from her client which established guilt *and* must have had evidence from "independent investigation" to establish the truth of the client's admissions before a duty to advise against taking the stand arose.¹¹⁸ An attorney may respond to such rules by asserting that she never "knows for sure" that her client is guilty¹¹⁹ and, therefore, never

111. *E.g.*, ABA CODE, CANON 4, reproduced in note 56 *supra*. See notes 28–33 and accompanying text *supra* (general discussion of this duty).

112. An attorney who remains selectively ignorant may be confronted at trial with substantial weaknesses in his client's case that he could have countered had he been sufficiently well-prepared to have anticipated them. Freedman, *supra* note 17, at 1472.

113. "It would seem required by minimal standards of attorney competence to conduct such investigation as is necessary to determine the extent to which cross-examination or impeachment of a client's intended testimony would effectively rebut the testimony." Wolfram, *supra* note 52, at 843 n.126.

114. ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 3.2(b), at 205. See note 86 *supra*.

115. To trigger the prohibitions against perjury under the ABA Code, "knowledge" is consistently required of the attorney. See note 116 *infra*. "[A]n attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured." United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (counsel's reporting of her opinion to court unwarranted).

116. "[K]nowingly" participating in the introduction of perjured testimony is prohibited. ABA CODE, DR 7–102(A)(4), reproduced in note 73 *supra*. The introduction of testimony that the attorney "should know" is perjurious is also prohibited. *Id.* EC 7–26, reproduced in note 72 *supra*. See Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEX. L. REV. 367, 370 (1970). See also ABA CODE, DR 7–102(A)(6), reproduced in note 74 *supra*.

117. Wolfram, *supra* note 52, at 825 n.56.

118. ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(a), at 167, reproduced in note 89 *supra*. The Commentary to Defense Standard § 7.7 restated the double knowledge requirement contained in the standard itself, but did not indicate the rationale for the requirement. *Id.*, Commentary to § 7.7, at 276.

119. Freedman, *supra* note 17, at 1472.

knows that her client is presenting perjured testimony.

3. Remonstrations

If the attorney does not follow the selective ignorance approach to client perjury and comes to "know" that his client intends to commit perjury, the commentators¹²⁰ and various professional rules¹²¹ are generally agreed that he should attempt to dissuade his client from presenting the perjured testimony.¹²²

In the criminal defense area, however, competing considerations render an attempt to dissuade a client from perjury problematic. A criminal defendant's right to take the stand can be exercised against the advice of counsel¹²³ and may be absolute.¹²⁴ A successful attempt to dissuade the

120. *E.g.*, *id.* at 1478; Wolfram, *supra* note 52, at 846.

121. ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(a), at 167, reproduced in note 89 *supra*. See ABA CODE, DR 7-102(A)(7), reproduced in note 75 *supra*.

122. For example, the attorney should inform the client of the tactical disadvantages of perjury, including the possibilities that the perjury will be exposed on cross-examination, Freedman, *supra* note 17, at 1478, or by the passive refusal to lend aid that the attorney plans to employ to deal with the perjury, Wolfram, *supra* note 52, at 850 n.159; that perjury is against the law, *id.* at 846; and that the attorney may be forced to cease representation or to report the intended perjury to the court, *id.* at 847.

An attorney can go too far, however, in her attempt to dissuade the defendant from presenting perjured testimony. In *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977), subsequent to a trial court ruling on the issue, court-appointed counsel informed her client that the court would permit her to withdraw, and that he would be forced to represent himself during the remainder of the trial, if he insisted on taking the stand to testify in what she considered to be a perjurious manner. The defendant consequently decided not to testify and the defense rested without presentation of any evidence. *Id.* at 117. The appellate court found the trial court's ruling " . . . put [the defendant] to a Hobson's choice": decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel." It therefore concluded that the ruling was "an impermissible infringement upon the [defendant's statutory] right to testify and his Sixth Amendment right to counsel." *Id.* at 120.

123. *E.g.*, ABA DEFENSE STANDARDS, *supra* note 5, § 5.2(a)(iii), at 162-63. See *Thornton v. United States*, 357 A.2d 429, 433 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (defendant allowed to testify against advice of retained counsel).

124. Whether the right of a criminal defendant to testify in his own behalf has reached constitutional dimensions is a question currently being considered by the federal courts. *E.g.*, *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 118-19 (3d Cir. 1977) (review of cases considering "constitutional" right of criminal defendant to testify and discerning an "enlightened trend" in its favor). See C. McCORMICK, *supra* note 61, § 42, at 84 n.48 ("Surely, today the right of an accused to testify in his own behalf must be of constitutional dimension."). Several state supreme courts have construed their state constitutions to grant the criminal defendant a constitutional right to testify. *United States ex rel. Wilcox v. Johnson*, 555 F.2d at 119 (cases collected). See ABA DEFENSE STANDARDS, *supra* note 5, § 5.2(a)(iii), at 162-63 ("The decisions which are to be made by the accused after full consultation with counsel [include] . . . whether to testify in his own behalf."). See note 89 *supra* (Section of Criminal Justice proposed revision to ABA Defense Standards § 7.7(b)-(c), acknowledging possibility of constitutional or statutory right of criminal defendant to testify). See

client from taking the stand therefore may be a form of “[p]rejudice or damage” to the client prohibited by the ABA Code.¹²⁵ On the practical level, an attempt to dissuade the client from presenting perjured testimony, in compliance with the ethical rules, may result in the client’s seeking another attorney¹²⁶ with whom she may be less candid.¹²⁷

4. *Withdrawal*

The criminal defense attorney can be confronted with ethical mandates to withdraw either prior to or at trial. If the attorney becomes reasonably certain prior to trial that her client will present perjured testimony, and has been unable to dissuade the client from taking the stand, the attorney

generally Hammerman, *A Criminal Defendant's Constitutional Right to Testify—The Implications of United States ex rel. Wilcox v. Johnson*, 23 VILL. L. REV. 678 (1978). See also ABA DEFENSE STANDARDS, *supra*, Commentary to § 7.7, at 275, 276.

If the defendant has a constitutional right to testify, then he must logically have a practical ability to lie. *But see Revised Code ‘Enforceable,’ supra* note 51, at 1283 (comments of Richard Sinkfield, member of Kutak Commission). One commentator has suggested a compromise alternative to this dilemma which would allow the defendant to testify and permit the attorney to tell the fact-finder that the client’s testimony is, to the best of his knowledge, “not . . . factually accurate.” Wolfram, *supra* note 52, at 870. This “compromise” position, however, is too compromising: If, indeed, there is a constitutional right to testify, this alternative would render that right less meaningful and would also recreate the problems inherent in the disclosure alternative. See Part III–B–5 *infra*.

Historically, the common law disqualified interested persons, including the criminal defendant, from testifying. By the end of the nineteenth century, this rule of incompetence had been abolished by legislation in every state but Georgia. *Ferguson v. Georgia*, 365 U.S. 570, 570 (1961); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 118 & n.7 (3d Cir. 1977). See C. McCORMICK, *supra*, § 65, at 142 (“The disability had the specious justification of preventing self-interested perjury . . .”). In response to the dilemma of client perjury, it has been suggested that criminal defendants be allowed to make statements to the fact-finder—similar to the common law procedure of allocution—and that these statements—unlike allocution—be presented as evidence in the trial. Frankel, *supra* note 25, at 1053–54; Wolfram, *supra*, at 851 n.162. In fact, courts may instruct the jury to give testimony by an interested party only such weight as they find it deserves, C. McCORMICK, *supra*, § 65, at 144, and juries may discount the credibility of testimony by a criminal defendant, Wolfram, *supra*, at 852.

125. ABA CODE, DR 7–101(A)(3).

Two different prejudicial or damaging aspects are created by the dissuasion alternative. First, some evidence indicates that the failure of a criminal defendant to testify at trial increases the likelihood of conviction. Freedman, *supra* note 17, at 1475. Consequently, an attorney’s successful effort to dissuade his client from testifying may result in a guilty verdict that would not otherwise have been rendered. Second, the client may have confided her guilt to the attorney in response to his assurances that her statements would remain confidential between them; his attempts to dissuade in response to her confidences may leave the client believing that she has been harmed by the relationship. See note 143 *infra* (a possible response to this issue by the new ABA Code).

126. See also note 129 and accompanying text *infra*.

127. Freedman, *supra* note 17, at 1476. Obviously, such an outcome would result in presentation of the same perjured testimony. *Id.*

may have a duty to withdraw from representation.¹²⁸ Again, as in the case of "successful" remonstrance that results in the client seeking another attorney, the client may simply disclose less to the successor attorney and present the same perjured testimony.¹²⁹ Further, the successor attorney may be alerted to the ethical problem in this situation by the first attorney's withdrawal.¹³⁰

A request to withdraw made at trial in response to surprise perjurious testimony can constitute a clear announcement of client perjury,¹³¹ resulting in a transfer of the ethical problem to the judge.¹³² In addition, the

128. *People v. Blye*, 223 Cal. App. 2d 143, 43 Cal. Rptr. 231, 235 (1965) (defense attorney should request to withdraw when client plans to commit perjury); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1318 (1975) (unsuccessful attempt to dissuade client triggers withdrawal requirement when criminal defendant intends to commit perjury). See Wolfram, *supra* note 52, at 855. An attorney who is representing an indigent defendant, however, may risk more serious prejudice to his client by withdrawal. Freedman, *supra* note 17, at 1476. See ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 7.7, at 275-76 (private criminal lawyers can exercise more control over the conduct of a case, and over client perjury, because of greater leverage than court-appointed or public defender counsel). See also ABA CODE, EC 2-29 (attorney's belief in guilt of accused is insufficient reason to request withdrawal); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 90 (1932) (withdrawal from a case after becoming convinced of the client's guilt is unethical unless the client was forewarned of the possibility). Also, when it is so close to the date of trial that withdrawal by the attorney would present a serious hardship to the defense of the client, the attorney may be precluded from withdrawal. Wolfram, *supra*, at 860.

129. In *State v. Phelps*, 24 Or. App. 329, 545 P.2d 901 (1976), for example, the first attorney withdrew from the case after receiving assurances from the client that the perjured testimony would not be presented at trial. The client retained another attorney and the perjured testimony was presented to defend the case successfully. *Id.* at 902. See *Henderson v. State*, 205 Kan. 231, 468 P.2d 136, 142 (1970); Freedman, *supra* note 17, at 1476; Lefstein, *supra* note 41, at 689-90. Some commentators have also suggested that the client will shop for another attorney who would not refuse to assist in the presentation of the perjured testimony. *E.g.*, Wolfram, *supra* note 52, at 856.

130. Wolfram, *supra* note 52, at 856 n.181.

131. The case best illustrating this communicative effect of a request to withdraw is *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). In *Lowery*, the attorney moved to withdraw immediately following his client's denial of shooting the deceased. Subsequent to the court's denial of counsel's motion to withdraw, the attorney stated that he had no further questions for his client. In his brief closing argument, counsel did not refer to his client's denial. *Id.* at 729. The Ninth Circuit Court of Appeals found the attorney's motion to withdraw, timed as it was and made to the judge in a bench trial, to be an "unequivocal announcement," *id.* at 730, of the defendant's guilt to the fact-finder which served to deprive the defendant of a fair trial, *id.* at 729-31.

132. *Thornton v. United States*, 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976), illustrates the confusion engendered in one trial judge by counsel's request to withdraw. When confronted with the Government's evidence against him immediately prior to trial for murder, the defendant changed his statement to one inconsistent with his original statement. At trial, retained defense counsel requested a bench conference and moved to withdraw "for moral ethical reasons." *Id.* at 432. At the court's request for greater specificity, counsel explained his ethical dilemma and then suggested that the court also certify the case to another judge. The court transferred the case to a second judge to avoid the possibility that the attorney's disclosure would influence its sentencing decision, but without ruling on the attorney's request to withdraw. The first judge had instructed the

attorney may not be permitted to withdraw during trial,¹³³ or may be required to support her request to withdraw with a statement of reasons.¹³⁴ Further, such conduct on the part of the attorney may result in reversal on grounds of deprivation of due process¹³⁵ or ineffective assistance of counsel.¹³⁶

5. Disclosure

The disclosure of the client's intent to commit perjury is perhaps the most controversial alternative,¹³⁷ because attorney revelation of perjury is usually also revelation of the client's admission that she is guilty of the

second judge not to inquire into counsel's reasons for requesting withdrawal so that, when counsel renewed his motion to withdraw, the second judge denied it for lack of valid reasons. The trial proceeded with no diminution of counsel's ethical dilemma. *Id.* See Freedman, *supra* note 17, at 1477.

Even when the trial judge is not the fact-finder, her sentencing decision may be influenced by the possibility of client perjury signaled by the motion to withdraw. ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 7.7, at 277. See Thornton v. United States, 357 A.2d at 432.

133. Lowery v. Cardwell, 575 F.2d 727, 729 (9th Cir. 1978) (court-appointed defense counsel's request to withdraw, made immediately following defendant's denial of shooting and with refusal to state reasons, was denied); Thornton v. United States, 357 A.2d 429, 432 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (retained counsel's first request to withdraw, accompanied by statement of reasons for request, resulted in transfer to another judge; counsel's second request to withdraw, made without statement of reasons, was denied). See State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976) (numerous motions by defendant and by defense counsel to allow withdrawal were denied; intended perjury by defense witness); ABA DEFENSE STANDARDS, *supra* note 5, Commentary to § 7.7, at 275 (attorney's request to withdraw may be refused because trial has begun or because the court declines to allow it).

134. The court may require a statement of reasons in order to render an "informed decision" on the attorney's motion to withdraw. Lowery v. Cardwell, 575 F.2d 727, 729 (9th Cir. 1978); Thornton v. United States, 357 A.2d 429, 434-35 & n.9 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (trial court's failure to inquire into reasons for motion to withdraw was error, but did not require reversal since counsel's assistance was effective). See ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(b) (proposed revision), reproduced in note 89 *supra* (suggesting change in standard to prohibit counsel from supporting request to withdraw with statement of reasons).

135. *E.g.*, Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978) (motion to withdraw served as announcement of client perjury; conviction reversed on due process grounds). See Freedman, *supra* note 17, at 1476-77.

136. See Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstedler, J., specially concurring) (ineffective assistance of counsel preferable to due process as basis for decision); Freedman, *supra* note 17, at 1477 (anticipating the Lowery decision). *But see* Thornton v. United States, 357 A.2d 429, 433-34 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (request to withdraw, made at trial, not ineffective assistance; credibility of defendant's alibi testimony, however, "was shattered by the later introduction of [his] prior inconsistent statements.").

137. *E.g.*, Revised Code 'Enforceable,' *supra* note 51, at 1283; Sutton, *supra* note 15, at 500 n.9. See United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) ("Whether an attorney representing a defendant in a criminal case must, or indeed may, disclose his client's intentions to perjure himself is an extremely complex question . . .") (footnotes omitted) (emphasis added).

crime for which she is being tried.¹³⁸ While attorneys may currently forego the disclosure alternative¹³⁹ because of its attendant problems¹⁴⁰ and because the professional rules have made it permissive rather than mandatory,¹⁴¹ the new ABA Code¹⁴² might require disclosure of the criminal defendant's intention to commit perjury.¹⁴³

138. Intended client perjury in criminal cases is the cutting edge of the future versus past crime distinction under the attorney-client privilege, *see* Part III-A-1 *supra*, since its disclosure reveals both the defendant's intent to commit a crime (the intended perjury) and the defendant's past commission of a crime (the original crime for which the defendant is being tried). *See* *People v. Blye*, 223 Cal. App. 2d 143, 43 Cal. Rptr. 231, 236 (1965) (client's absence from recorded meeting at which his counsel disclosed client confidences, his belief in the client's guilt, and the client's intent to commit perjury was deprivation of fair trial). *But cf.* *Henderson v. State*, 205 Kan. 231, 468 P.2d 136, 139, 141 (1970) (since details of attorney-client communications were not revealed, attorney's disclosure of defendant's intention to commit perjury was not disclosure of confidential communications). Since the disclosure alternative involves an all-or-nothing choice for the attorney—disclosing both the future and past client crimes or disclosing neither—it is at this point that the theoretical distinction between past and future crimes breaks down.

139. The professional rules have offered justification for the attorney who elects to forego the disclosure alternative. As discussed above, the ABA Code makes revelation of future crimes of a client permissive, ABA CODE, DR 4-101(C)(3), *reproduced in* note 65 *supra*, and ABA Defense Standard § 7.7 was an attempt to prohibit the express revelation of a criminal defendant's perjury, ABA DEFENSE STANDARDS, *supra* note 5, § 7.7(c), at 17-18, *reproduced in* note 89 *supra*. Disciplinary Rule 7-102(B)(1), *reproduced in* note 77 *supra*, as interpreted by ABA Opinion 341, *see* note 79 *supra*, is so confusing on the issue of revelation of past client perjury that it is "extremely unlikely that the disclosure requirement would ever be activated." Wolfram, *supra* note 52, at 837.

Conjuring up real-life hypothetical situations in which the committee that drafted Formal Opinion 341 would apply the disclosure requirement of DR 7-102(B)(1) has become something of a law school parlor game. Given the very broad reach of the "secret" confidentiality requirement as stated in DR 4-101(A), the starting point is that the attorney must learn the information from a source other than the client and at a time before his representation of the client begins or after it ends. In the final analysis the practical effect of Opinion 341 is nearly to emasculate the affirmative disclosure duty stated in DR 7-102(B)(1).

Id. at 837 n.106.

140. *See* note 138 *supra*.

141. *See* note 139 *supra*. *But see* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1314 (1975) (attorney must withdraw or report perjury to court if unsuccessful in dissuading client from committing perjury).

142. *See* note 51 *supra*.

143. *Revised Code 'Enforceable,' supra* note 51, at 1283. While the Kutak Commission is not releasing details of its proposed new code until circulation of a working draft in February 1980, one "unofficial" report by Professor Monroe Freedman has indicated that it will require criminal defense attorneys to give their clients *Miranda*-like warnings that their confidential communications could be revealed in the event of client perjury. *Id.* *See also* Lefstein, *supra* note 41, at 688. A rule to this effect would fall into the truth-oriented model discussed in notes 24-27 and accompanying text *supra*. Professor Freedman properly argues against such a requirement because it would simply result in the "intentional ignorance" alternative discussed earlier. *Revised Code 'Enforceable,' supra*, at 1283. *See* Part III-B-1 *supra*. Then, if the client presents the perjured testimony before the attorney becomes aware that it is perjured, he need not disclose because it has become a past crime and is therefore privileged. *See* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1314 (1975).

6. *Passive refusal to lend aid*

Although passive refusal to lend aid¹⁴⁴ to the client's perjury may avoid the ABA Code's prohibitions against "participation in"¹⁴⁵ or "use"¹⁴⁶ of perjured testimony and has been assumed by many lawyers to be within the rules for professional conduct,¹⁴⁷ the practice has been widely criticized¹⁴⁸ and is no longer officially sanctioned by the ABA.¹⁴⁹ Advocates of the truth-oriented view have argued that an attorney conforming to Defense Standard § 7.7 must act in "almost every respect as if the witness were telling the truth,"¹⁵⁰ and that such conduct misleads the fact-finder.¹⁵¹ On the other hand, advocates of the adversary-oriented view have argued that conforming to the standard by neither engaging in traditional direct examination nor relying on the defendant's testimony in later argument is as damaging as failing to argue the case to the jury¹⁵² and that, in fact, such conduct serves as a clear announcement of client perjury to the fact-finder.¹⁵³ In addition, passive refusal to lend aid to client

144. See Part III-A-3 *supra*.

145. ABA CODE, DR 7-102(A)(4), reproduced in note 73 *supra*; *id.* EC 7-26, reproduced in note 72 *supra*.

146. *Id.* DR 7-102(A)(4), reproduced in note 73 *supra*.

147. Wolfram, *supra* note 52, at 817-18. See *Thornton v. United States*, 357 A.2d 429, 437 n.14 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (praising the ABA Standards in general and ABA Defense Standard § 7.7 in particular).

148. *E.g.*, Freedman, *supra* note 17, at 1477; Wolfram, *supra* note 52, at 853.

149. See note 89 and accompanying text *supra*. The ABA Standing Committee on Association Standards for Criminal Justice cited *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978), and *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976), as the cases prompting the proposed revisions to Defense Standard § 7.7. FEBRUARY 1979 STANDING COMMITTEE REPORT, *supra* note 82, at 25. See note 89 *supra* (history and texts of the original version of Defense Standard § 7.7 and proposed revisions).

150. Wolfram, *supra* note 52, at 853.

151. *Id.* (arguing for rule requiring disclosure of client perjury to the fact-finder). See also *id.* at 852 (conceding that the free narrative solution may be relatively harmless since defense testimony perceived as incredible is frequently discounted by juries).

152. Freedman, *supra* note 17, at 1477.

153. See *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978), discussed in note 131 *supra*; *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174, 180 (1976) (counsel's passive refusal to lend aid to perjury by defense witness found to be denial of fair trial and warranted new trial); Freedman, *supra* note 17, at 1477. See also *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959) (attorney's failure to argue provocation defense based on defendant's signed statement was as improper as telling the jury that his client had lied; reversal on due process grounds). But see *Thornton v. United States*, 357 A.2d 429, 438 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (defense counsel's compliance with ABA Defense Standard § 7.7 not ineffective assistance when defendant's alibi was transparent and Government's case was strong). For a related discussion of the effect of a motion to withdraw on the trial court's inferences of client perjury, see notes 131-32 *supra*.

Juries are certain that the attorney knows whether or not his client is guilty and are alert to any conduct by him that is inconsistent with a belief in the client's innocence. Freedman, *supra*, at 1471-72. Both the recommendations that the attorney present his client's testimony in free narrative form and that he avoid reference to the client's denial of guilt in his closing argument would seem to

perjury might constitute abandonment of a diligent defense¹⁵⁴ and ineffective assistance of counsel.¹⁵⁵

7. Active aid

Several commentators, advocating an adversary-oriented view, contend that the only appropriate course of conduct for criminal defense counsel confronted with a perjurious client is to present the client's testimony without explicit *or* implicit disclosure of his knowledge to either the judge or the jury.¹⁵⁶ The logic of this position is supported by the confidentiality of the attorney-client relationship¹⁵⁷ and by the special constraints of the constitutional right to a fair trial and the doctrine of ineffective assistance of counsel.¹⁵⁸ One major difficulty with the active aid alternative, in addition to any moral objections that the individual at-

be clear signals to the fact-finder, whether judge or jury, of client perjury. The trial court may initially be more alert to the meaning of the attorney's conduct but, if the practice became widespread, juries would also become alert to its meaning. See Wolfram, *supra* note 52, at 849-50. See also Lefstein, *supra* note 41, at 684 & n.83.

154. See Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstедler, J., specially concurring); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174, 180 (1976) (passive refusal to lend aid to perjury of defense witness was denial of fair trial).

In one murder case, court-appointed defense counsel disbelieved the defendant's signed statement describing the events surrounding the killing. *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959). When the statement, which raised a provocation defense, was introduced by the prosecution at trial, defense counsel's ethically prompted failure to argue that defense rendered the representation incompetent. Such conduct was "as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement." *Id.* at 953. The *Johns* decision, which reversed the defendant's conviction on due process grounds, *id.* at 954, did not present the issue of client perjury at trial, since the defendant did not testify, *id.* at 952. Consequently, *Johns* falls into the class of less controversial cases dealing with past, rather than future or continuing, crimes. See notes 61-62 and accompanying text *supra*. See also note 138 *supra*.

155. See Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstедler, J., specially concurring). See also Wolfram, *supra* note 52, at 849 n.155. In *United States ex rel. Smith v. Fogel*, 403 F. Supp. 104 (N.D. Ill. 1975), defendant's allegation of trial counsel's incompetence, based in part on a dispute between counsel and client on the substance of defendant's testimony, resulted in remanding the case for a full evidentiary hearing. See also note 154 *supra*. But see *Thornton v. United States*, 357 A.2d 429, 438 (D.C.), *cert. denied*, 429 U.S. 1024 (1976) (retained counsel's compliance with ABA Defense Standard § 7.7 did not constitute ineffective assistance, given strong prosecution evidence and defendant's transparent alibi).

156. *E.g.*, Freedman, *supra* note 17, at 1477-78. Professor Freedman has supported his choice of this active aid alternative in part by reference to survey data: Ninety percent of one Washington, D.C. sample of attorneys, who responded anonymously, reported they would elect this alternative. M. FREEDMAN, *supra* note 79, at 38 (citing Friedman, *Professional Responsibility in D.C.: A Survey*, 1972 RES IPSA LOQUITUR 60, 81). See also Noonan, *supra* note 25, at 1486 ("Professor Freedman's solutions seem plausible, if not mandatory; he has merely expressed as a norm what is, in fact, current practice for some practitioners.").

157. Freedman, *supra* note 17, at 1478.

158. See M. FREEDMAN, *supra* note 79, at 34.

torney may well have to the practice,¹⁵⁹ is that it may constitute subornation of perjury.¹⁶⁰

IV. THE ALTERNATIVE OF SYSTEM-ORIENTED RULES FOR PROFESSIONAL CONDUCT

The preceding overview of the various professional rules of ethical conduct¹⁶¹ as applied to a criminal defense attorney confronted with client perjury¹⁶² indicates the problems inherent in a situation-oriented model of professional responsibility.¹⁶³ The rules, based on two often competing views of the lawyer's role,¹⁶⁴ are at times contradictory,¹⁶⁵ ambiguous,¹⁶⁶ and do not anticipate all factual situations with which an attorney may be confronted.¹⁶⁷ The difficulties with the various situation-oriented rules are magnified greatly in the case of the criminal defense attorney¹⁶⁸—perhaps because of the unique capacity that he serves in the adversary system¹⁶⁹—but are representative of other contexts and capacities as well.

159. This comment is concerned only with professional standards for ethical conduct; individual, personal ethics, while undoubtedly exerting a major influence on attorney conduct, are not subject to systematic analysis and are outside its scope. *But see* Johns v. Smyth, 176 F. Supp. 949, 953 (E.D. Va. 1959) (professional conduct based on personal conscience can result in incompetent defense), discussed in note 154 *supra*.

160. Some commentators have argued that active aid is not subornation of perjury, *e.g.*, Freedman, *supra* note 17, at 1478, while others are less certain, *e.g.*, Wolfram, *supra* note 52, at 816–17 n.23. Whether the active aid alternative constitutes subornation may be a trivial question, since the risks that an attorney will be criminally prosecuted are “not great.” *Id.* at 816. *See also* Bronston v. United States, 409 U.S. 352, 358–60 (1973) (federal perjury statute should not be loosely construed, since such construction would discourage witnesses from appearing and since the burden is on the questioner to expose perjury through cross-examination). Obviously, the risks of subornation for the attorney will vary with the statutory definitions and decisional law within his jurisdiction.

161. *See* Part III–A *supra*.

162. *See* Part III–B *supra*.

163. For a general discussion of the situation-oriented model of professional responsibility and its inherent problems, see notes 7–13 and accompanying text *supra*.

164. *See* notes 23–33 and accompanying text *supra* (brief discussion of the two competing views).

165. Aronson, *supra* note 7, at 274.

166. *Id.*; Wolfram, *supra* note 52, at 870.

167. Wolfram, *supra* note 52, at 870. “The problem is that the infinitude of facts tends to limit the usefulness of precedent, and inevitably sound legal reasoning requires a return to principles and the justifications for them, which is the point we are approaching with legal ethics.” Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C. L. REV. 519, 527 (1979). As one commentator has observed, “[i]n what is probably a confession of seriously divided opinion, rather than a refusal to recognize the existence of the problem, the formal regulations of the legal profession speak in barely detectable whispers about perjury and are entirely silent about many common problems.” Wolfram, *supra*, at 811.

168. *E.g.*, *Fruits of the Attorney-Client Privilege*, *supra* note 40, at 240.

169. The unique capacity served by the criminal defense attorney involves a more delicate balancing of the “officer of the court” and “zealous representative of the client” views than does any

One of the consequences of the ambiguous rules that purport to guide attorneys' conduct is that much of the responsibility for determining appropriate professional behavior is placed on the attorney herself.¹⁷⁰ In the particular situation analyzed above, for instance, the attorney alone is afforded the privilege of confidential communications with the client and has the best opportunity to know of client perjury.¹⁷¹ The protected nature of the relationship, however, also serves to keep the ethical propriety or impropriety of the attorney's conduct invisible¹⁷² and it is therefore difficult to know how individual attorneys are resolving the issue of client perjury.¹⁷³ That professional rulemakers frequently leave enormous discretion to the individual attorney is antithetical to rulemaking itself.¹⁷⁴ If the purpose of professional rules of conduct is to control that conduct, the first task must be to formulate a set of clear, consistent, and comprehensive rules.¹⁷⁵

Several commentators have previously recognized that appropriate sys-

other attorney capacity. For example, the prosecutor's obligations to the truth and to the court appear much more clearly to fall within the "truth-oriented" view. See note 24 and text accompanying notes 24-27 *supra*. The special protections afforded to the criminal defense attorney's client contribute to the uniqueness of his capacity. See notes 31 & 40 *supra*. No other attorney in the legal system, for example, is subject to scrutiny for ineffective assistance of counsel. Whatever the cause, the professional debate about the appropriate conduct of a lawyer whose client is committing perjury becomes particularly heated when that client is a criminal defendant.

170. "Just as the decisionmaker might seek to escape responsibility by applying formal rules, the rulemaker might seek to escape responsibility by promulgating nonformal standards that place discretion and responsibility on the shoulders of the decisionmaker." Powers, *supra* note 8, at 29-30 n. 14. See also Aronson, *supra* note 7, at 320.

171. See, e.g., Freedman, *supra* note 17, at 1476.

172. For example, it would be difficult for someone outside the attorney-client relationship to detect an attorney who is selectively ignorant of, or who refuses to "know" about, or who actively aids in, client perjury. See generally Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 98; Comment, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039, 1042 (1952). See also note 156 *supra*.

173. But see note 156 *supra* (one source of data on how attorneys are resolving this issue).

174. One commentator, for example, has observed that:

[t]he paradox is that to give the lawyer discretion to be ethical through the medium of ethics is also to give him the discretion to be unethical. Thus, unless we correlate rules of ethical and legal conduct for the lawyer, the result will often be less than either . . .

. . . [T]he price of a separate body of ethical rules is both opportunity for the cynical and confusion for the conscientious lawyer. To command with one rule what is merely commended by another frequently gives a choice, whether intended or not, and the effect is to detract from the efficacy of the legal rule. The advantage goes to the unethical lawyer, since the ambiguity created thereby gives an opportunity to apply the ethical or legal rule as expedience dictates.

Patterson, *supra* note 167, at 522-23 (footnotes omitted) (discussing ABA Code, DR 4-101(C) in conjunction with ABA Committee on Professional Ethics, Opinions, No. 341 (1975)).

175. See generally Aronson, *supra* note 7, at 319.

tem-oriented rules of conduct for attorneys in one capacity might differ from those for attorneys in other capacities.¹⁷⁶ In the context of the special protections surrounding an accused in a criminal case,¹⁷⁷ for example, the current situation-oriented ethical rules for her attorney—some of which favor adherence to the “lawyer as an officer of the court” role—frequently conflict with other legal protections afforded to the client. A system-oriented model would provide a coherent guiding principle that could be applied to all conduct of an attorney acting in a given capacity. Adoption of an adversary-oriented set of ethical rules for criminal defense attorneys, for example, would avoid the conflict by recognizing that representation of a criminal defendant justifies certain attorney conduct as “ethical” that would not be so in other situations. If an adversary-oriented alternative was adopted, the profession could “stop treating criminal defense attorneys as somewhat soiled and instead develop rules which not only permit but demand that all conduct be consistent with a belief in the innocence of an accused.”¹⁷⁸ Alternatively, application of a truth-oriented view to the role of criminal defense attorneys would require constriction of the attorney-client privilege¹⁷⁹ and of the available courses of conduct justifiable in the name of zealous representation.

While both adversary- and truth-oriented views provide valid bases for formulating a system-oriented set of ethical rules, their coexistence in a situation-oriented model has been anything but peaceful. The attempt to balance the two competing views within the current situation-oriented model has led to professional conduct rules that fail to guide attorneys in all but the simplest cases. A system-oriented model—by selecting at the outset one view to be systematically applied to all attorneys acting in a certain capacity—would present the attorney with a guiding principle against which he could measure his professional conduct and against which the profession could reasonably hold him accountable. Until such a model is adopted, neither is possible.

176. *E.g., id.*; *Fruits of the Attorney-Client Privilege*, *supra* note 40, at 243 (suggesting separate rules for criminal attorneys are essential). *See* Sutton, *supra* note 15, at 513 (“The second method likely to be considered [in selecting a format for the new ABA Code] is one that subdivides the professional code according to the various roles a lawyer performs . . .”).

177. *See, e.g.*, text accompanying notes 30–31 *supra*.

178. Aronson, *supra* note 7, at 319. Under this model, “[a]n attorney who reveals confidences because of a perceived duty to the court . . . will be deemed to have acted unethically.” *Id.* Cf. Wolfram, *supra* note 52, at 840 n.114 (The special protections surrounding a criminal defendant should not be used to justify a “battlefield ethics” that sanctions client perjury.).

179. Aronson, *supra* note 7, at 319.

V. CONCLUSION

As exemplified by the situation in which a criminal defense attorney is confronted with a perjurious client, the various rules for professional conduct are found in several sources, are often inconsistent, are frequently ambiguous, do not anticipate all potential sets of facts, and generally do not provide much guidance for the attorney who is attempting to act ethically. Rather than defining ethical courses of conduct, the professional rules frequently add confusion to already confused areas of professional responsibility. Because any systematic effort to enforce rules of conduct through professional discipline depends on the clarity and comprehensiveness of the rules themselves, the first task of the professional rule-makers must be to formulate a system-oriented set of rules. The professional debates over controversial ethical situations, such as perjury of a criminal defendant, will likely continue until the legal system as a whole is willing to abandon its situation-oriented professional rules for those that are system-oriented.

Since the very nature of discrete rules to guide conduct ensures that all factual situations will not be anticipated, attorneys must also be provided with system-oriented principles to follow in their absence. The current professional rules, by embodying two often contradictory views of the attorney's role, provide the least guidance in the most difficult ethical situations. Unless the attorney is given a guiding principle that can be systematically applied, both by the professional rulemakers in the formulation of conduct rules and by herself in the absence of such conduct rules, her role in the legal system will continue to be confused and confusing.

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