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Ethical Considerations When Clients Want to (or Did) Testify

Hypotheticals and Analyses*

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* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Hypothetical 1

As a criminal defense lawyer, you occasionally have to wrestle with tough issues that your civil litigation colleagues rarely face. This morning, your client told you that he wants to testify at his murder trial starting later this week. You tried to talk him out of it, because there is damaging evidence about his whereabouts at a key time. Your client quickly dismissed your worry, telling you that he had "no choice" but to lie about where he was at that time. You tried to talk him out of that too, but without success.

What do you do?

(A) Use the "narrative" approach, under which you put your client on the stand and ask him to offer testimony -- without asking specific questions and without referring to his testimony in your closing argument?

(B) Put your client on the stand to testify, but advise the court if he carries through on his threat to lie?

(C) Directly examine your client as if he were telling the truth, and rely on his testimony in your closing -- even though you know he has lied?

(B) PUT HIM ON THE STAND TO TESTIFY, BUT ADVISE THE COURT IF HE CARRIES THROUGH ON HIS THREAT TO LIE (PROBABLY)

Analysis

Bars and courts have wrestled for decades with lawyers' appropriate response to a client's intent to present testimony the lawyer suspects, reasonably believes, or knows for certain, is false.

This issue can arise in the civil setting, but constitutional issues make the dilemma much more acute in the criminal context.

Criminal Clients' Right to Testify on Their Own Behalf

Many lawyers might be surprised to learn that traditionally criminal clients could not testify on their own behalf.

This longstanding prohibition apparently rested on worries that (1) criminal defendants would necessarily lie (making their testimony inherently incredible), and (2) allowing criminal defendants to testify would lead juries to conclude that a defendant choosing not to testify was guilty. The ethics rules continue to wrestle with the first concern, and it is uncertain that even the most stern jury instruction can eliminate the second concern.

As recently as 1986, the United States Supreme Court explained that a criminal accused's right to testimony on his own behalf was "of relatively recent origin."

- Nix v. Whiteside, 475 U.S. 157, 164 (1986) ("The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case. See, e. g., Ferguson v. Georgia, 365 U.S. 570 (1961); R. Morris, Studies in the History of American Law 59-60 (2d ed. 1959). Iowa was among the states that adhered to this rule of disqualification. State v. Laffer, 38 Iowa 422 (1874). By the end of the 19th century, however, the disqualification was finally abolished by statute in most states and in the federal courts. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30-31; see Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1, 12 (1895). Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so held, and the right has long been assumed. See, e.g., United States v. Curtis, 742 F.2d. 1070, 1076 (CA7 1984); United States v. Bifield, 702 F.2d 342, 349 (CA2), cert. denied, 461 U.S. 931 (1983). We have also suggested that such a right exists as a corollary to the Fifth Amendment privilege against compelled testimony, see Harris v. New York, supra, at 225. See also Ferguson, 365 U.S., at 598-601 (concurring opinion of Frankfurter, J.); id., at 601-603 (concurring opinion of Clark, J.)." (emphases added)).

A 1961 United States Supreme Court case reviewed the history of this issue, ultimately concluding that Georgia could not constitutionally prohibit a criminal defendant from providing sworn (as opposed to unsworn) testimony on his or her own behalf.

- Ferguson v. Georgia, 364 U.S. 570, 573-74, 574, 575-76, 576 n.5, 577, 578, 580, 596 (1961) (explaining the history of courts' original prohibition on criminal defendants testifying, which eroded over the centuries; ultimately concluding that Georgia could not constitutionally prohibit criminal defendant's lawyer from questioning the client in court about his unsworn statement; "In the sixteenth century it was necessary for an accused to conduct his own defense, since he was neither allowed to call witnesses in his behalf nor permitted the assistance of counsel. . . . In the seventeenth century, however, he was allowed to call witnesses in his behalf; the right to have them sworn was accorded by statute for treason in 1695 and for all felony in 1701. . . . A distinction was drawn between the accused and his witnesses -- they gave evidence but he did not." (emphases added); "Disqualification for interest was thus extensive in the common law when this Nation was formed. . . . Here, as in England, criminal defendants were deemed incompetent as witnesses." (emphases added); "Broadside assaults upon the entire structure of disqualifications, particularly the disqualification for interest, were launched early in the nineteenth century in both England and America. Bentham led the movement for reform in England, contending always for rules that would not exclude but would let in the truth. . . . The qualification in civil cases of nonparty witnesses despite interest came first. See Lord Denman's Act of 1843, 6 & 7 Vict., c. 85. The first general exception in England for party witnesses in civil cases was the County Courts Act of 1846, 9 & 10 Vict., c. 95, although there had been earlier grants of capacity in certain other courts. . . . Lord Brougham's Act of 1851, 14 & 15 Vict., c. 99, virtually abolished the incompetency of parties in civil cases." (emphases added); "'The first American statute removing the disability of interested nonparty witnesses seems to have been Michigan's in 1846, and Connecticut was first to abolish the general incapacity of parties in 1849. The Field reforms in New York State were influential in leading other American jurisdictions to discard the incapacity of both witnesses and parties in civil cases.'" (emphasis added); "The qualification of criminal defendants to give sworn evidence if they wished came last. The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. . . . Within 20 years most of the States now comprising the Union had followed Maine's lead. A federal statute to the same effect was adopted in 1878, 20 Stat. 30, 18 U.S.C. 3481. Before the end of the century every State except Georgia had abolished the disqualification." (emphases added); "The lag in the grant of competency to the criminally accused was attributable in large measure to opposition from those who believed that such a grant threatened erosion of the privilege against self-incrimination and the presumption of innocence." (emphasis added); "This controversy left its mark on the laws of many jurisdictions which enacted competency. The majority of the competency statutes of the States forbid comment by the prosecution on the failure of an accused to testify, and provide that no presumption of guilt should arise from his failure to take the

> stand. The early cases particularly emphasized the importance of such limitations."; "We therefore hold that, in effectuating the provisions of § 38-415, Georgia, consistently with the Fourteenth Amendment, could not, in the context of § 38-416, deny appellant the right to have his counsel question him to elicit his statement." (emphasis added)).

In 1998, a California appellate court also discussed this interesting history.

> By the 17th century in England, a criminal defendant was allowed to call witnesses to testify and by 1701 had the right to call witnesses to testify under oath but the defendant himself was still precluded from giving sworn testimony.
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> By the mid-19th century, parties and interested witnesses in civil cases were allowed to give sworn testimony in England and in most states in this country.
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> . . .
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> Criminal defendants, however, were still deemed incompetent to testify. The two main arguments against permitting criminal defendants to testify were: (1) criminal defendants were so likely to commit perjury to avoid conviction that their testimony was inherently untrustworthy and (2) permitting criminal defendants to testify would erode the constitutional right to remain silent and the presumption of innocence because suspicion would fall on the defendant who failed to testify.
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> > As one commentator wrote in the 1860's: '[T]he prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is mockery to swear a man to speak the truth who is certain to disregard it . . . .' (Stephen, A General View of the Criminal Law of England (1863).
>
> Maine was the first state to enact a statute providing that a criminal defendant was competent to testify.
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> . . .

> Within 20 years most states, including California, had eliminated the prohibition against criminal defendants providing testimony. . . . Finally, by 1960, all states except Georgia, had provided a criminal defendant was competent to testify in his own behalf.
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> In 1960, the United States Supreme Court struck down the last remaining state statute (in Georgia) which provided a criminal defendant was incompetent to give sworn testimony. . . . The court held Georgia's statute which permitted only unsworn testimony by a criminal defendant denied the defendant his right to assistance of counsel during every step of the proceedings.
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> . . .
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> In 1987, the United States Supreme Court explicitly held a criminal defendant had a constitutional right to testify on his own behalf.

People v. Johnson, 72 Cal. Rptr 2d 805, 807-09 & n.3 (Cal. Ct. App. 1998) (emphases added; footnotes omitted).

A 2001 New York case described New York's history.

- People v. DePallo, 754 N.E.2d 751, 753 (N.Y. 2001) (in an opinion by New York's highest court, finding that a lawyer had not provided ineffective assistance of counsel after having used the "narrative approach," because he knew that his client would testify falsely, and when disclosing to the court that his client had just testified falsely; "The ethical dilemma presented by this case is not new. Defense attorneys have confronted the problem of client perjury since the latter part of the 19th century when disqualification of criminal defendants to testify in their own defense was abolished by statute in federal courts and in most states, including New York in 1869 . . . . A lawyer with a perjurious client must contend with competing considerations -- duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other. Courts, bar associations and commentators have struggled to define the most appropriate role for counsel caught in such situations (compare Wolfram, Client Perjury, 50 S Cal L Rev 809 [1977] [emphasizing the truth-seeking function of the judicial system] with Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest

> Questions, 64 Mich L Rev 1469 [1966] [arguing that attorney's duty of confidentiality is paramount])." (emphasis added)).

Once criminal defendants could testify on their own behalf, and especially after such testimony became a constitutional right, lawyers representing those criminal defendants faced a nearly insoluble ethical dilemma if they knew that their clients would testify falsely.

ABA Canons

The 1908 Canons (amended in 1937) contained an exception to the general confidentiality rule for clients' intent to commit any criminal act.

> The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

ABA Canons of Prof'l Ethics, Canon 37 (emphasis added). The ABA appears not to have dealt with this basic principle's application in the case of clients' stated intent to testify falsely.

The main canon focusing on fraud in the judicial context dealt only with past false testimony.

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

Id. Canon 41 (emphasis added).

In 1945, the ABA dealt with a lawyer whose client admitted that he had lied about his residency in connection with obtaining a divorce, but eventually hired another lawyer to represent him. The ABA focused on the lawyer's obligation to report the would-be client's false statements by the client on the successor lawyer's watch.

> While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences. It is not infrequently the case that a lawyer who has been retained by a client accused of crime, having been told by the client facts which make it certain that the client is guilty, declines to represent the defendant, insomuch as a successful defense cannot be hoped for without suborning perjury under such circumstances. In such case, the lawyer is bound by the Canon not to disclose the information received from the client in confidence, though he ascertains that the client, having subsequently retained another lawyer, has, in his defense, stated the facts to be otherwise.

ABA LEO 268 (6/21/45) (emphasis added). The ABA's use of the present tense ("is being practiced on the court") could have been more clear, but seemed to focus on clients' past false testimony rather than clients' intent to testify falsely in the future.

Eight years later, the ABA again dealt with lawyers' responsibilities upon learning that their clients had already presented false testimony. ABA LEO 287 (6/27/53). So as with the earlier ABA LEO 268, the ABA had not really dealt with lawyers' duties upon learning that their client intended to testify falsely.

Professor Monroe Freedman's 1966 Lecture

In 1966, George Washington Law School Professor Monroe Freedman presented a lecture to 45 District of Columbia Bar members attending a Criminal Trial Institute. Later that year, Professor Freedman presented the same analysis in a

Michigan Law Review article. Monroe H. Freedman, Symposium on Professional Ethics – Prof'l Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1496 (1966).

Professor Freedman's lecture and later law review article contended that criminal defense lawyers may -- and probably must -- allow their clients to testify as if they were telling the truth, even if the lawyers knew beforehand that the clients would testify falsely.

Professor Freedman started his analysis praising the adversarial litigation process as the most effective means of determining the truth.

> The attorney functions in an adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views. It is essential to the effective functioning of this system that each adversary have, in the words of Canon 15, "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability." It is also essential to maintain the fullest uninhibited communication between the client and his attorney, so that the attorney can most effectively counsel his client and advocate the latter's cause.

Id. at 1470 (emphasis added). Professor Freedman then explained that the adversarial process essentially requires clients and lawyers to "lie" -- by, for example, pleading not guilty even if the lawyers know that their clients are guilty.

> Even the accused who knows that he committed the crime is entitled to put the government to its proof. Indeed, the accused who knows that he is guilty has an absolute constitutional right to remain silent. The moralist might quite reasonably understand this to mean that, under these circumstances, the defendant and his lawyer are privileged to "lie" to the court in pleading not guilty. In my judgment, the moralist is right. However, our adversary system and

> related notions of the proper administration of criminal justice sanction the lie.

Id. at 1471 (emphasis added; footnote omitted).

In explaining the options that criminal lawyers face, Professor Freedman criticized what many criminal lawyers even today describe as their favored approach -- essentially remaining willfully ignorant of their clients' innocence or guilt.

> It is also argued that a defense attorney can remain selectively ignorant. He can insist in his first interview with his client that, if his client is guilty, he simply does not want to know. It is inconceivable, however, that an attorney could give adequate counsel under such circumstances. How is the client to know, for example, precisely which relevant circumstances his lawyer does not want to be told? The lawyer might ask whether his client has a prior record. The client assuming that this is the kind of knowledge that might present ethical problems for his lawyer, might respond that he has no record. The lawyer would then put the defendant on the stand and, on cross-examination, be appalled to learn that his client has two prior convictions for offenses identical to that for which he is being tried.
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> . . .
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> If one recognizes that professional responsibility requires that an advocate have full knowledge of every pertinent fact, it follows that he must seek the truth from his client, not shun it. This means that he will have to dig and pry and cajole, and, even then, he will not be successful unless he can convince the client that full and confidential disclosure to his lawyer will never result in prejudice to the client by any word or action of the lawyer.

Id. at 1472-73 (emphasis added; footnote omitted).

Professor Freedman then dealt with three issues implicating the adversarial system's careful balancing of interests.

First, Professor Freedman posed the following question:

> Is it proper to cross-examine for the purpose of discrediting the reliability or the credibility of a witness whom you know to be telling the truth?

Id. at 1474.

Professor Freedman concluded that lawyers serving their clients must try to discredit the reliability of a witness lawyers know to be telling the truth.

> [I]f you destroy her reliability through cross-examination designed to show that she is easily confused and has poor eyesight, you may not only eliminate the corroboration, but also cast doubt in the jury's mind on the prosecutor's entire case. On the other hand, if you should refuse to cross-examine her because she is telling the truth, your client may well feel betrayed, since you knew of the witness's veracity only because your client confided in you, under your assurance that his truthfulness would not prejudice him.
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> The client would be right.
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> . . .
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> Therefore, one must conclude that the attorney is obligated to attack, if he can, the reliability or credibility of an opposing witness whom he knows to be truthful. The contrary result would inevitably impair the "perfect freedom of consultation by client with attorney," which is "essential to the administration of justice."

Id. at 1474-75 (emphasis added).

Second, Professor Freedman then turned to a question which ultimately caused the most controversy -- and which continues to vex criminal defense lawyers, courts, and bars.

> Is it proper to put a witness on the stand when you know he will commit perjury?

Id. at 1475.

Professor Freedman initially explained that lawyers' withdrawal in that situation would not work as a practical matter.

> Perhaps the most common method for avoiding the ethical problem just posed for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney. The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of his guilt from his new attorney. On ethical grounds, the practice of withdrawing from a case under such circumstances is indefensible, since the identical perjured testimony will ultimately be presented. More important, perhaps, is the practical consideration that the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but he loses it in the very act of evading the ethical problem.

Id. at 1475-76 (emphases added; footnote omitted).

Professor Freedman then rejected as impractical and ultimately ineffective lawyers' approach to the court with a request to be relieved.

> If a lawyer has discovered his client's intent to perjure himself, one possible solution to this problem is for the lawyer to approach the bench, explain his ethical difficulty to the judge, and ask to be relieved, thereby causing a mistrial. This request is certain to be denied, if only because it would empower the defendant to cause a series of mistrials in the same fashion. At this point, some feel that the lawyer has avoided the ethical problem and can put the defendant on the stand. However, one objection to this solution, apart from the violation of confidentiality, is that the lawyer's ethical problem has not been solved, but has only been transferred to the judge. Moreover, the client in such a case might well have grounds for appeal on the basis of deprivation of due process and denial of the right of counsel, since he will have been tried before, and sentenced by, a judge who has been informed of the client's guilt by his own attorney.

Id. at *1477 (emphases added).

Professor Freedman next criticized the strategy of lawyers putting their perjurious clients on the stand and permitting a "narrative" (which the lawyer would not refer to in closing arguments).

> A solution even less satisfactory than informing the judge of the defendant's guilt would be to let the client take the stand without the attorney's participation and to omit reference to the client's testimony in closing argument. The latter solution, of course, would be as damaging as to fail entirely to argue the case to the jury, and failing to argue the case is "as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement."

Id. at *1477 (emphasis added).

Professor Freedman argued that the justice system would work best if lawyers put their clients on the stand to testify despite knowing that the clients will lie.

Professor Freedman reached this conclusion under the then-applicable ABA Canons.

> Therefore, the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury. Canon 37 does not proscribe this conclusion; the canon recognizes only two exceptions to the obligation of confidentiality. The first relates to the lawyer who is accused by his client and may disclose the truth to defend himself. The other exception relates to the "announced intention of a client to commit a crime." On the basis of the ethical and practical considerations discussed above, the Canon's exception to the obligation of confidentiality cannot logically be understood to include the crime of perjury committed during the specific case in which the lawyer is serving. Moreover, even when the intention is to commit a crime in the future, Canon 37 does not require disclosure, but only permits it. Furthermore, Canon 15, which does proscribe "violation of law" by the attorney for his client, does not apply to the

> lawyer who unwillingly puts a perjurious client on the stand after having made every effort to dissuade him from committing perjury. Such an act by the attorney cannot properly be found to be subordination . . . of perjury. Canon 29 requires counsel to inform the prosecuting authorities of perjury committed in a case in which he has been involved, but this can only refer to perjury by opposing witnesses. For an attorney to disclose his client's perjury "would involve a direct violation of Canon 37." Despite Canon 29, therefore, the attorney should not reveal his client's perjury "to the court or to the authorities."

Id. at 1477-78 (emphasis added; footnote omitted).

Third, Professor Freedman posed a related question:

> [W]hether it is proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury.

Id. at 1478.

Interestingly, Professor Freedman thought that this question was the most controversial.

> This may indeed be the most difficult problem of all, because giving such advice creates the appearance that the attorney is encouraging and condoning perjury.

Id.

Professor Freedman concluded that lawyers should be able to provide such advice.

> Essentially no different from the problem discussed above [clients providing lawyers incriminating information without knowing its significance], but apparently more difficult, is the so-called Anatomy of a Murder situation. The lawyer, who has received from his client an incriminating story of murder in the first degree, says "If the facts are as you have stated them so far, you have no defense, and you will probably be electrocuted. On the other hand, if you acted in a blind rage, there is a possibility of saving your life. Think it over, and we will talk about it tomorrow." As in the

> tax case, and as in the case of the plea of guilty to a lesser offense, the lawyer has given his client a legal opinion that might induce the client to lie. This is information which the lawyer himself would have, without advice, were he in the client's position. It is submitted that the client is entitled to have this information about the law and to make his own decision as to whether to act upon it. To decide whether would not only penalize the well-educated defendant, but would also prejudice the client because of his initial truthfulness in telling his story in confidence to the attorney.

Id. at 1481-82 (emphasis added; footnote omitted).

Professor Freedman ended his controversial law review article by again praising the American adversarial system.

> The lawyer is an officer of the court, participating in a search for truth. Yet no lawyer would consider that he had acted unethically in pleading the statute of frauds or the statute of limitations as a bar to a just claim. Similarly, no lawyer would consider it unethical to prevent the introduction of evidence such as a murder weapon seized in violation of the fourth amendment or a truthful but involuntary confession, or to defend a guilty man on grounds of denial of a speedy trial. Such actions are permissible because there are policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim. Similarly, there are policies that justify an affirmative answer to the three questions that have been posed in this article. These policies include the maintenance of an adversary system, the presumption of innocence, the prosecutor's burden to prove guilt beyond a reasonable doubt, the right to counsel, and the obligation of confidentiality between lawyer and client.

Id. at 1482 (emphasis added; footnote omitted).

Reaction to Professor Freedman's 1966 Lecture

Professor Freedman's 1966 lecture triggered a more intense controversy than perhaps any other lecture in American legal history. The shock waves began almost immediately, and continue to roil the legal profession.

Professor Freedman devoted the first footnote in his post-lecture law review article to the astounding efforts by some to disbar him for his opinions.

> The substance of this paper was recently presented to a Criminal Trial Institute attended by forty-five members of the District of Columbia Bar. As a consequence, several judges (none of whom had either heard the lecture or read it) complained to the Committee on Admissions and Grievances of the District Court for the District of Columbia, urging the author's disbarment or suspension. Only after four months of proceedings, including a hearing, two meetings, and a de novo review by eleven federal district court judges, did the Committee announce its decision to "proceed no further in the matter."

Id. at 1469 n.1 (emphasis added).

Over forty years after his controversial lecture, Professor Freedman described in more detail the judicial reaction.

> Chief Justice Warren Burger and two other federal judges initiated disbarment proceedings against me in 1966. The charge was that, in a lecture to a group of lawyers, I had expressed opinions that "appear to be in conflict with the Canons of Professional Ethics of the American Bar Association." The offensive opinions related to the criminal defense lawyer's conflicting ethical obligations in dealing with client perjury, based on requirements in the Canons of Professional Ethics.
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> While the disbarment proceedings were pending, the lecture became an article: The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions. After four months of hearings and deliberations, the charges were dismissed.

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133,133-34 (2008) (emphases added; footnotes omitted).

Also long after the 1966 incident, another law professor noted the firestorm Professor Freedman's 1966 lecture triggered.

> Ironically, one of the first American commentators to criticize the client perjury rules publicly was himself subjected to a judicial witch hunt. Addressing the Criminal Trial Institute of the District of Columbia Bar in the spring of 1966, Professor Monroe Freedman raised an objection to the client perjury rules, which while the issue is now standard fare in the curriculum of every law school, ignited a McCarthy-like vendetta against him. Reading a brief account of Freedman's remarks in the newspaper the next day, a group of federal judges led by former Chief Justice Warren Burger, then a member of the United States Court of Appeals of the District of Columbia, instigated disciplinary proceedings against the stunned professor for "express[ing] opinions" inconsistent with the legal profession's prevailing principles of ethical conduct.
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> Efforts to silence Freedman intensified daily. Through private correspondence with Freedman's dean, Burger's group sought to have the young professor expelled from teaching. One of Burger's law clerk's posing as a "disinterested but incensed" member of the American Civil Liberties Union and writing on personal stationery, even sent a letter to the organization demanding that Freedman be removed as chair of its Washington D.C. affiliate. The national bar quickly closed ranks as leaders of the profession publicly assailed Freedman's character.
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> Freedman's offense: he had suggested that fostering a criminal defendant's trust and willingness to confide in counsel is so vital to constructing an adequate defense and receiving a fair trial that, on balance, a criminal defense attorney who believes the accused will testify untruthfully is duty-bound to present the accused's testimony as if counsel believed it to be truthful.

Jay Sterling Silver, Truth, Justice, and the American Way: The Case *Against* the Client Perjury Rules, 46 Vand. L. Rev. 339, 352-53 (1994) (emphases added; footnotes omitted.

A few academics came to Professor Freedman's defense. For instance, Professor Anthony Amsterdam sent a letter to the Washington Post which contained the following sarcastic comment.

> If disbarment were the fate of every lawyer or judge in the District of Columbia who made a wrong legal judgment -- or even several grossly wrong legal judgments -- we would have very few lawyers left, and no judges at all.

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133,138 (2008) (quoting Amsterdam's May 1, 1966, letter to the editor of the Washington Post).

Interestingly, Professor Freedman has even pointed to his 1966 lecture as raising the legal profession's consciousness about legal ethics.

> Eleven years [after the famous 1966 lecture], in 1977, I succeeded in persuading a reluctant ABA Standing Committee on Law Lists that legal ethics and professional responsibility should be recognized as an acceptable "field of law." Thus, lawyers' ethics joined 155 previously recognized fields of law, including cemetery law and drainage and levee law. See Monroe Freedman, Crusading for Legal Ethics, Legal Times, July 10, 1995, at 25.

Id. at 139 n.27 (emphasis added).

1969 ABA Model Code

Perhaps it was a coincidence, but just three years after Professor Freedman argued that criminal defense lawyers should be permitted to knowingly use perjured testimony, the ABA for the first time explicitly rejected that approach.

The 1969 ABA Code of Professional Responsibility contained forward-looking prohibitions on lawyers' presentation of false evidence.

> In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence[,] . . . [k[Knowingly make a false statement of law or fact[,] . . . [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false[,] . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent[, or] . . . [k]nowingly engage in

> other illegal conduct or conduct contrary to a Disciplinary Rule.

ABA Model Code of Prof'l Responsibility, DR 7-102(A)(4)-(8) (emphasis added). An Ethics Consideration provided some guidance.

> 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. EC 7-26 (emphasis added; footnotes omitted). Of course, this guidance does not really help answer the key question -- what should a criminal defense lawyer do when her client wants to exercise her constitutional right to testify, but the lawyer knows that the client will lie.

Another more generic ABA Model Code provision contained a forward-looking provision, but only permitted rather than required lawyers' disclosure of clients' intended criminal conduct.

> a lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.

Id. DR 4-101(C)(3) (emphasis added; footnote omitted).

This discretionary standard worked well in most situations (although with crimes such as murder it might seem too mild). But the standard did not fit well in the context of clients' intent to commit future perjury. This is because the clients' consummation of their intent triggers unique ethics responsibilities. Lawyers whose clients commit murder or some other crime on the lawyer's watch cannot disclose anything about the clients' misconduct. However, given perjury's corrosive effect on the justice system,

lawyers must take some remedial action. So allowing but not requiring lawyers to disclose their clients' intent to commit perjury might eliminate the ethics issue if the client does not follow through, but merely delays the ethics dilemma if the client follows through.

The 1969 version of the ABA Model Code dealt much more directly with lawyers' obligation to disclose clients' past fraud on the tribunal.

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

Id. DR 7-102(B)(1) (emphasis added).

Although the ABA Model Code provision spoke of clients' past false testimony (rather than the intent to present false testimony), the disclosure obligation obviously affected lawyers' pre-testimony responsibilities.

ABA's 1970s Endorsement of the "Narrative Approach"

As explained above, Professor Freedman's 1966 lecture condemned what is called the "narrative approach" -- under which a lawyer knowing that her client will lie puts the client on the stand and essentially asks the client to provide a narrative, without asking specific questions drawing out the narrative and without referring to the testimony in her closing argument.

However, despite Professor Freedman's criticism, at least one official ABA group endorsed the "narrative approach." A 1998 California Appellate Court decision taking the same approach pointed to this earlier ABA imprimatur.

> In the early 1970's, the American Bar Association adopted the narrative approach in its Project on Standards for Criminal Justice, Standards Relating to the Defense Function.
>
> "Testimony by the defendant.
>
> "(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.
>
> "(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.
>
> "(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely on his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not receive or rely upon the false testimony in his closing argument."

People v. Johnson, 72 Cal. Rptr. 2d 805, 814-15, 815 (Cal. Ct. 1998) (emphasis added).

As explained below, the ABA eventually abandoned this approach.

Other 1970s ABA Developments

In 1974, the ABA dramatically reduced the disclosure obligation -- adding the following phrase to the disclosure duty when lawyers learn of clients' past fraud on the tribunal.

> [E]xcept when the information is protected as a privileged communication

ABA Code of Prof'l Responsibility, DR 7-102(B)(1) Thus, this new provision weakened the original ABA Code's absolute duty to report clients' past false testimony.

But the ABA wasn't finished in diminishing lawyers' disclosure duty and reemphasizing confidentiality. Just one year later, the ABA issued a facially inexplicable legal ethics opinion that ignored crystal-clear ABA Model Code language. In ABA LEO 341 (9/30/75), the ABA expanded the disclosure exception to include "secrets" -- although the 1974 black letter Code amendment limited the exception to a "privileged communication."

The ABA Model Code's confusing and intellectually suspect evolution resulted in enormous confusion.

As the ABA wrestled inconclusively with lawyers' knowledge of their clients' past fraud on a tribunal, it failed to even explicitly address the implications of lawyers' knowledge that their clients intended to defraud the tribunal in the future (rather than having already done so). This is surprising, because Professor Freedman's 1966 lecture had created an unprecedented stir in the profession. Perhaps the ABA did not know what to say.

As explained above, lawyers face ethics dilemmas at two possible points in a typical scenario. If the lawyer learns from the client that the client intends to commit perjury, the lawyer must decide whether to report the intent at the time the client states it. If the client tells the lawyer that he will testify about certain facts that the lawyer knows to be false, the lawyer might have the same dilemma as if the client bluntly

stated that he intended to lie on the stand -- which raises the issue of what level of knowledge triggers the lawyer's dilemma.

The next important point comes when the client testifies. The client might bluster about his intent to lie but not follow through. In that case, the problem disappears. But the client might follow through on the intent -- either fulfilling the earlier threat to lie or reneging on an assurance to the lawyer that the client will tell the truth. At that point, the lawyer must deal with the ethics provisions governing clients' past fraud on a tribunal.

As explained below, the ABA addressed this second point in a 1987 legal ethics opinion.

In 1975, an ABA legal ethics opinion dealt with lawyers' knowledge of their clients' past fraud on the tribunal. But in one sentence, the ABA tiptoed into lawyers' obligation upon learning that their client intends to commit perjury again.

- ABA Informal LEO 1318 (1/13/75) (holding that a lawyer did not have a duty to disclose a client's past perjury in another court, but would have to withdraw if the client intended to commit perjury again; "It is the opinion of this Committee that since <u>your client obviously proposes to commit perjury</u> and by so doing will perpetrate a fraud upon the court before which he testifies, <u>you will have to withdraw from the case if he persists in that position.</u>" (emphasis added)).

Just a few months later, the ABA issued another legal ethics opinion dealing with clients' fraud on a tribunal indicating that the lawyer may withdraw if a client intends to commit perjury.

- ABA LEO 1314 (3/25/75) (addressing a criminal defendant's lawyer's duty if the client "insists upon taking the stand and giving perjured testimony"; concluding that a lawyer whose client threatens to commit perjury: (1) must report perjury to the court if the client carries through on his threat despite the lawyer's efforts to dissuade him from doing so; but (2) "may withdraw" from

> the representation without disclosing the perjury if the lawyer does not know in advance that the client will commit perjury but discovers afterwards that the client has done so; "if the attorney knows in advance that his client intends to use false or perjured testimony, it is his duty to advise the client that the lawyer must take one of two courses of action: (1) Withdraw at that time in advance of the submission of the perjured testimony or false evidence; or (2) Report to the court or tribunal the falsity of the testimony or evidence, if the client insists on so testifying." (emphasis added); contrasting that duty with the duty of a lawyer who does not know in advance that the client will testify falsely; also inexplicably concluding that a lawyer who does not know in advance that the client will perjure himself but who learns later that the client has perjured himself must call upon the client "to rectify the fraud," but "may" withdraw "if the client refuses or is unable to do so"; "If the attorney does not know in advance that the client intends to use perjured testimony or false evidence, but finds in the course of the trial of the case that the client has done this, either by his own admissions or by the obviously false nature of the testimony or evidence, then the lawyer, pursuant to the provisions DR 7-102(B), has the primary duty to protect the confidentiality of any privileged communication from his client. Subject, however, to affording the client proper protection on the basis of any privileged communication, the lawyer does have the obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client. . . . In other words, the confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal.").

This is an odd result. ABA LEO 1314 concluded that (1) a lawyer whose client threatens to commit perjury and then does so must disclose the perjury to the court, but (2) a lawyer whose client surprises the lawyer by committing perjury may not disclose the perjury to the court -- but instead "may" withdraw from the representation. If the ethics rules' goal was to avoid taint to the process, one would think that the lawyer would have the same duty regardless of whether or not the lawyer knew in advance that the client intended to commit perjury.

And as explained above, eleven years earlier Professor Freedman articulated why lawyers' withdrawal in that situation simply deferred the problem -- possibly at the expense of the criminal defendant's legitimate defense.

> Perhaps the most common method for avoiding the ethical problem just posed for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney. The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of his guilt from his new attorney. On ethical grounds, the practice of withdrawing from a case under such circumstances is indefensible, since the identical perjured testimony will ultimately be presented. More important, perhaps, is the practical consideration that the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but he loses it in the very act of evading the ethical problem.

Monroe H. Freedman, Symposium on Prof'l Ethics – Prof'l Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1475-76 (1966) (emphases added; footnote omitted).

A 1987 ABA legal ethics opinion characterized this earlier legal ethics opinion.

> The duty imposed on the lawyer by Informal Opinion 1314, when the lawyer knows in advance that the client intends to commit perjury, to advise the client that if the client insisted on testifying falsely, the lawyer must disclose the client's intended perjury to the tribunal, was based on the Committee's reading of DR 7-102(A)(4), (6) and (7). These provisions prohibit a lawyer from: (1) knowingly using perjured testimony or false evidence; (2) participating in the creation or preservation of evidence the lawyer knows to be false, and (3) counseling or assisting the client in conduct the lawyer knows to be illegal or fraudulent. However, none of these prohibitions requires disclosure to the tribunal of any information otherwise protected by DR 4-101. Although DR 4-101(C)(3) permits a lawyer to reveal a client's stated

> intention to commit perjury [among other crimes], this exception to the lawyer's duty to preserve the client's confidences and secrets is only discretionary on the part of the lawyer.

ABA LEO 353 (4/20/87) (emphasis added). This 1987 opinion explained that the older ABA LEO 1314 ironically complied more with the 1983 ABA Model Rules than with the 1969 ABA Model Code that applied when the ABA issued that earlier opinion.

> Informal Opinion 1314 in this regard is more consistent with Model Rule 3.3(a)(2) than with any provision of the Model Code, upon which the opinion was based.

ABA LEO 353 (4/20/87). ABA LEO 353 then went on to address the lawyer's obligations at the two important points in the typical scenario -- discussed above.

> However, the Committee does not believe that the mandatory disclosure requirement of this Model Rule provision is necessarily triggered when a client states an intention to testify falsely, but has not yet done so. Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in Nix. v. Whiteside [, 475 U.S. 157 (1983)]. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner. If the client does in fact testify falsely, the lawyer's obligation to make disclosure to the court is covered by Rule 3.3(a)(2) and (4).

Id. (emphasis added).

The ABA's silence despite Professor Freedman's earlier groundbreaking lecture and resulting debate undoubtedly left lawyers confused about their responsibility in the face of clients' intent to commit perjury. And the meager guidance the ABA offered in its 1970s legal ethics opinions seemed unsatisfactory.

Early 1980s Profession-Wide Debate

In the early 1980s, the ABA began a lengthy and vigorous process revamping its ethics rule.[1]

As lawyers throughout the United States began to debate the upcoming overhaul of the ABA ethics rules, the American Trial Lawyers established a commission to recommend that group's preferred approach.

Not surprisingly, the American Trial Lawyers focused extensively on confidentiality issues. An American Trial Lawyers Commission issued an August 1980 "Public Discussion Draft" and a May 1982 "Proposed Revision of the Code of Professional Responsibility." The American Lawyer's Code of Conduct, Including A Proposed Revision of the Code of Prof'l Responsibility, Commission on Prof'l Responsibility, Roscoe Pound-American Trial Lawyers Found., Revised Draft (May 1982).

Professor Monroe Freedman acted as the reporter for the Proposed Code -- which must have been obvious from its content.

Much like Professor Freedman's earlier lecture and law review article, the Commission

> [r]ecogniz[ed] that the American attorney functions in an adversary system, and that such a system expresses fundamental American values, helps us to appreciate the emptiness of some cliches of lawyers' ethics. It is said, for example, that the lawyer is an "officer of the court," or an

[1] Stephen Gillers, Model Rule 1.13(c) Gives the Wrong Answer To the Question of Corporate Counsel Disclosure, 1 Geo. J. Legal Ethics 289, 291 (1987) ("The Model Rules went through many drafts with various circulations. The first to receive public circulation was dated January 30, 1980. The second major release, dated May 30, 1981, contained changes responsive to comments on the 1980 draft. The proposed final draft, dated June 30, 1982, responded to criticisms of the 1981 draft. The 1982 draft was further amended before the Model Rules were adopted on August 2, 1983." (footnotes omitted)).

> "officer of the legal system." Out of context, such phrases are at best meaningless, and at worst misleading. In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.

Id. (emphases added).

The Commission's proposal emphasized that its provisions protected confidentiality more than the ABA Model Code or some of the early ABA Model Rules drafts that were then being circulated.

> The Rules to this Chapter are more protective of confidentiality than the Code of Professional Responsibility or the A.B.A. Commission's Rules. The exceptions permit divulgence, but to not require it, under compulsion of law; to avoid proceeding before a corrupted judge or juror; to defend the lawyer or the lawyer's associates against formally instituted charges of misconduct, or charges made by the client; and to prevent imminent danger to human life. . . . Also, withdrawal is permitted in non-criminal cases, even when a confidence might thereby be divulged indirectly, when the client has induced the lawyer to act through material misrepresentation.

Id. Ch1. cmt. (emphasis added).

The Proposed Code explained its confidentiality emphasis.

> It is sometimes suggested that confidentiality is inimical to the truth-seeking function of our system of justice. That is true, however, only in a superficial and short-sighted sense. Certainly, under the adversary system, lawyers frequently have knowledge that the court or other parties would want to have. Most often, however, lawyers have such knowledge precisely because of the established rule of confidentiality. If we were to remove that safeguard, by permitting lawyers to divulge their clients' confidences, lawyers would come to have few truths to divulge.

Id. (emphasis added).

An illustration made it clear that a lawyer (in either a civil or a criminal case) may freely offer client testimony that the lawyer knows to be false.

> A lawyer learns from a client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer reasonably believes that a request for leave to withdraw would be denied and/or would be understood by the judge and by opposing counsel as an indication that the testimony is false. The lawyer does not seek leave to withdraw, presents the client's testimony in the ordinary manner, and refers to it in summation as evidence in the case. The lawyer has not committed a disciplinary violation.

Id. Ch. 1, Illustrative Cases, at 1(j) (emphases added).

Another illustration explained that lawyers would violate the Commission's proposed ethics rules if they used the "narrative" approach.

> A lawyer learns from a client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer does not present the client's testimony as she otherwise would, but instead simply requests a narrative from the client and returns to her seat at the counsel table. On summation to the jury, the lawyer makes no reference to her client's false testimony, contrary to what she would have done had she not known it to be false. The lawyer has committed disciplinary violations, both in the manner of presenting the client's testimony and in the manner of summation.

Id. Ch. 1, Illustrative Cases, at 1(i) (emphases added).

The Proposed Code also addressed withdrawal as a possible option for lawyers whose clients intend to commit perjury. Reflecting Professor Freeman's rejection of withdrawal as a possible remedy, the Commission's proposed ethics rules concluded that lawyers would violate the ethics rules by even hinting at the clients' intent.

> A lawyer representing the accused in a criminal case learns from the client that he intends to present a false alibi. The lawyer knows that he will be required to give an

> explanation to the judge if he makes motion for leave to withdraw as counsel; he also knows that the judge will take an equivocal explanation as an indication that the client intends to commit perjury. The lawyer nevertheless asks leave to withdraw, telling the judge only, "I have an ethical problem," or, "My client and I do not see eye to eye." The lawyer has committed a disciplinary violation.

Id. Ch. 6, Illustrative Cases, at 6(a) (emphasis added).

The Proposed Code also emphasized confidentiality in addressing lawyers' own statements to the court. Several illustrations explain that lawyers may lie to the court about their clients' guilt or innocence, and would violate the proposed ethics rules by failing to lie.

> 3(e). A lawyer is conducting the defense of a criminal prosecution. The judge calls the lawyer to the bench and asks her whether the defendant is guilty. The lawyer knows that the defendant is guilty, and reasonably believes that an equivocal answer will be taken by the judge as an admission of guilt. The lawyer assures the judge that the defendant is innocent. The lawyer has not committed a disciplinary violation.
>
> 3(f). The same facts as in 3(e), but the lawyer replies to the judge, "I'm sorry, Your Honor, but it would be improper for me to answer that question." The lawyer has committed a disciplinary violation.
>
> 3(g). The same facts as in 3(e), but the lawyer is an assistant public defender, and the public defender has publicly announced that the office's policy is to refuse to answer such questions and to report every judge who asks such questions to the state Judicial Discipline Commission. For that reason, a refusal to answer would not be taken as an admission of guilt. The lawyer reminds the judge of her office's policy, and asks the judge to withdraw the question. The lawyer has not committed a disciplinary violation.

Id. at Ch. 3, Illustrative Cases, at 3(e)-3(g) (emphasis added).

Thus, Professor Freeman's fingerprints appeared throughout the American Trial Lawyers' proposed revision. Perhaps the most surprising position was the proposed revision's rejection of the "narrative approach." For decades, bars had debated whether lawyers may employ the "narrative approach" as a way to solve the ethical dilemma. Some bars had said yes, other bars said no. But the proposed revision explicitly indicated that lawyers using the "narrative approach" violated the ethics rules.

Not surprisingly, the ABA did not adopt the proposed revision's extreme approach.

1983 ABA Model Rules

If lawyers had hoped that the ABA would make things clearer in its 1983 ABA Model Rules, they would soon be disappointed.

Nothing in as-adopted 1983 ABA Model Rule 1.6 dealt with clients' intent to defraud a tribunal. The only two confidentiality exceptions focused on self-defense (ABA Model Rule 1.6(b)(2) (as of 1983)) and preventing the client from committing a "criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." ABA Model Rule 1.6(b)(1) (as of 1983).

The 1983 version of the ABA Model Rules contained four possibly pertinent provisions.

First, an ABA Model Rules' provision prohibited lawyers from advising their clients to engage in future crimes or frauds.

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to

> determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d) (as of 1983) (emphasis added). A comment provided guidance.

> A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

ABA Model Rule 1.2 cmt. (as of 1983).

Second,

> [a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal.

ABA Model Rule 3.3(a)(1) (as of 1983).

The Model Code Comparison compared this provision to the old ABA Model Code.

> Paragraph (a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not 'knowingly make a false statement of law or fact.'

ABA Model Rule 3.3, Model Code Comparison (1983).

This provision could theoretically have prevented a lawyer from repeating in an argument or a closing statement some "material fact" a client had earlier presented from the stand -- and which the lawyer knew to be false. However, the discussion about this provision generally dealt with lawyers' statement about some "material fact" from their own knowledge, rather than repeating what some witness had said.

Third,

> [a] lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

ABA Model Rule 3.3(a)(2) (as of 1983).

The Model Code Comparison compared this provision to the old ABA Model Code.

> Paragraph (a)(2) is implicit in DR 7-102(A)(3), which provided that 'a lawyer shall not . . . knowingly fail to disclose that which he is required by law to reveal.'

ABA Model Rule 3.3, Model Code Comparison (1983).

A client's knowingly false statement under oath presumably counted as a "criminal or fraudulent act by the client," so this provision presumably would have required the lawyer to speak up if the lawyer's silence could be seen as "assisting" the client's wrongful conduct.

Fourth,

> [a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.

ABA Model Rule 3.3(a)(4) (as of 1983). The Model Code Comparison compared this provision to the old ABA Model Code.

> With regard to paragraph (a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not 'knowingly use' perjured testimony or false evidence.

ABA Model Rule 3.3, Model Code Comparison (1983).

Thus, like the ABA Model Code, the ABA Model Rules explicitly rejected Professor Freedman's suggested approach. But neither provision gave any guidance to lawyers whose clients have a constitutional right to testify on their own behalf -- but who

know that their clients will lie, and who have been unsuccessful in seeking to withdraw during the trial.

Another provision indicated that

> [a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

ABA Model Rule 3.3(c) (as of 1983). Although this provision did not explicitly state the corollary, the 1983 ABA Model Rule's Model Code Comparison thought that it did.

> Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer 'reasonably believes' is false. This gives the lawyer more latitude that DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer 'knows' is false.

ABA Model Rule 3.3 Model Code Comparison (1983).

The first sentence makes sense, although later-adopted ABA Model Rule comments explicitly stated as much. However, the second sentence does not make much sense. Allowing lawyers to present evidence that they "reasonably believe" is false does not give them more latitude than a prohibition on presenting evidence that they "know" is false. There is an enormous difference between "reasonably believing" evidence is false and "knowing" evidence is false. The ABA Model Code permitted, and the ABA Model Rules permit, lawyers to present the former -- but not the latter.

Under a heading called "Perjury by a Criminal Defendant," a 1983 ABA Model Rule comment set the context of the profession-wide debate that Professor Freedman had ignited in 1966.

> Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, <u>there has been dispute concerning the lawyer's duty when that persuasion</u>

> fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.
>
> The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

ABA Model Rule 3.3 cmt. (as of 1983) (emphases added).

The next two comments described the three widely discussed possible steps lawyers might take, ultimately imposing a disclosure duty on lawyers who know that clients have followed through on their intent to commit perjury.

> Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.
>
> The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid

> implication in the commission of perjury or other falsification of evidence. See Rule. 1.2(d).

ABA Model Rule 3.3 cmt. (as of 1983) (emphases added).

Interestingly, the ABA Model Rules comment criticized the "narrative approach" without acknowledging that at the same time an ABA group had endorsed that approach, as had several states. As explained below, the ABA eventually acknowledged the latter fact. The comment almost surely referred to Professor Freedman's suggested approach, and for some reason contained the gratuitous comment "of relatively recent origin." One might suppose that the ABA considered that a criticism.

A later comment saluted the constitutional issue.

> The general rule -- that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client -- applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Id. (emphasis added).

The comment did not identify the jurisdictions allowing criminal defense lawyers to present knowingly false testimony because their constitutions required that. It would be interesting to know which jurisdictions the ABA referred to. The ABA Model Rules could not be any more explicit in condemning such conduct as unethical.

The next comment also recognized constitutional issues.

> Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Id.

Thus, the 1983 ABA Model Rules rejected the Professor Freedman approach and the narrative approach -- in favor of a prohibition on lawyers presenting clients' evidence that they know to be false, and a requirement that lawyers remedy false client evidence (whether the lawyer knew it was coming from clients' threat to present it, or whether it took the lawyer by surprise).

However, the comments also mentioned that some jurisdictions have rejected the ABA Model Rules approach, and thus allowed lawyers to present criminal clients' knowingly false testimony or allowed lawyers to use the "narrative approach."

Nix v. Whiteside

In 1986, the United States Supreme Court added its voice to this continuing debate. Nix v. Whiteside, 475 U.S. 157 (1986).

In Nix, Whiteside was convicted by an Iowa jury of second-degree murder, and sought federal habeas corpus relief based on his attorney Nix's alleged ineffective assistance of counsel. Whiteside complained that Nix warned him that he would have to disclose his perjurious testimony about whether Whiteside had seen a gun in his victim's hand before shooting the victim.

In an opinion by Chief Justice Burger, the Supreme Court reversed the Eighth Circuit -- agreeing with the trial court that Nix had provided effective assistance.

Chief Justice Burger's majority opinion relied on the ABA Model Code and the ABA Model Rules.

> Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. DR 4-101(C)(3) (intention of client to commit a crime); Rule 3.3 (lawyer has duty to disclose falsity of evidence even if disclosure compromises client confidences). Indeed, both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure. See Rule 3.3(a)(4); DR 7-102(B)(1).

Nix v. Whiteside, 475 U.S. 157, 168 (1986) (emphasis added).

The majority equated clients' intent to commit perjury with intent to commit other crimes.

> The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. . . . In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

Id. at 174. At first blush, this analysis makes sense, but arguably overlooks an important difference between those other crimes and the crime involving testimony.

The courts had already generally acknowledged criminal defendants' right to testify, and the year after Nix the Supreme Court officially recognized that constitutional right. There is no parallel constitutional right implicated in those other crimes. If a criminal defendant decides to exercise the constitutional right, yet intends to lie, the lawyer has a difficult if not nearly impossible dilemma.

The majority acknowledged what it called the ABA's "evolution" of an approach to clients' intent to commit perjury, ultimately rejecting the "narrative approach."

> In the evolution of the contemporary standards promulgated by the American Bar Association, an early draft reflects a compromise suggesting that, when the disclosure of intended perjury is made during the course of trial, when withdrawal of counsel would raise difficult questions of a mistrial holding, counsel had the option to let the defendant take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination. Instead, counsel would stand mute while the defendant undertook to present the false version in narrative form in his own words, unaided by any direct examination. This conduct was thought to be a signal at least to the presiding judge that the attorney considered the testimony to be false and was seeking to disassociate himself from that course. Additionally, counsel would not be permitted to discuss the known false testimony in closing arguments. See ABA Standards for Criminal Justice, Proposed Standard 4-7.7 (2d ed.1980). Most courts treating the subject rejected this approach and insisted on a more rigorous standard, see, e.g., United States v. Curtis, 742 F.2d 1070 (CA7 1984); McKissick v. United States, 379 F.2d 754 (CA5 1967); Dodd v. Florida Bar, 118 So.2d 17, 19 (Fla.1960). The Eighth Circuit in this case and the Ninth Circuit have expressed approval of the "free narrative" standards. Whiteside v. Scurr, 744 F.2d 1323, 1331 (CA8 1984); Lowery v. Cardwell, 575 F.2d 727 (CA9 1978).
>
> The Rule finally promulgated in the current Model Rules of Professional Conduct rejects any participation or passive role whatever by counsel in allowing perjury to be presented without challenge.

Id. at 170 n.6 (emphases added). One cannot help but wonder whether Justice Burger was still thinking of his reaction to Professor Freedman's lecture presented exactly twenty years earlier -- after which then D.C. Circuit Judge Burger sought to have Professor Freedman disbarred.

Justice Brennan concurred in the opinion, but criticized the majority.

> Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. . . . Lawyers, judges, bar associations, students, and others should understand that the problem has not now been "decided."

Id. at 177 (emphasis added).

Justice Blackmun's concurrence also criticized the majority's decision to address the main issue.

> How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue. But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

Id. at 177-78 (emphasis added; footnote omitted). Justice Blackmun would have not adopted a "one-size-fits-all" approach.

> Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain

> the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court.

Id. at 189-90 (emphasis added).

Presumably Chief Justice Burger would have noticed Justice Blackmun's list of citations supporting his and the other concurring Justices' opinion -- which included Professor Freedman's 1966 law review article memorializing the lecture. That lecture had prompted then-D.C. Circuit Judge Burger to seek Professor Freedman's disbarment.

ABA LEO 353 (4/20/87)

Predictably, the ABA Model Rules did not quell the debate about lawyers' duty in the face of clients' intent to provide false evidence.

Four years after adopting its ABA Model Rules, the ABA issued an extensive legal ethics opinion addressing clients' intent to provide false testimony.

In ABA LEO 353 (4/20/87), the ABA discussed both lawyers' responsibility upon (1) learning in advance that their clients intended to testify falsely, and (2) discovering that their clients had testified falsely.

In addressing the first scenario, ABA LEO 353 indicated that lawyers did not have a duty to disclose their client's intent to commit future perjury.

> However, the Committee does not believe that the mandatory disclosure requirement of this Model Rule provision is necessarily triggered when a client states an intention to testify falsely, but has not yet done so.

> Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in Nix. v. Whiteside. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner. If the client does in fact testify falsely, the lawyer's obligation to make disclosure to the court is covered by Rule 3.3(a)(2) and (4).

ABA LEO 353 (4/20/87) (emphasis added). Rather than disclose the client's intent to commit future perjury, lawyers must decline to examine the client -- at least on the topics that would trigger the perjury.

> In the unusual case, where the lawyer does know, on the basis of the client's clearly stated intention, that the client will testify falsely at trial, the lawyer is unable to effectively withdraw from the representation, the lawyer may not examine the client in the usual manner. Under these circumstances, when the client has not yet committed perjury, the Committee believes that the lawyer's conduct should be guided in a way that is consistent, as much as possible, with the confidentiality protections provided in Rule 1.6, and yet not violative of Rule 3.3. This may be accomplished by the lawyer's refraining from called the client as a witness when the lawyer knows that the only testimony the client would offer is false; or, where there is some testimony, other than the false testimony, the client can offer in the client's defense, by the lawyer's examining the client on only those matters and not on the subject which would produce the false testimony. Such conduct on the part of the lawyer would serve as a way for the lawyer to avoid assisting the fraudulent or criminal act of the client without having to disclose the client's confidences to the court.

Id. (emphases added).

ABA LEO 353 concluded that in certain limited circumstances (such as when the client insists on testifying when asked by the court about his or her intent), the lawyer may have "no other choice" but to advise the court of the client's intent to commit future perjury.

> However, if the lawyer does not offer the client's testimony, and, on inquiry by the court into whether the client has been fully advised as to the client's right to testify, the client states a desire to testify, but is being prevented by the lawyer from testifying, the lawyer may have no other choice than to disclose to the court the client's intention to testify falsely.

Id. (emphasis added).

Ironically, in the same year that the ABA issued ABA 353, the United States Supreme Court officially recognized criminal defendants' right to testify. That recognition essentially rendered unavailable the lawyer's ability not to let the client testify.

In addressing lawyers' options when clients intend to provide false testimony, the opinion rejected the "narrative" approach.

> The Committee believes that under Model Rule 3.3(a)(2) and the recent Supreme Court decision of Nix v. Whiteside, U.S., 106 S. Ct. 988, 89 L.Ed.2d 123 (1986), the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury. Despite differences on other issues in Nix v. Whiteside, the Justices were unanimous in concluding that a criminal defendant does not have the constitutional right to testify falsely. More recently, this ruling was made the basis of the holding by the Seventh Circuit in U.S. v. Henkel, 799 F.2d 369 (7th Cir. 1986) that the defendant 'had no right to lie' and, therefore, was not deprived of the right to counsel when the defense lawyer refused to present the defendant's testimony which he knew was false.

Id. (emphasis added).

In taking this position, ABA LEO 353 criticized the ABA-published standard recommending such an approach.

> This approach must be distinguished from the solution offered in the initially ABA approved Defense Function Standard 7.7 (1971). This proposal, no longer applicable, permitted a lawyer, who could not dissuade the client from

> committing perjury and who could not withdraw, to call the client solely to give the client's own statement, without being questioned by the lawyer and without the lawyer's arguing to the jury any false testimony presented by the client. This 'narrative' solution was offered as a model by the ABA and supported by a number of courts on the assumption that a defense lawyer constitutionally could not prevent the client from testifying falsely on the client's own behalf and, therefore, would not be assisting the perjury if the lawyer did not directly elicit the false testimony and did not use it in argument to the jury.

Id. (emphasis added; footnotes omitted). The opinion almost apologetically noted that the ABA House of Delegates had never approved that earlier standard.

> This particular Standard was not approved by the ABA House of Delegates during the February, 1979 meeting when the Standards were reconsidered and otherwise approved.

Id.

Thus, ABA LEO 353 continued the ABA's on-again, off-again endorsement of the "narrative approach." As the legal ethics opinion indicated, the ABA endorsed the "narrative approach" in 1979. That endorsement lasted for some time, because the Nix decision described a 1980 edition of the ABA's Standards for Criminal Justice that recognized the "narrative approach." Nix v. Whiteside, 475 U.S. 157, 170 n.6 (1986).

Finally, ABA LEO 353 warned lawyers that they probably could not remain willfully ignorant of the facts.

> The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never 'know' that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4-3.2(a) and (b) are also applicable.

ABA LEO 353 (4/20/87). At least on this one point, the ABA agreed with Professor Freedman -- who had earlier criticized criminal defense lawyers' intentional decisions not to seek such information from their clients.

The ABA rarely issues legal ethics opinions as extensive as ABA LEO 353. The opinion represented the ABA's continuing effort to assess the ethical propriety of the "narrative approach," and otherwise tried to provide lawyers guidance in a difficult situation. The opinion ultimately concluded that lawyers who know of their clients' intent to present false evidence had to carefully avoid assisting at the presentation of that evidence -- without preventing criminal defendants from exercising their constitutional right to testify.

1990s Developments

In the 1990s, the profession continued to wrestle with lawyers' appropriate response to clients' intent to present false evidence. A chronological review of that decade's opinions and case law shows bars' continued difficulty in determining what tactic would pass ethical muster.

In 1992, Arizona endorsed the narrative approach.

- Arizona LEO 92-2 (3/12/92) (analyzing a lawyer's duties upon discovering from his client's wife and then the client himself that he has given the authorities an incorrect name upon his arrest; addressing a situation as a "continuing crime"; "The rules for disclosure of a present and continuing crime, rather than a threatened future crime, are different. With the exception of certain frauds on the court listed in ER 3.3, discussed below, a lawyer may not ethically reveal the client's commission of a past crime. Where disclosure of a client's current and continuing crime would necessarily disclose the client's past crime, the rule of confidentiality applies. The Comment to ER 1.2 discusses an attorney's obligations in this situation: "'When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by ER 1.6. However,

> the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.'"; "In short, a lawyer may not reveal a client's continuing crime if such a disclosure would also reveal a past crime by the client."; "Assuming that the client's past statement to the court of a false name was a crime, and that the client intends to continue the false statement, the client's course of conduct involves a past and continuing crime which the lawyer may not reveal under either ER 1.6(b) or (c)."; concluding as follows: "[T]he committee believes that the rules applicable to client perjury in a criminal setting should apply to this fact situation. Accordingly, the inquiring lawyer should advise the client that he cannot use a false name with the court. If the client insists on using a false name, the lawyer must move to withdraw citing irreconcilable differences, but not telling the court of the client's use of a fictitious name. If the motion to withdraw is denied, then counsel must proceed but cannot rely upon or argue the client's false statement in his or her further representation of the client." (emphasis added)).

Although bars continued to reject Professor Freedman's controversial proposals and analyses, others defended his conclusions.

In 1994, St. Thomas University Law Professor Jay Silver took up Professor Freedman's approach. Jay Sterling Silver, Truth, Justice, and the American Way: The Case *Against* the Client Perjury Rules, 47 Vand. L. Rev. 339 (1994).

After discussing the frightening historical example of the British Star Chamber, Professor Silver praised the U.S. Constitution's emphasis on the adversarial process -- echoing Professor Freedman's 1966 law review article.

> Keenly aware of the specter of the Star Chamber and the historical abuses of Continental inquisitorial proceedings, the drafters of the Bill of Rights provided to criminal defendants the procedural protections of the Fifth and Sixth Amendments. These guarantees represent the constituent elements of the adversarial process, the mode of adjudication that the drafters knew firsthand, and are meaningful only within the context of the process itself. By vesting primary responsibility in opposing parties for

> developing evidence and testing credibility, the Sixth Amendment rights to effective assistance of counsel, to testify on one's own behalf, to compel the testimony of others, and to confront one's accusers -- including the derivative right of cross-examination -- define the adversarial system of criminal justice. The Sixth Amendment right to trial by jury entrusts factfinding to a defendant's peers, and the Fifth Amendment privilege against self-incrimination further limits the coercive powers of the state. Reflecting the Framers' belief in the intrinsic link between justice and the adversarial process, the Supreme Court has repeatedly acknowledged that "the Constitution recognizes an adversary system as the proper method of determining guilt."
>
> . . .
>
> The client perjury rules and their resultant denaturing of the adversarial mode of adjudication reflect, in part, the failure of leaders of the bench and bar, drafters of the codes of attorney conduct, and legal scholars to recognize two imperatives of legal ethics: that rules of legal ethics must not undermine the adversarial process prescribed by the Constitution, and that professional ethics are necessarily process-specific. Some leaders have even openly dismissed the need for the standards of professional conduct to conform to the adversarial process. In a flagrant example, the late Robert Kutak, Chair of the Commission that drafted the Model Rules of Professional Conduct and the driving force behind the Rules, unabashedly declared, "[A]s useful as the [adversarial system] may have been in an earlier day, it simply is neither accurate nor functional as an organizing principle around which to order our thinking about professional responsibility."

Id. at 405-10 (emphases added).

Professor Silver then noted the firestorm triggered by Professor Freedman's 1966 lecture.

> Ironically, one of the first American commentators to criticize the client perjury rules publicly was himself subjected to a judicial witch hunt. Addressing the Criminal Trial Institute of the District of Columbia Bar in the spring of 1966, Professor Monroe Freedman raised an objection to the client perjury rules, which while the issue is now standard fare in the

> curriculum of every law school, ignited a McCarthy-like vendetta against him. Reading a brief account of Freedman's remarks in the newspaper the next day, a group of federal judges led by former Chief Justice Warren Burger, then a member of the United States Court of Appeals of the District of Columbia, instigated disciplinary proceedings against the stunned professor for "express[ing] opinions" inconsistent with the legal profession's prevailing principles of ethical conduct.
>
> Efforts to silence Freedman intensified daily. Through private correspondence with Freedman's dean, Burger's group sought to have the young professor expelled from teaching. One of Burger's law clerk's posing as a "disinterested but incensed" member of the American Civil Liberties Union and writing on personal stationery, even sent a letter to the organization demanding that Freedman be removed as chair of its Washington D.C. affiliate. The national bar quickly closed ranks as leaders of the profession publicly assailed Freedman's character.
>
> Freedman's offense: he had suggested that fostering a criminal defendant's trust and willingness to confide in counsel is so vital to constructing an adequate defense and receiving a fair trial that, on balance, a criminal defense attorney who believes the accused will testify untruthfully is duty-bound to present the accused's testimony as if counsel believed it to be truthful.

Id. at 352-53 (emphases added; footnotes omitted).

Professor Silver agreed with Professor Freedman that allowing lawyers to put on knowingly false testimony actually advanced the search for truth.

> Permitting counsel to call a criminal defendant who she believes will testify untruthfully may, in the end, actually advance the adversarial search for truth. A defendant's confused, conflicting, fantastic, or incomplete testimony or suspicious demeanor frequently represents, in the minds of jurors, the clearest proof that the defendant's version of the case is untruthful. Even if the Rehnquist Court recently observed "[c]ross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies." In fact, over 125 years ago, the Supreme

> Court noted that "[a]llowing defendants] to testify promotes 'the detection of guilt.'"

Id. at 355 (emphasis added; footnote omitted). Professor Silver argued that Professor Freedman's approach would most benefit folks who might not be able to afford a lawyer.

> In his ground-breaking article, Monroe Freedman described the adverse effect on client trust and counsel's resultant inability to adequately represent the accused as the principal negative effects of the client perjury rules. In fact, the dynamics of the rules are more complex and the harm to the accused is broader than described by Professor Freedman. In addition to understanding an array of Fifth and Sixth Amendment rights of criminal defendants and upsetting the fragile balance of responsibilities between defense counsel, prosecutor, judge, and jury in our adversarial system, the rules are enforced primarily against poor, disproportionately minority criminal defendants in violation of the fundamental principles of equal protection.

Id. at 357-58 (footnote omitted).

Professor Silver rejected the suggestion that criminal lawyers could avoid the classic dilemma by warning their criminal clients that they would disclose the clients' intention to provide false testimony.

> Commentators have suggested that criminal defense attorneys could avoid misleading clients by including their description of the attorney-client privilege a Miranda-like warning to the effect that counsel must disclose a defendant's intention to testify untruthfully. This suggestion, however, poses two problems. First, by warning an accused that counsel might later feel compelled to disclose their discussions to the court and thus enhance the accused's chances of conviction, counsel will normally engender in the accused a distrust of counsel and a reluctance to convey any seemingly inculpatory information necessary for counsel to wage a meaningful defense. Even the drafters of the Model Rules conceded in a Discussion Draft that such a warning "may lead the client to withhold . . . relevant facts, thereby making the lawyer's representation . . . less effective."

> Second, even with the addition of Miranda-like warning, the ethical rules obliging counsel to disclose client perjury to the factfinder chill the exercise of the privilege against self-incrimination. Since, for reasons discussed previously, counsel might inaccurately conclude that the defendant intends to testify falsely or that she has already done so, the client's only means of ensuring the exercise of the privilege is to refuse to convey any facts to counsel, thus forgoing a meaningful defense.

Id. at 394-95 (emphasis added; footnotes omitted).

Professor Silver criticized the ABA Model Rules' suggestion that lawyers seek to withdraw if their criminal clients intend to testify falsely -- without explaining why.

> The Model Rules instruct counsel who petitions for withdrawal to refrain from stating to the court that the defendant intends to testify falsely, asserting instead that "professional considerations require termination." The result, however, is invariably unsatisfactory. If the trial judge does not accurately read between the lines, then she has no means of determining whether the grounds for the request are frivolous or compelling. From the perspective of the bench, the "professional consideration" could be as fundamental as counsel's prior representation of the victim, as petty as the attorney's annoyance with a minor personality trait of the defendant, or as self-serving as the desire to evade non-lucrative court appointments. If, on the other hand, the court correctly surmises the reason, as it almost certainly will, then the prohibition against disclosing the specific nature of the problem becomes a transparent charade. As the Eighth Circuit Court of Appeals has observed, defense counsel "inform[s] the court, and perhaps incidentally his adversary and the jury, of his client's possible perjury . . . when the lawyer makes a motion for withdrawal (usually for unstated reasons)."

Id. at 414-15 (emphasis added; footnotes omitted).

Professor Silver also criticized the "narrative approach."

> A traditional alternative to withdrawal and disclosure permits counsel to disassociate herself from the false testimony of the accused while ostensibly avoiding the futility of withdrawal and the harshness of disclosure. With the

> narrative method, counsel who believes that her client will perjure herself calls the defendant to the witness stand and, without guiding her testimony in the normal fashion, permits the defendant to narrate her version of the alleged crime on direct examination. In opening and closing arguments, counsel refrains from referring to the suspected falsehoods of the defendant but does not seek to withdraw from representation or expressly disclose her suspicions to the court.
>
> Assailed by the Supreme Court in Nix, by the Model Rules, by several state and federal courts, and by state codes of conduct, the "narrative" method nonetheless is authorized by the courts or the code in some jurisdictions, and is utilized to some extent in practice. This method, however, is generally understood to telegraph to the factfinder counsel's belief in the defendant's guilt and, in the words of one commentator, represents an "incoherent attempt to have it both ways on client perjury." In fact, the narrative approach represents an attempt to compromise based on the universal but invalid view of the client perjury issue as a clash between the interests of truth and crime-control on one hand and the integrity of the adversarial process on the other.
>
> If, in fact, the factfinder understands counsel's belief, then the narrative model -- designed to avert the spectacle of counsel impeaching her own client through direct disclosure in a supposedly adversarial proceeding and, thus, to prevent the total rupture of client trust -- would indirectly produce the very effect it was intended to prevent. In addition, although a client's false assertions may constitute only a small portion of her total narrative, the taint conveyed to the factfinder applies equally to the accused's entire testimony. Finally, by telegraphing her own belief in the inveracity of the accused, the defendant's lawyer arguably violates the ethical prohibitions against counsel serving as a witness and against expressing a personal opinion about the client's "credibility . . . or . . .guilt or innocence" and also contravenes the evidentiary restrictions on opinion evidence and on testimony presented without oath or affirmation or the laying of proper foundation.

Id. at 419-22 (emphases added; footnotes omitted).

Professor Silver ended up at the same place Professor Freedman had suggested in 1966 -- permitting lawyers to treat criminal clients as if they were telling the truth, even if the lawyer knows otherwise.

> In light of the pitfalls of withdrawal and disclosure, the narrative approach, and deferring to counsel's conscience, the solution for handling suspected client perjury is self-evident: if the seemingly untruthful criminal defendant chooses to testify, defense counsel should call her to the stand and conduct the defense as if counsel believed the testimony was truthful. Similarly, counsel who, at a later point in the proceeding, comes to believe that the defendant has testified falsely should continue to defend her as if counsel believed her testimony was true.

Id. at 423 (emphasis added).

In 1998, a California appellate court reviewed both the history and various options lawyers face if their clients admit their guilt to the lawyers but insist on testifying. People v. Johnson, 72 Cal. Rptr. 2d 805 (Cal. Ct. App. 1998). The court ultimately concluded that the lawyer representing a criminal defendant should have permitted him to testify using the narrative approach, but that the lawyer's lapse did not require reversal.

The opinion started with an excellent summary of its analysis.

> Defense counsel told the court he had "an ethical conflict" with Johnson about Johnson's desire to take the stand and testify. Defense counsel explained, "I cannot disclose to the court privileged communications relating to that, but I'm in a position where I am not willing to call Mr. Johnson as a witness despite his desire to testify," In response to the court's question, Johnson indicated defense counsel had accurately described the situation and defense counsel indicated he would '[n]ot voluntarily" call Johnson as a witness.

Id. at 806.

The court then acknowledged the considerable academic and judicial debate about lawyers' proper response if they know that their clients will commit perjury if allowed to testify.

> There has been much scholarly discussion of what an attorney should do when faced with a client who intends to commit perjury. Solutions range from the attorney providing full cooperation to his client in presenting the testimony to the attorney refusing to permit his client to testify. Intermediate solutions include persuading the client not to testify falsely, disclosing the perjurious intent to the court, making a motion to withdraw, or allowing the defendant to testify in a "free narrative" fashion.

Id. at 811 (emphasis added).

The court addressed several possible approaches.

First, the court noted that no court had endorsed Professor Freedman's proposal that

> [an] attorney should fully cooperate with putting on his client's testimony even when the client intends to permit perjury.

Id.

Second, the court noted that lawyers could try to persuade their clients not to commit perjury, but would obviously face that difficult issue if the client nevertheless insisted on testifying falsely. Id. at 811-12.

Third, the court noted that

> The Model Rules and Model Code provide an attorney should make a motion to withdraw from representation when the representation will result in a violation of law or rules of professional conduct.

Id. at 812. However, the court quickly added that a court might deny the motion. And even if the court granted the motion, the next lawyer would presumably face the same problem.

Fourth, the court warned that lawyers' disclosure to the court of their clients' perjury would create conflicts between the lawyer and the client, and might require a "mini-trial" on whether the client had actually perjured herself. Id. at 813.

Fifth, the court then turned to the narrative approach.

> Under the narrative approach, the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange. Instead, the attorney permits the defendant to testify in a free narrative manner. In closing arguments, the attorney does not rely on any defendant's false testimony.

Id. As explained below, the court ultimately adopted this approach.

Sixth, the court noted that lawyers could refuse to permit their clients to testify, which is "[t]he opposite extreme from Professor Freedman's solution of full cooperation by the attorney in presenting the defendant's testimony." Id. at 814-15. The court explained that this approach essentially forces the defense counsel to decide if the client would perjure himself or herself if allowed to testify. Id. at 815.

After reviewing all of these options, the court endorsed the narrative approach.

The court noted that in the early 1970s the ABA had endorsed this approach.

> In the early 1970's, the American Bar Association adopted the narrative approach in its Project on Standards for Criminal Justice, Standards Relating to the Defense Function.
>
> "Testimony by the defendant.
>
> "(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent

> investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.
>
> "(b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.
>
> "(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely on his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not receive or rely upon the false testimony in his closing argument.

Id. at 813-14.

However, the court then noted that by the early 1980s the ABA had abandoned its earlier endorsement of the narrative approach.

> This standard, adopting the free narrative approach "was not included in the 1980 second edition of the ABA Standards for Criminal Justice (hereafter ABA Standards). The editorial note to that edition explained, 'the question of what should be done in situations dealt with by the standard has been deferred until the ABA Commission on Evaluation of Professional Standards reports its final recommendations.' In the 1983 Model Rules of Professional Conduct, standard 7.7 was rejected by rule 3.3 (lawyer has duty to disclose falsity of evidence, even if disclosure compromises client confidences.)"

Id. at 814 (citation omitted). The court listed other jurisdictions that had endorsed the narrative approach, including Alaska, Idaho, Illinois, South Carolina, and West Virginia.

> We further note that not only has the narrative approach received approval in California (People v. Guzman, supra, 45 Cal. 3d 915; People v. Gadson, supra, 19 Cal. App. 4th 1700) but it has also been approved by several other jurisdictions (see Lowery v. Cardwell, supra, 575 F.2d 727, 731; Coleman v. State (Alaska 1980) 621 P.2d 869, 881; State v. Waggoner (1993) 124 Idaho 716, 721-722 [864 P.2d 162, 167-168]; People v. Taggart (1992) 233 Ill. App. 3d 530, 558-559 [174 Ill. Dec. 717, 599 N.E. 2d 501, 521]; Matter of Goodwin (1983) 279 S.C. 274, 277 [305 S.E. 2d 578, 580]; State v. Layton (1993) 189 W. Va. 470, 484-485 [432 S.E.2d 740, 754-755] [". . . the trial court appropriately weighed the conflicting interests involved and, in this Court's opinion, adopted a procedure which allowed the defendant to testify, which shielded the attorney from unethical and illegal conduct, and which advanced the societal interest in the administration of justice"]; see also Com. v. Jermyn (1993) 533 Pa. 194, 200 [620 A.2d 1128, 1131]).

Id. at 818.

The court concluded that the narrative approach best balanced all the competing interests.

> None of the approaches to a client's stated intention to commit perjury is perfect. Of the various approaches, we believe the narrative approach represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his owns words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role.
>
> In contrast, the two extremes -- fully cooperating with the defendant's testimony and refusing to present the defendant's testimony -- involve no accommodation of the conflicting interests; the first gives no consideration to the attorney's ethical obligations, the second gives none to the defendant's right to testify. The other intermediate solutions -- persuasion, withdrawal and disclosure -- often

> result in no solution, i.e., the defendant is not persuaded, the withdrawal leads to an endless chain of withdrawals and disclosure compromises client confidentiality and typically requires further action.

Id. at 817 (emphases added).

Thus, the opinion ultimately concluded that lawyers' withdrawal from the representation would largely cure the ethics dilemma. However, as Professor Freedman noted over thirty years earlier, such withdrawal would simply transfer the ethics dilemma to the replacement lawyer -- or deprive a criminal defendant of the advice a successor lawyer could provide only if the lawyer knew all of the relevant facts.

In the same year, a law review article noted California's approval of the narrative approach, as well as the continuing controversy.

> A further alternative is the 'narrative approach.' This consists of the lawyer calling the client to the stand and asking him to recite in narrative form his version of the events at issue. In closing argument, the lawyer does not advance the client's version of the facts as worthy of belief and does not recite or otherwise rely upon the false testimony. The narrative approach was adopted in the 1970s by the American Bar Association in its Project on Standards for Criminal Justice. The narrative approach has been criticized as being both tantamount to the lawyer actively participating in the commission of a fraud on the court and the same thing as telegraphing to the court and the jury that the lawyer doesn't believe the client's testimony. The narrative approach is described in Arizona Ethical Opinion No. 92-2 (March 12, 1992) while discussing the American Bar Association Defense Function Standards, but there is no clear indication whether it is considered proper under Arizona practice. However, the opinion does state that if the lawyer proceeds to present the client's testimony, no reliance or argument can be made upon the client's false statement. It should also be noted that the narrative approach has recently been approved in California and several other jurisdictions.

David D. Dodge, When Your Client Wants to Lie, 35 Az. Attorney 12, 14-15, Aug./Sept. 1998 (footnotes omitted).

A few months after the California opinion, the ABA issued another legal ethics opinion addressing this issue. Although the opinion primarily focused on a client's violation of a court order, the ABA also explained that a lawyer knowing that a client intended to commit perjury should withdraw. This meant that the lawyer had no duty to disclose the client's perjurious intent, and could avoid any disclosure duty by withdrawing before the client committed the perjury.

- ABA LEO 412 (9/9/98) ("The Committee has been asked to address a lawyer's obligations under the Model Rules of Professional Conduct when the lawyer representing a client in civil litigation discovers that her client has violated a court order prohibiting the client from transferring or disposing of assets. In addition, we are asked whether there is a disclosure obligation by a lawyer who tries without success to convince her client to make disclosure to the tribunal and then withdraws or is discharged and is replaced by new counsel." (emphasis added); also addressing the obligations of the lawyer who withdraws from a representation; "The Committee also has been asked to address whether a lawyer who withdraws or is discharged and is replaced by new counsel has any continuing disclosure obligation when the client has violated a court order prohibiting the client's disposition of assets. We assume that the lawyer who has withdrawn or been discharged knows that the client intends to make a false statement to the court or believes that her continued representation of the client would assist the client in a fraud on the court. We conclude that the lawyer may not make disclosure to successor counsel or to the court in the absence of client consent." (emphases added); "When faced with intended future perjury by a client, withdrawal is sufficient to enable the lawyer to avoid assisting criminal or fraudulent act by her client. If the lawyer is no longer represents the client, then the lawyer will not be in a position to engage in any conduct by Rule 3.3(a) that would trigger an obligation to disclose the client's intended false statement to the court or, in the alternative, to successor counsel. Specifically, on the facts under consideration, Rule 3.3(b) requires disclosure of otherwise confidential information protected by Rule 1.6 only to prevent the lawyer from knowingly making a false statement of material fact to the tribunal; failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or offering evidence the lawyer knows to be false. If the lawyer no longer is representing the client, then the lawyer will not be in

> a position to make a false statement of material fact to the court, as the lawyer will not be appearing in court for the client at all. For the same reason, the lawyer cannot be said to be assisting the client's criminal or fraudulent act or offering false evidence because the lawyer will not be performing any services for the client. Accordingly, the lawyer will be violating no duties imposed by Rule 3.3 and, therefore, has no authority to disclose information protected by Rule 1.6." (emphases added); "[W]hen a lawyer knows only of a client's intention to make a false statement in the future and the lawyer has not offered any false evidence or made any false statement to a court, the only provision of Rule 3.3(a) at issue is subparagraph (a)(2), which requires disclosure of material facts when necessary to avoid assisting a client's criminal or fraudulent act. We found in Formal Opinion 87-353 that the lawyer's withdrawal was sufficient to enable the lawyer to 'avoid assisting' the client's or fraudulent act when the client states an intention to commit that act in the future. We reach the same conclusion with respect to a lawyer's withdrawal to avoid assisting a client's continuing fraud on the court caused by disposition on assets in violation of a preservation order." (emphasis added)).

At the end of the 1990s, bars seemed to be no closer than before to a consensus about how lawyers should respond to criminal clients' announced intent to exercise their constitutional right to testify, but also intending to provide false evidence when they did so.

2000 Restatement

In 2000, the American Law Institute's Restatement analyzed the issues. Restatement (Third) of Law Governing Lawyers (2000).

A reporter's note provided some background information about earlier case law and states' adoption of the ABA Model Rules approach.

> Some earlier authority had required a lawyer to withdraw if a client threatened perjury or would not retract past perjury, but did not require the lawyer to disclose it. . . . Following the ABA's adoption of ABA Model Rule 3.4 in 1983, the majority of courts now hold that a lawyer is required to take corrective action, including disclosure if necessary.

Restatement (Third) of Law Governing Lawyers § 120 reporter's note cmt. h. (2000).

That reporter's note also described the current variation in courts' approach.

Some courts clearly required lawyers' disclosure of clients' perjury.

> Some authority requires a lawyer to correct false testimony without regard to when the lawyer comes to know of the information. E.g., Office of Disciplinary Counsel v. Heffernan, 569 N.E.2d 1027 (Ohio 1991), cert. denied, 502 U.S. 865, 112 S.Ct. 191, 116 L.Ed.2d 151 (1991) (suspension for failure to notify court of fraud where criminal-defense lawyer learned, 2 months after court hearing and end of representation, that client had misrepresented true identity to court). The preferable rule is that of ABA Model Rules of Professional Conduct, Rule 3.3(b) (1983), quoted in Reporter's Note to Comment b, supra, and is reflected in the Comment.

Id. (emphasis added).

In contrast, some courts permitted the "narrative approach."

> Some courts approved the so-called "open narrative" method of examining an accused who intends to testify falsely, with counsel not otherwise disclosing the false testimony or other evidence. . . . That solution was first suggested in ABA Standards for Criminal Justice, The Defense Function 7.7(c) (1971 ed.). See Nix v. Whiteside, supra, 475 U.S. at 170 n.6, 106 S.Ct. at 995 n.6. However, the American Bar Association's endorsement of the approach employing both open narrative and nondisclosure was abrogated by its adoption of ABA Model Rule 3.3(a)(4) in 1983. The ABA ethics committee disapproved that approach following the ABA's adoption of the ABA Model Rules. See ABA Formal Opinion 87-353 (1987). The approach continues to attract some scholarly support. See Lefstein, Client Perjury in Criminal Cases: Still in Search of an Answer, 1 Geo. J. Leg. Ethics 521 (1988). It has been incorporated into the D.C. Rules of Professional Conduct, Rule 3.3(b) (1990).

Restatement (Third) of Law Governing Lawyers § 120 reporter's note cmt. i. (2000)

(emphasis added).

Section 120 parallels the ABA Model Rules prohibition on lawyers offering knowing false testimony.

> A lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

Restatement (Third) of Law Governing Lawyers § 120(1)(c) (2000). The Restatement also includes the discretionary language found in the ABA Model Rules.

> A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

Restatement (Third) of Law Governing Lawyers § 120(3) (2000).

A comment explains why criminal defense lawyers frequently face a much more difficult dilemma than other lawyers.

> The rules stated in the Section generally govern defense counsel in criminal cases. The requirement stated in Comment g with respect to remonstrating with a client may often be relevant. However, because of the right to the effective assistance of counsel, withdrawal . . . may be inappropriate in response to threatened client perjury in a criminal case. If defense counsel withdraws, normally it will be necessary for the accused to retain another lawyer or for the court to appoint one, unless the accused proceeds without counsel. Replacement counsel also may have to deal with the same client demand to take the stand to testify falsely. A tribunal may also be concerned that controversy over false evidence may be contrived to delay the proceeding. In criminal cases many courts thus are strongly inclined not to permit withdrawal of defense counsel, particularly if trial is underway or imminent. Withdrawal may be required, however, if the accused denies defense counsel's assertion that presentation of false evidence is threatened.

Restatement (Third) of Law Governing Lawyers § 120 cmt. i (2000) (emphases added).

The comment then notes some states' recognition that lawyers may use what the Restatement calls the "open narrative" approach.

> Some courts permit an accused in such circumstances to give "open narrative" testimony, without requiring defense counsel to take affirmative remedial action as required under Subsection (2). Defense counsel asks only a general question about the events, provides no guidance through additional questions, and does not refer to the false evidence in subsequent argument to the factfinder. Counsel does not otherwise indicate to the presiding officer or opposing counsel that the testimony or other evidence is false, although such indication may be necessary to deal with a prosecutor's objection to use of the open-narrative form of testimony. From the unusual format of examination, prosecutor and presiding officer are likely to understand that the accused is offering false testimony, but an unguided jury may be unaware of or confused about its significance. That solution is not consistent with the rule stated in Subsection (2) or with the requirements of the lawyer codes in most jurisdictions.

Restatement (Third) of Law Governing Lawyers § 120 cmt. i (2000) (emphases added).

On the other hand, the reporter's note praises the combination of a "narrative approach" and ultimate disclosure of client perjury.

> Notwithstanding the Nix decision, the open narrative combined with disclosure to the judge or prosecutor remains the only method of effectuating both the right of the accused to testify and the duty of a defense lawyer not to assist in presenting known perjured testimony.

Restatement (Third) of Law Governing Lawyers § 120 reporter's note cmt. i. (2000).

The Restatement ultimately ends up in the same place as the ABA Model Rules -- requiring criminal defense lawyers to report their clients' false testimony.

> However, the defendant may still insist on giving false testimony despite defense counsel's efforts to persuade the defendant not to testify or to testify accurately . . . . The accused has the constitutional rights to take the witness stand and to offer evidence in self-defense . . . . Unlike counsel in a civil case, who can refuse to call a witness (including a client) who will offer false evidence . . . , defense counsel in a criminal case has no authority (beyond persuasion) to prevent a client-accused from taking the

> witness stand. (Defense counsel does possess that authority with respect to nonclient witnesses and must exercise it consistent with this Section . . . . If the client nonetheless insists on the right to take the stand, defense counsel must accede to the demand of the accused to testify. Thereafter defense counsel may not ask the accused any question if counsel knows that the response would be false. Counsel must also be prepared to take remedial measures, including disclosure, in the event that the accused indeed testifies falsely.

Restatement (Third) of Law Governing Lawyers § 120 cmt. i (2000) (emphases added).

Unlike the ABA Model Rules, the Restatement also provides some guidance about lawyers' appropriate steps in a non-jury case.

> In one situation, disclosure of client perjury to the tribunal may not be feasible. When a criminal case is being tried without a jury, informing the judge of perjury by an accused might be tantamount to informing the factfinder of the guilt of the accused. In such an instance, disclosure to the prosecutor might suffice as a remedial measure. The prosecutor may not refer in the judge's presence to the information provided by defense counsel under this Section.

Restatement (Third) of Law Governing Lawyers § 120 cmt. i (2000) (emphasis added).

The Restatement provides a "snapshot" as of 2000 of bars' struggle to determine what lawyers may do in the face of a criminal client's intent to lie on the stand. Although the ABA changed its position on the "narrative approach" about twenty years earlier, the Restatement notes that some states continue to approve such a tactic. And the Restatement ultimately endorses that tactic too -- "[n]ot withstanding the Nix decision." Of course, the Restatement coupled that with a requirement that lawyers remedy any client testimony they know to be false if the client fails to heed the lawyer's warning not to provide such false testimony.

2002 ABA Model Rules Changes

In 2002, the ABA fine-tuned ABA Model Rule 3.3.

The ABA maintained but renumbered the basic principle that a lawyer

> shall not knowingly . . . offer evidence that the lawyer knows to be false.

ABA Model Rule 3.3(a)(3) (formerly ABA Model Rule 3.3(a)(4)).

The ABA deleted the prohibition on "fail[ing] to disclose the material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Former ABA Model Rule 3.3(a)(2).

In its place, the ABA added a new Rule 3.3(b).

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (as of 2002) (emphasis added).

The 2002 changes also deleted the rule indicating that lawyers "may refuse to offer evidence that the lawyer reasonably believes is false (former ABA Model Rule 3.3(c)), and replaced it with a more nuanced statement that acknowledged the difference between the civil and criminal contexts.

> A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added). Of course, the exception for criminal defendants comes from the constitutional right such defendants have to testify on their own behalf.

In 2002, the ABA also added some additional comments.

> [5] Paragraph(1)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
>
> [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.
>
> [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

ABA Model Rule 3.3 cmts. [5]-[7] (as of 2002) (emphases added). These replaced four previous comments under the heading "Perjury by a Criminal Defendant."

The ABA also revised ABA Model 3.3 cmt. [14], and renumbered it as [9].

> Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

ABA Model Rule 3.3 cmt. [9] (emphasis added).

Current ABA Model Rules

The current ABA Model Rules contains a blunt prohibition.

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(a)(3).

That rule ends with a sentence confirming that lawyers may refuse to offer such evidence they reasonably believe to be false -- except in criminal cases.

> A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Id. (emphasis added).

Another rule applies to a broader range of characters, but a narrower range of conduct.

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added).

A comment identifies the occasional tension between confidentiality and disclosure duties.

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the

> client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2].

Another more specific comment reinforces the prohibition on lawyers presenting knowingly false testimony.

> Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

ABA Model Rule 3.3 cmt. [5] (emphasis added). A comment then predictably requires lawyers to seek their clients' agreement not to lie, and provides guidance to lawyers who fail in that effort.

> If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

ABA Model Rule 3.3 cmt. [6] (emphasis added).

The next comment begins to complicate the matter, noting the more subtle issues arising in the criminal context.

> The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

ABA Model Rule 3.3 cmt. [7] (emphasis added).

In a comment that surprises most civil practitioners, the ABA Model Rule confirms lawyers' ethical freedom to present evidence they reasonably believe to be false.

> The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8].

The final comment in this portion of ABA Model Rule 3.3 addresses lawyers' discretion to refuse to present evidence they reasonably believe to be false.

> Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the

> lawyer must honor the client's decision to testify. See also Comment [7].

ABA Model Rule 3.3 cmt. [9].

Post-2002 Continuing Debate: "Narrative Approach"

Introduction. The profession's continuing debate about the "narrative approach" highlights the nearly insoluble dilemma criminal defense lawyers face when their clients state their intent to testify falsely.

As explained above, the ABA originally endorsed what is called the "narrative approach," but later abandoned it. In 1986, the United States Supreme Court condemned the narrative approach. Nix v. Whiteside, 475 U.S. 157 (1986). In 2000, the Restatement praised the combination of the "narrative approach" and ultimate disclosure of client perjury.

Remarkably, courts continue to debate the "narrative approach."

In 2002, despite having repeatedly rejected the "narrative" approach as a permissible remedy, the ABA added a new comment to the ABA Model Rules acknowledging the "narrative" approach's continued viability in some states.

> The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

ABA Model Rule 3.3 cmt. [7] (emphasis added). Thus, despite the ABA's initial endorsement and later explicit rejection of the "narrative approach," its 2002 comment recognizes that states continue to allow that tactic.

State Ethics Rules. Some jurisdictions' ethics rules still explicitly endorse the "narrative" approach.

Florida. The Florida rules contain a unique provision explaining that the judge might order a criminal defense lawyer to use the "narrative approach."

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal.

Florida Rule 4-3.3(a)(4) (emphasis added).

> A lawyer may not assist the client or any witness in offering false testimony or other false evidence, nor may the lawyer permit the client or any other witness to testify falsely in the narrative form unless ordered to do so by the tribunal. If a lawyer knows that the client intends to commit perjury, the lawyer's first duty is to attempt to persuade the client to testify truthfully. If the client still insists on committing perjury, the lawyer must threaten to disclose the client's intent to commit perjury to the judge. If the threat of disclosure does not successfully persuade the client to testify truthfully, the lawyer must disclose the fact that the client intends to lie to the tribunal and, per 4-1.6, information sufficient to prevent the commission of the crime of perjury.

Florida Rule 4-3.3 cmt.

Massachusetts.

> A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or . . . offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the

> testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Massachusetts Rule 3.3(a) (emphases added).

> In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. (1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation. (2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. (3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Massachusetts Rule 3.3(e) (emphases added).

In the defense of a criminally accused, the lawyer's duty to disclose the client's intent to commit perjury or offer of perjured testimony is complicated by state and federal constitutional provisions relating to due process, right to counsel, and privileged communications between lawyer and client. Rule 3.3(e) accommodates these special constitutional concerns in a criminal case by providing specific procedures and restrictions to be followed in the rare situations in which the client states his intention to, or does, offer testimony the lawyer knows to be perjured in a criminal trial. . . . Rule 3.3(e) requires that a lawyer know that the client intends to present false testimony before the lawyer proceeds under paragraph (e). This standard requires that the lawyer, before invoking the Rule, act in good faith and have a firm basis in objective fact. Conjecture or speculation that the defendant intends to testify falsely is not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the Rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in the lawyer's mind that the defendant is equivocating and not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient. Lawyers may rely on facts made known to them, and are under no duty to conduct an independent investigation. . . . In cases to which Rule 3.3(e) applies, it is the clear duty of the lawyer first to seek to persuade the client to refrain from testifying perjuriously. That persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed. If that persuasion fails, and the lawyer has not yet accepted the case, the lawyer must not agree to the representation. If the lawyer learns of this intention after the lawyer has accepted the representation of the client, but before trial, and is unable to dissuade the client of his or her intention to commit perjury, the lawyer must seek to withdraw from the representation. The lawyer must request the required permission to withdraw from the case by making an application ex parte before a judge other than the judge who will preside at the trial. The lawyer must request that the hearing on this motion to withdraw be heard in camera, and that the record of the proceedings, except for an order granting a motion to withdraw, be impounded. . . . Once the trial has begun, the lawyer may seek to withdraw from the representation but is not required to do so if the

> lawyer reasonably believes that withdrawal would prejudice the client. If the lawyer learns of the client's intention to commit perjury during the trial, and is unable to dissuade the client from testifying falsely, the lawyer may not stand in the way of the client's absolute right to take the stand and testify. If, during a trial, the lawyer knows that his or her client, while testifying, has made a perjured statement, and the lawyer reasonably believes that any immediate action taken by the lawyer will prejudice the client, the lawyer should wait until the first appropriate moment in the trial and then attempt to persuade the client confidentially to correct the perjury. . . . In any of these circumstances, if the lawyer is unable to convince the client to correct the perjury, the lawyer must not assist the client in presenting the perjured testimony and must not argue the false testimony to a judge, or jury or appellate court as true or worthy of belief. Except as provided in this Rule, the lawyer may not reveal to the court that the client intends to perjure or has perjured himself or herself in a criminal trial.

Massachusetts Rule 3.3 cmt. [11A] - [11E] (emphases added).

Tennessee.

> A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

Tennessee Rule 3.3(b) (emphasis added).

> If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall discuss with the client the consequences of the client's failure to do so.

Tennessee Rule 3.3(e).

> If a lawyer, after discussion with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

Tennessee Rule 3.3 (f).

> When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw, as required by paragraph (f), is denied. Paragraph (c) precludes a lawyer from affirming the validity of, or otherwise using, any evidence the lawyer knows to be false, including the narrative testimony of a criminal defendant.

Tennessee Rule 3.3 cmt. [6] (emphasis added).

> If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client, but cannot assist the client in consummating the fraud or perjury by directing or indirectly using the perjured testimony or false evidence during the current or subsequent stage of the proceeding. A defense lawyer who complies with these

> rules acts professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

Tennessee Rule 3.3 cmt. [12] (emphasis added).

District of Columbia. District of Columbia Rule 3.3(b) could not be any clearer.

> When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

District of Columbia Rule 3.3(b) (emphasis added). Two comments provide additional guidance.

> Paragraph (b) allows the lawyer to permit a client who is the accused in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner. Even in a criminal case the lawyer must seek to persuade the defendant-client to refrain from perjurious testimony. There has been dispute concerning the lawyer's duty when that persuasion fails. Paragraph (b) requires the lawyer to withdraw rather than offer the client's false testimony, if this can be done without seriously harming the client.
>
> Serious harm to the client sufficient to prevent the lawyer's withdrawal entails more than the usual inconveniences that necessarily result from withdrawal, such as delay in concluding the client's case or an increase in the costs of concluding the case. The term should be construed narrowly to preclude withdrawal only where the special circumstances of the case are such that the client would be significantly prejudiced, such as by express or implied divulgence of information otherwise protected by Rule 1.6. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may

> not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available. In those rare circumstances in which withdrawal without such serious harm to the client is impossible, the lawyer may go forward with examination of the client and closing argument subject to the limitations of paragraph (b).

District of Columbia Rule 3.3 cmt. [9], [10] (emphases added).

Case Law and Legal Ethics Opinions

A chronological list of case law and legal ethics opinions issued since 2002 shows the continuing (albeit minority) position approving the "narrative approach."

- People v. DePallo, 754 N.E. 2d 751, 752, 752-53, 754, 754-55, 755(N.Y. 2001) (in an opinion by New York's highest court, finding that a lawyer had not provided ineffective assistance of counsel, after having used the "narrative approach" because he knew that his client would testify falsely, and when disclosing to the court that his client had just testified falsely; "At trial, defense counsel noted at a sidebar that he had advised defendant that he did not have to testify and should not testify, but if he did, he should do so truthfully. Defendant confirmed counsel's statements to the court but insisted on testifying. Defense counsel elicited defendant's direct testimony in narrative form. Defendant testified that he was home the entire evening of the crime, and that his contrary statements to the police were induced by promises that he could return home. During the prosecutor's cross-examination, defense counsel made numerous objections."; "After both sides rested, defense counsel addressed the court in Chambers, outside the presence of defendant and the prosecutor. Counsel stated: 'prior to the [defendant's] testimony, I informed the Court that . . . the defendant was going to take the witness stand, and that he had previously told me that he was involved in this homicide. Although I did not get into details with him, I don't know exactly what his involvement was, but he had stated to me that he was there that night, he had gotten at least that far.'"; "'Knowing that, I told the defendant I cannot participate in any kind of perjury, and you really shouldn't perjure yourself. But, he, you know, dealing with him is kind of difficult and he was insistent upon taking the stand. He never told me what he was going to say, but I knew it was not going to be the truth, at least to the extent of him denying participation.'"; "[D]efense counsel first sought to dissuade defendant from testifying falsely, and indeed from testifying at all. Defendant insisted on proceeding to give the perjured testimony and, thereafter, counsel properly notified the court." (emphasis added); "[I]n this case defense counsel did not reveal the substance of any client confidence at defendant had already

admitted at a pre-trial hearing that he had forced one of his accomplices to participate in the crime under threat of death." (emphasis added); "[D]efendant contends that his counsel should have sought to withdraw from the case. However, substitution of counsel would do little to resolve the problem and might, in fact, have facilitated any fraud defendant wished to perpetrate upon the court. We agree with Salquerro [People v. Salquerro, (433 N.Y.S.2d 711 (1980)] that withdrawal of counsel could present other unsatisfactory scenarios which ultimately could lead to introduction of the perjured testimony in any event or further delay the proceedings."; "In this case, defendant was allowed to present his testimony in narrative form to the jury. The remainder of defense counsel's representation throughout the trial was more than competent. The lawyer's actions properly balanced the duties he owed to his client and the court and criminal justice system; '[HN5] since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel.'" (emphasis added); "We also reject defendant's contention that his right to be present during a material stage of trial was violated by his absence from the ex parte communication between the court and his attorney. Although a defendant has a constitutional and statutory right to be present at all material stages of a trial, and at ancillary proceedings when he or she may have something valuable to contribute or when presence would have a substantial effect on a defendant's ability to defend against the charges.").

- Commonwealth v. Mitchell, 781 N.E.2d 1237, 1244-45, 1245,1246 (Mass. 2003) ("After both the Commonwealth and defense had rested, the defendant's trial counsel and the prosecutor approached the bench, where the defendant's trial counsel informed the judge that the defendant now wished to testify. In the absence of an objection by the prosecutor, the judge reopened the evidence to permit the defendant (and Smith, Adams's brother-in-law) to testify. The defendant's trial counsel stated that he had concerns about participating in a fraud on the court and could not reveal more without violating the attorney-client privilege, but that he wanted to put the defendant on the stand, ask him his name, and let him tell his story to the jury. The judge then took a recess to read rule 3.3 (e). When the sidebar conference resumed, the defendant's trial counsel indicated that he would remain as counsel in order not to prejudice the defendant. He also assured the judge that he had tried to dissuade the defendant from testifying falsely. The judge instructed the defendant's trial counsel to remain standing during the defendant's narrative testimony on direct and to make objections to the prosecutor's cross-examination one question at a time, as appropriate, keeping in mind that he could not assist the defendant in presenting false testimony." (emphasis added); "The defendant's trial counsel did not argue the defendant's testimony during his closing argument, but argued as summarized above. The defendant's request to make an unsworn statement to the jury was denied by the judge." (emphasis added); "The judge rejected

the defendant's proposed standard -- knowledge beyond a reasonable doubt -- concluding that 'such a standard is unworkable, as it will be all but impossible, particularly in the crucible of a trial where the evidence is often conflicting and counsel is under enormous stress, for counsel to ever know beyond a reasonable doubt that a defendant's proposed testimony is false.' The judge adopted the 'lesser but still demanding requirement that counsel have a "firm factual basis" for concluding that the defendant will commit perjury' before invoking rule 3.3 (e). The judge rejected the defendant's argument that his trial counsel was required to undertake an independent investigation of the facts before concluding that the defendant's proposed testimony would be perjurious. The judge concluded that the defendant's trial counsel had a 'firm factual basis' supporting his decision.").

- Orange County LEO 2003-01 (2003) (analyzing possible different standards for when a lawyer "knows" that a client will commit perjury in the future: adopting the "narrative" approach; "Absent an admission by the client of an intent to testify falsely, a defense attorney must protect the defendant's right to testify and assist in the presentation of the defendant's testimony. Regardless of counsel's suspicion of the client's intentions, absent an admission, the attorney must proceed as a zealous advocate."; "If an attorney concludes that the client actually intends to commit perjury, the attorney must first attempt to dissuade the client from so testifying. <u>If the client refuses to follow the attorney's advice and insists on providing perjurius testimony, the attorney may seek to withdraw from representation, but this Opinion recommends that the attorney instead proceed with a 'narrative' presentation of the testimony after providing a recommended set of advertisements and admonishments to the client. The narrative approach permits the client to testify without the involvement of the attorney; the attorney must not make use of the perjurious testimony in any way during the trial.</u>" (emphasis added); "What should a criminal defense attorney do when a client informs him of an intent to commit perjury at trial? As set forth below, this Opinion recommends that the attorney first attempt to dissuade the client from committing perjury, and if unsuccessful, then to provide the client with advisements before presenting the perjurious testimony in narrative form."; "Clearly an attorney's initial obligation is to attempt to dissuade the client from testifying falsely."; "If the client remains undeterred, the attorney's choices include cooperation with the defendant in presenting the perjured testimony, refusing to allow the defendant to testify, withdrawing from representation, reporting the planned perjury to the court, and presenting the perjury passively through the narrative form."; "California caselaw and the California Rules of Professional Conduct each sanction withdrawal from representation once the client signals his intention to proceed with perjured testimony."; "This approach does not solve the problem, however, because while it affords a possibility for the attorney to avoid eliciting perjurious testimony, it is also possible that the court will deny the motion to withdraw."; "Disclosure to the court regarding the client's

intention to testify is another disfavored option. . . . Disclosure has been criticized because it compromises the attorney's ethical duty to keep client communications confidential. . . . This solution would also cause a significant conflict of interest between the attorney and his or her client if the attorney discloses to the court that the defendant has committed perjury. . . . In addition, such a disclosure would require some additional court action such as a decision as to whether the defendant's statement is, in fact, false and a further decision whether the defendant will be permitted to testify and in what form and manner. Thus defense counsel would likely become enmeshed in a mini-trial on the perjury issue while struggling to remain a zealous advocate for the remainder of trial."; "The best accommodation between the defendant's right to testify and the attorney's right to not participate in the presentation of perjured testimony is found in the narrative approach. With the narrative approach, an attorney calls the defendant to the stand, the attorney does not engage in the usual question and answer approach, but permits the defendant to testify in a free narrative. In closing arguments, the attorney does not rely on the perjured testimony of the defendant." (emphasis added); "First suggested by the ABA in the early 1970's, see Project of Standards for Criminal Justice, Standards Relating to the Defense Function [the narrative approach was not included in the 1980 second edition of the ABA Standards for Criminal Justice], the narrative approach has been criticized on the basis that the attorney would participate in committing a fraud on the court. . . . The narrative approach has also been criticized as communicating to the jury that the defendant is committing perjury. One court has stated, '[t]his procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable.'" (footnote omitted); "Three California cases to date have recognized that the narrative approach, though imperfect, represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's right not to participate in the presentation of perjured testimony."; "Many other jurisdictions have also concluded that the narrative approach is the best option for addressing client perjury. See e.g., Wisconsin v. McDowell, 669 N.W.2d at 225; Commonwealth v. Mitchell, 781 N.E.2d 1237, 1249 (Mass. 2003); Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978); Coleman v. State, 621 P.2d 869, 881 (Alaska 1980); State v. Waggoner, 864 P.2d 162, 167-168 (Idaho 1993); People v. Taggart, 599 N.E. 2d 501, 521 (Ill. 1992); Matter of Goodwin, 305 S.E. 2d 578, 580 (S.C. 1983); State v. Layton, 432 S.E. 2d 740, 754-755 (W. Va. 1993) ['the trial court appropriately weighed the conflicting interests involved and, in this Court's opinion, adopted a procedure which allowed the defendant to testify, which shielded the attorney from unethical and illegal conduct, and which advanced the societal interest in the administration of justice']; People v. Bartee, 566 N.E. 2d 855, 858 (Ill. Ct. App. 1991); Shockley v. State, 565 A.2d 1373, 1380

(Del. 1989); Butler v. United States, 414 A.2d 844, 850 (D.C. 1980); Sanborn v. State, 474 So. 2d 309, 313 & n.3 (Fla. Dist. Ct. App. 1985)."; "Prior to proceeding with the narrative approach, the attorney should advise the client of the possible adverse consequences of so testifying, including the signal to the court and to the prosecution that the defendant is likely lying, and the risk that the jury might draw the same inference."; "In addition, the attorney should expressly advise the client that the jury might draw an adverse inference [from] the use of the narrative form of testimony.").

- State v. McDowell, 681 N.W.3d 500, 513, 513-14, 514 (Wisc. 2004) ("Accordingly, we determine that an attorney may not substitute narrative questioning for the traditional question and answer format unless counsel knows that the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully. While we recognize that the defendant's admission need not be phrased in 'magic words,' it must be unambiguous and directly made to the attorney." (emphases added))"; "On those occasions when a defendant informs counsel of the intention to testify falsely, the attorney's first duty shall be 'to attempt to dissuade the client from the unlawful course of conduct.'" (citation omitted); "In addition, we emphasize that an attorney should seriously consider moving to withdraw from the case."; "If, however, the motion to withdraw is denied and the defendant insists in committing perjury, we conclude that counsel should proceed with the narrative form, advising the defendant beforehand of what that would entail. While far from perfect, we recognize that the narrative represents the best of several imperfect options."; "Finally, we agree with the court of appeals that attorneys must also inform opposing counsel and the circuit court of the change of questioning style prior to use of the narrative. Courts, in turn, shall be required to examine both counsel and the defendant and make a record of the following: '(1) the basis for counsel's conclusion that the defendant intends to testify falsely; (2) the defendant's understanding of the right to testify, notwithstanding the intent to testify falsely; and (3) the defendant's, and counsel's, understanding of the nature and limitations of the narrative questioning that will result.'" (citation omitted)).

- Brown v. Commonwealth, 226 S.W.3d 74, 76, 78, 80, 84, 85 (Ky. 2007) (reversing a drug conviction, because defense counsel left the courtroom after unsuccessfully seeking to withdraw as the criminal defendant's lawyer and disclosing to the court that his client would testify to facts contrary to the lawyer's investigation; "The trial in this case progressed normally until the trial court took a break before the cross-examination of a witness, Officer King. The prosecutors and defense counsel approached the bench after the break, and defense counsel informed the court that after several discussions with his client, he had concluded that a conflict had arisen which he wanted to address to the court outside the presence of the prosecution. The court

allowed the ex parte discussion, during which defense counsel informed the court that the Appellant wanted to present through his testimony a theory that was not consistent with counsel's investigation of the case. Counsel told the court that his client wanted to testify, and had the right to do so, but that counsel felt his ethical limitations created a conflict with the client. He stated that he did not believe he could deliver his planned opening statement or elicit the testimony Appellant now wanted to give." (emphases added); "The trial court and defense counsel then took a break to consult the Rules of Professional Conduct, specifically Rule 3.3 and its commentary. On returning, they again conferred on the record but outside the presence of the prosecutors on possible options for proceeding. Appellant was brought to the bench, and the trial court conducted a lengthy and thorough colloquy with him, setting forth the situation and presenting options, and directing him to consult further with his attorney before making a final decision on how he was going to proceed. The court did, however, at one point tell Appellant and his counsel that, in addition to allowing Appellant to make a limited narrative statement of his own testimony and a closing argument, Appellant could choose to have counsel remain in the courtroom or to excuse counsel, who would then leave the courtroom. Defense counsel offered to cross-examine the final two prosecution witnesses and informed the court that he would then be stepping out of the courtroom. On hearing this, Appellant told the court that counsel could remain, but the court said that counsel did not want to do that. The court also asked Appellant if he wanted her to explain to the jury that he would be representing himself from that point forward, and Appellant told the court she did not have to tell the jury anything. Defense counsel indicated that he had discussed with his client that it might make things worse if he remained seated at counsel table while his client proceeded." (footnote omitted) (emphasis added); "The trial court . . . appears to have read these disclosures as implying that Appellant was set to commit perjury, as she repeatedly informed Appellant of the dangers of untruthful testimony and how it created a conflict with his attorney." (emphasis added); "After the prosecutors completed their case, they and defense counsel approached the bench and made motions. Defense counsel then shook hands with the prosecutors and left the courtroom, but remained on call nearby. The trial court determined that if there were a guilty verdict, he would return for the sentencing phase because the Appellant's testimony would no longer matter. The court then told the jury that the defendant had chosen to represent himself from that point forward." (emphases added); "Some believe that the lawyer should be entirely excused from revealing the potential perjury when the witness is her client, giving more weight to the attorney-client relationship of confidentiality than candor to the court. These theorists take the position that the ability of a client to feel safe in his confidences to his attorney is so important to adversarial jurisprudence that the lawyer should be given a pass on any ethical or criminal violation."; "Another possible resolution is that the accused be permitted to testify by narrative statement without the benefit of

his attorney's questioning and without informing the court of the specific reasons for the departure from regular examination. This solution, however, 'compromises both contending principles' (the duty of candor and duty of confidentiality) by simultaneously 'exempt[ing] the lawyer from the duty to disclose false evidence but subject[ing] the client to an implicit disclosure of information imparted to counsel.'" (citation omitted); "The third solution is that the lawyer reveal that her client is about to commit perjury, and the substance of what she believes the perjury to be, because no client has the right to assistance of counsel in committing perjury. Permitting perjured testimony undermines the fundamental purpose of finding the truth. This solution is what is generally contemplated by Kentucky's version of Rule 3.3."; "It is also appropriate for the defendant to present the contested testimony in narrative form, in his attorney's presence, and with the attorney continuing to represent him by making appropriate objections on cross-examination regarding portions of the testimony she does not believe to be perjured. In this manner, the defendant is always represented by counsel on matters for which he is entitled to be represented, not involving perjury. It is a denial of counsel to completely deprive a defendant of representation on matters not involving the alleged perjury." (emphasis added); "[T]he court did err in advising Appellant and counsel that counsel could leave the courtroom during the narrative testimony. They either chose this option together or defense counsel chose his preference -- the record does not disclose which. By completely leaving the courtroom, in the presence of the jury, counsel telegraphed a problem to the jury." (emphasis added)).

- New York State LEO 837 (3/16/10) ("Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also 'material.'"; "Disclosure of the falsity, however, is required only 'if necessary.' Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not 'necessary' under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken." (emphasis added); "In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding -- he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. See People v. Andrades, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure

himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); Benedict v. Henderson, 721 F. Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony 'without intrusion of direct questions,' because counsel thereby met his 'obligation . . . not to assist in any way presenting false evidence.')." (emphasis added); "Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b)(1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a 'reasonable remedial measure' under Rule 3.3(a).").

- State v. Chambers, 994 A.2d 1248, 1250, 1258 n.12, 1259 & n.13, 1262, 1263 & n.19 (Conn. Mar. 23, 2010) (affirming a criminal conviction and rejecting criminal defendant's "claims that the trial court deprived him of his constitutional rights to due process and a fair trial after his trial counsel had invoked rule 3.3(a)(3) of the Rules of Professional Conduct on the basis of counsel's conclusion that the defendant intended to offer false testimony. In advancing this claim, the defendant raises issues relating to the standard for determining whether counsel properly has invoked [R]ule 3.3(a)(3), the procedures required to determine whether that standard is met and the procedures to be followed at trial once that standard has been met."; explaining that "[a]lthough the narrative form of testimony as a response to this ethical dilemma initially was adopted by the American Bar Association in 1971; A.B.A., Standards for Criminal Justice (Approved Draft 1971); standard 4-7.7; the American Bar Association later rejected this approach in favor of one that allows the attorney to examine a client as to truthful testimony, and the narrative approach has been subject to other criticism. . . . Nonetheless, 'the narrative [approach] continues to be a commonly accepted method of dealing with client perjury.' . . . Of the various approaches, we believe the narrative approach represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role.'" (emphasis added); explaining that "[w]e agree with the state that our Rules of Professional Conduct require 'actual knowledge' and not a mere 'reasonable belief' by the attorney that his client intends to commit perjury. . . . We disagree with the state's implicit contention, however, that the Rules of Professional Conduct impose an actual knowledge standard also necessarily resolves the question of the nature of proof and the procedures by which a trial court determines whether that standard has been met. Indeed, how to implement the obligations imposed by [R]ule 3.3(a)(3) when the question of perjured testimony by a defendant arises presents a separate and distinct issue."; also explaining that "[c]ourts in other jurisdictions have

> set forth, and commentators have suggested, a myriad of standards for determining when an attorney 'knows' his or her client intends to testify falsely. These standards include: 'good cause to believe,' 'knowledge beyond a reasonable doubt,' 'a firm factual basis,' and 'a good faith determination' that a client intends to testify falsely."; finding that the lawyer had acted properly; "In our view, Berke [criminal defendant's lawyer] made the minimum disclosure necessary to alert the court to the problem, while declining to offer further specificity in order to maintain the defendant's confidences and to allow for his continued zealous advocacy at trial. Accordingly, we conclude that the trial court reasonably relied on his representations."; further explaining that "the defendant's failure to contest the factual representations, which gave rise to the ethical dilemma, demonstrate his obvious acquiescence to Berke's statements and supports Judge Alexander's reliance on their accuracy and veracity as they pertained to the defendant's intent to perjure himself. Under these circumstances, there was no need for trial court to delve further into the basis for that determination." (footnote omitted); "Therefore, we do not decide whether, under other circumstances, a trial court should conduct an evidentiary hearing and whether other witnesses could be called and a new attorney appointed. We note, however, that some commentators have suggested that such procedures during trial could risk interfering with the confidentiality between the defendant and his counsel.").

Thus, despite the Supreme Court's explicit condemnation of the "narrative approach," in Nix v. Whiteside, 475 U.S. 157 (1986), and the ABA's rejection of the "narrative approach," states continue to support that tactic.

2012-2013 "Virginia Lawyer" Incident. The continuing confusion about the "narrative approach's" acceptability became apparent in a 2012-2013 series of articles in the Virginia State Bar's official magazine Virginia Lawyer.

In the December 2012 edition, a Virginia practitioner predictably explained that lawyers must try to convince clients not to follow through on their intent to testify falsely.

The author then explained that if the lawyer failed in this effort, and also proved unsuccessful in a withdrawal motion,

> the attorney can still put the client on the stand and have him testify by narrative. Additionally, in this circumstance, the

> attorney should not use the client's testimony in closing argument. . . . [T]he narrative form seems to be an accepted option as long as the attorney has attempted (but failed) in persuasion and in a withdrawal motion.

Afshin Farashahi, Avoiding Perjury (or at Least Presending to): The Ethical Considerations in Determining What Witnesses to Call to the Stand in a Criminal Trial, 61 Va. Lawyer 24, 25-26 (Dec. 2012), citing Nathan M. Crystal, False Testimony By Criminal Defendants: Still Unanswered Ethical And Constitutional Questions, 5 U. Ill. L. Rev. 1529, 1548 (2003).

Two months later, the Virginia State Bar's Assistant Ethics Counsel bluntly rejected the author's conclusion.

> Afshin Farashahi, an experienced criminal law practitioner in Virginia Beach, writes that defense counsel might use the 'narrative approach' as an acceptable solution when faced with a client who insists on taking the stand and committing perjury. . . . While some criminal defense practitioners believe this approach addresses the problem, Comments 13[a] and 13[b] to Virginia Rule 3.3 criticize the narrative approach as not fulfilling the lawyer's ethical duty of candor to the court. . . . In the first situation, the lawyer must advise the client of the possible consequences of committing perjury, attempt to persuade him to change his mind, and advise the client that if he follows through with his plan, the lawyer is obligated to reveal the perjury and move to withdraw from the case. In the second situation, if the client has already testified and then later acknowledges to the lawyer that his testimony was untruthful, the lawyer should counsel the client to correct the testimony, and advise the client that if he will not correct it himself, the lawyer must do so.

Emily F. Hedrick, Use of the "Narrative Approach" When a Criminal Defendant Insists on Committing Perjury: Ethics Counsel's Perspective, 61 Va. Lawyer 14 (Feb. 2013) (emphasis added).

In the same edition of Virginia Lawyer, the December 2012 article's author contritely acknowledged his error -- but noted that many other lawyers share his misunderstanding.

> I agree with the office of ethics counsel's response that the narrative approach does not comply with Comments 13[a] and 13[b] of Rule 3.3 of Virginia State Bar Rules of Professional Conduct. I suspect that many attorneys will be surprised to hear that the narrative method is inconsistent with their ethical duties when dealing with client perjury. (In fact, in one criminal law seminar last year, the attorneys were advised that this device would meet their ethical obligations in this situation.).

Afshin Farashahi, A Reply to Ethics Counsel's Response, 61 Va. Lawyer 15 (Feb. 2013) (emphases added).

After again acknowledging his error, the author defended the propriety of the "narrative" approach. However, in doing so he implicitly reaffirmed Professor Freedman's and several courts' basis for condemning the narrative approach -- because it essentially signals to the jury that the criminal defendant is lying.

> While I agree with ethics counsel's correction of my article on this point, I do want to make several observations in support of the narrative approach. . . . [T]he narrative method accomplishes exactly what Rules 3.3 and 1.6 tell counsel to do -- advise the tribunal that the client has committed perjury. A defense counsel accomplishes this when she makes a failed motion to withdraw, presents the client's testimony in narrative form, and does not mention the client's testimony in closing argument. The judge will get it.

Id. (emphases added).

To make matters more confusing, the author relied in part on what he described as comments to the "current" version of ABA Model Rule 3.3

> The newer version of Rule 3.3 of the Model Rules is accompanied by comments that 'no longer explicitly reject

> the narrative solution and now recognize that the narrative solution has been accepted by some jurisdictions.'

Id., quoting Nathan M. Crystal, False Testimony By Criminal Defendants: Still Unanswered Ethical And Constitutional Questions, 5 U. Ill. L. Rev. 1529, 1547 (2003) and Model Rules 3.3 cmt. [7] [2002]. However, Virginia has explicitly declined to adopt ABA Model Rules cmt. [7].

The 2012-2013 debate highlighted the continuing disagreement about the "narrative" approach.

2008: Professor Freedman Revisits His 1966 Lecture

In an article he published just over 40 years after his original lecture and law review article that triggered the debate, Professor Freedman again described the criticism he faced at that time.

Professor Freedman summarized his famous 1966 lecture's central thesis.

> With regard to client perjury, I noted that there are three ways to resolve the lawyer's problem. One possible resolution that I discussed is to caution the client against giving the lawyer incriminating information that might create ethical problems -- what has since been called the "lawyer-client Miranda warning." This is the model of "intentional ignorance," which has been expressly condemned by the ABA; that is "[d]efense counsel should not . . . intimate to the client in any way that the client should not be candid in revealing facts . . . ." Another solution I discussed is to promise the client confidentiality, but to break that promise if the client later proposes to give false testimony in his defense. The third solution, which I have favored, is to make good faith efforts to dissuade the client from committing the perjury, but, if the lawyer is unsuccessful in those efforts, to present the client's false testimony to the court in the ordinary way.

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133, 135-36 (2008) (emphasis added). Professor Freedman repeated his conclusion.

Professor Freedman concluded his 2008 article with the argument that requiring criminal defense lawyers to report their clients' intended perjury would violate the Fifth and Sixth Amendments -- especially in the case of indigent criminal defendants relying on court-appointed lawyers.

> [T]here remains a critical policy issue under Model Rule 3.3, because there are still some cases in which lawyers conclude that their clients are lying and then betray their clients' confidences. Unfortunately, those lawyers are almost always court-appointed attorneys representing indigent criminal defendants, most of whom are members of minority groups. This has produced a race- and class-based double standard, resulting in a de facto denial of equal protection of the laws.
>
> It is therefore important to consider the point that Model Rule 3.3 violates the Fifth and Sixth Amendments to the Constitution. This is an issue that no court has yet ruled upon. However, analogous authorities strongly support the conclusion that a lawyer violates the Constitution by deliberately eliciting unwarned admissions from a client and then revealing those admissions to a court.

Id. at 148-49 & 162 (footnote omitted).

Conclusion

The profession in general and the ABA in particular have struggled for decades with defining lawyers' duties if their clients intend to provide testimony that the lawyers know to be false.

Professor Freedman's 1966 lecture raised issues that the profession has still not resolved. Even today, some states allow the "narrative approach" that the ABA and other states condemn as unethical.

Because this issue most frequently arises in high-stakes criminal cases, one would think that the ABA (and the profession) would have reached a consensus about how lawyers must proceed. But that has not happened yet, there is no sign that it ever will.

Best Answer

The best answer to this hypothetical is **(B) PUT HIM ON THE STAND TO TESTIFY, BUT ADVISE THE COURT IF HE CARRIES THROUGH ON HIS THREAT TO LIE (PROBABLY)**.

B 12/15

Lawyers' Decision to Remain Willfully Ignorant of Their Clients' Guilt or Innocence

Hypothetical 2

Having dealt with several agonizing dilemmas in representing previous criminal clients, you want to avoid any uncertainty in representing your current client in defending against an armed robbery charge. During your first meeting with the client, he asks "Do you want me to tell you whether I did it or not?"

Should you tell your client that you want to know whether he committed the armed robbery?

(B) NO (PROBABLY)

Analysis

Many criminal defense lawyers explain that they do not want to know whether their clients committed the criminal acts of which they are accused -- because it hampers their ability to present testimony, and might require those lawyers to report their client's false testimony.

As long ago as 1966, Professor Monroe Freedman criticized some criminal lawyers' tactic of remaining willfully ignorant of their clients' innocence or guilt.

> It is also argued that a defense attorney can remain selectively ignorant. He can insist in his first interview with his client that, if his client is guilty, he simply does not want to know. It is inconceivable, however, that an attorney could give adequate counsel under such circumstances. How is the client to know, for example, precisely which relevant circumstances his lawyer does not want to be told? The lawyer might ask whether his client has a prior record. The client assuming that this is the kind of knowledge that might present ethical problems for his lawyer, might respond that he has no record. The lawyer would then put the defendant on the stand and, on cross-examination, be appalled to learn that his client has two prior convictions for offenses identical to that for which he is being tried.

> . . .
>
> If one recognizes that professional responsibility requires that an advocate have full knowledge of every pertinent fact, it follows that he must seek the truth from his client, not shun it. This means that he will have to dig and pry and cajole, and, even then, he will not be successful unless he can convince the client that full and confidential disclosure to his lawyer will never result in prejudice to the client by any word or action of the lawyer.

Monroe H. Freedman, Symposium on Prof'l Ethics – Prof'l Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469. 1472-73 (1966) (emphases added; footnote omitted).

In 1987, an ABA legal ethics opinion reached the same conclusion -- explaining that lawyers deliberately avoiding knowledge of their clients' actions may be violating their duty of diligence.

> The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never 'know' that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4-3.2(a) and (b) are also applicable.

ABA LEO 353 (4/20/87) (emphasis added).

Best Answer

The best answer to this hypothetical is **(B) PROBABLY NO**.

B 12/15

Level of Knowledge Required to Report Clients' False Testimony

Hypothetical 3

You are defending a client accused of a burglary in Charlotte. She had always been hesitant to give you what seems like a "straight story" about where she was when the burglary occurred. This morning, she told you that she intended to testify that she was in Dallas when the burglary occurred -- but cannot point to any alibi witnesses, or any paperwork that shows she was in Dallas. You know from other witnesses that your client was in Charlotte the morning and the evening of the day the burglary occurred. Your check of airline schedules does not explain how she could have been in Charlotte early and late that day, but in Dallas when the burglary occurred. You wonder what level of knowledge triggers your duties to avoid putting on false testimony.

What level of knowledge triggers the lawyers' ethics duties that arise if a client intends to testify falsely?

(A) Suspicion.

(B) Reasonable certainty.

(C) Actual knowledge from clients' explicitly stated intent.

(C) ACTUAL KNOWLEDGE FROM CLIENTS' EXPLICITLY STATED INTENT (PROBABLY)

Analysis

For obvious reasons, the level of lawyers' knowledge plays a central role in guiding lawyers' ethics decisions.

Determining the level of lawyers' knowledge that their client will commit perjury is key in such central determinations as whether the lawyer must seek to withdraw from a representation; whether the lawyer must report the client's intent to present false evidence; whether the lawyer must refuse to present evidence; whether the lawyer has discretion to present evidence, or refuse to present evidence; whether the lawyer must

report evidence the client has presented; and whether a criminal defense lawyer has provided ineffective assistance of counsel by declining to present clients' testimony.

Ethics Rules

Early ethics rules did not carefully define the state of mind triggering lawyers' responsibilities. Even as the ethics rules began to articulate standards, the decades-long uncertainty about lawyers' response to clients' past or (especially) future perjury necessarily involved lawyers' state of mind. As it turns out, setting the appropriate knowledge standard for lawyers' responsibilities in this scenario may have played the key role in essentially cutting the Gordian Knot involving lawyers' obligation when their clients intend to commit perjury.

ABA Canons. The 1908 ABA Canons contained a broad exception to lawyers' general confidentiality rule that applied when clients intended to commit future crimes.

Canon 37 explained exactly what level of knowledge triggered the canon's effect.

> The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

ABA Canons of Prof'l Ethics, Canon 37, amended Sept. 30, 1937 (emphasis added). Thus, Canon 37 articulated a clear "red line" that triggered lawyers' responsibilities in the case of clients' intent to commit a future crime -- presumably including perjury.

Ironically, as explained below, many courts and bars returned to this simple but easily understood standard after the ABA's decades-long effort to articulate more nuanced standards.

1969 ABA Model Code. The 1969 ABA Model Code focused on both lawyers' presentation of false evidence and clients' intent to provide false testimony.

The 1969 ABA Code of Professional Responsibility contained forward-looking prohibitions on lawyers' presentation of false evidence.

> In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence[;] [k]nowingly make a false statement of law or fact[;] [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false[;] [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent[; or] [k]nowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

ABA Model Code of Prof'l Responsibility, DR 7-102(A)(4)-(8) (emphasis added; footnote omitted). An Ethical Consideration provided some guidance.

> 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.

ABA Model Code of Prof'l Responsibility, EC 7-26 (emphasis added; footnotes omitted).

Thus, lawyers' responsibilities when gauging their own actions generally focus on the lawyers' knowledge. The phrase "it is obvious" differs a bit from that standard, but the ABA seems not to have dealt with that slight variation.

The ABA Model Code provision dealing with clients' actions paralleled the 1908 ABA Canon, but introduced some uncertainty.

> A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.

ABA Model Code of Professional Responsibility, DR 4-101(C)(3) (emphasis added; footnote omitted). Thus, the 1969 ABA Model Code deleted the word "announced," which had appeared in the ABA Canons. Lawyers had to somehow gauge their clients' intention, rather than waiting for clients to announce their intentions to commit a crime such as perjury.

In addressing clients' possible past perjury, the 1969 ABA Code introduced a phrase that apparently had no meaning in the law as of that point.

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

Id. DR 7-102(B)(1) (emphasis added). This standard for clients' past perjury created its own problems, and the ABA dropped that standard in the 1983 ABA Model Rules.

The ABA dealt several times between the 1969 ABA Model Code and the 1983 ABA Model Rules with the level of lawyers' knowledge sufficient to trigger the ethics rules' duties.

In 1975, the ABA addressed a hypothetical in which a client "obviously" intended to commit perjury -- which the ABA explained would require the lawyers' withdrawal.

- ABA Informal LEO 1318 (1/13/75) (holding that a lawyer did not have a duty to disclose a client's past perjury in another court, but would have to withdraw if the client intended to commit perjury again; "It is the opinion of this Committee that since your client obviously proposes to commit perjury and by so doing will perpetrate a fraud upon the court before which he testifies, you will have to withdraw from the case if he persists in that position." (emphasis added)).

A few months later, the ABA dealt with a similar scenario, but posited in one section of the opinion that the lawyer "knows in advance" of the client's intention.

- ABA LEO 1314 (3/25/75) (addressing a criminal defendant's lawyer's duty if the client "insists upon taking the stand and giving perjured testimony"; concluding that a lawyer whose client threatens to commit perjury (1) must report perjury to the court if the client carries through on his threat despite the lawyer's efforts to dissuade him from doing so; but (2) "may withdraw" from the representation without disclosing the perjury if the lawyer does not know in advance that the client will commit perjury but discovers afterwards that the client has done so; "[I]f the attorney knows in advance that his client intends to use false or perjured testimony, it is his duty to advise the client that the lawyer must take one of two courses of action: (1) Withdraw at that time in advance of the submission of the perjured testimony or false evidence; or (2) Report to the court or tribunal the falsity of the testimony or evidence, if the client insists on so testifying." (emphasis added); contrasting that duty with the duty of a lawyer who does not know in advance that the client will testify falsely; also inexplicably concluding that a lawyer who does not know in advance that the client will perjure himself but who learns later that the client has perjured himself must call upon the client "to rectify the fraud," but "may" withdraw "if the client refuses or is unable to do so"; "If the attorney does not know in advance that the client intends to use perjured testimony or false evidence, but finds in the course of the trial of the case that the client has done this, either by his own admissions or by the obviously false nature of the testimony or evidence, then the lawyer, pursuant to the provisions DR 7-102(B), has the primary duty to protect the confidentiality of any privileged communication from his client. Subject, however, to affording the client proper protection on the basis of any privileged communication, the lawyer does have the obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client. . . . In other words, the confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal.").

1983 ABA Model Rules. As the profession debated what eventually became the 1983 ABA Model Rules, the American Trial Lawyers' Proposed Code also used the "knows" standard -- but took the position that even a lawyer knowing that a client will commit perjury may present the client's testimony without disclosing the perjury before or after the testimony.

> A lawyer learns from a client during the trial of a civil or criminal case that the client intends to give testimony that the lawyer knows to be false. The lawyer reasonably

> believes that a request for leave to withdraw would be denied and/or would be understood by the judge and by opposing counsel as an indication that the testimony is false. The lawyer does not seek leave to withdraw, presents the client's testimony in the ordinary manner, and refers to it in summation as evidence in the case. The lawyer has not committed a disciplinary violation.

Am. Trial Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Ch. 1 Illustrative Cases, at 1(j), Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphases added). Because the Proposed Code freely allowed lawyers to present knowingly perjured testimony, the lawyers' level of knowledge did not matter much.

The 1983 ABA Model Rules abandoned the ABA Canons' easily-discerned standard (the clients' explicit intent to commit a criminal act) and the ABA Model Code's less carefully-defined standard (the clients' intention). Instead, the ABA repeatedly defined the lawyers' knowledge as the triggering mental state.

The 1983 version of the ABA Model Rules contained four possibly pertinent provisions.

First, an ABA Model Rules' provision prohibited lawyers from advising their clients to engage in future crimes or frauds.

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d) (as of 1983) (emphasis added). A comment provided guidance.

> A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a

> client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

ABA Model Rule 1.2 cmt. (unnumbered in the 1983 version).

Second,

> [a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal.

ABA Model Rule 3.3(a)(1) (as of 1983).

The Model Code Comparison compared this provision to the old ABA Model Code.

> Paragraph (a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not "knowingly make a false statement of law or fact."

ABA Model Rule 3.3, Model Code Comparison (1983).

This provision could theoretically have prevented a lawyer from repeating in an argument or a closing statement some "material fact" a client had earlier presented from the stand -- and which the lawyer knew to be false. However, the discussion about this provision generally dealt with lawyers' statement about some "material fact" from their own knowledge, rather than repeating what some witness had said.

Third,

> [a] lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

ABA Model Rule 3.3(a)(2) (as of 1983).

The Model Code Comparison compared this provision to the old ABA Model Code.

> Paragraph (1a)(2) is implicit in DR 7-102(A)(3), which provided that "a lawyer shall not . . . knowingly fail to disclose that which he is required by law to reveal."

ABA Model Rule 3.3, Model Code Comparison (1983).

A client's knowingly false statement under oath presumably counted as a "criminal or fraudulent act by the client," so this provision presumably would have required the lawyer to speak up if the lawyer's silence could be seen as "assisting" the client's wrongful conduct.

Fourth,

> [a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.

ABA Model Rule 3.3(a)(4) (as of 1983). The Model Code Comparison compared this provision to the old ABA Model Code.

> With regard to paragraph(a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not 'knowingly use' perjured testimony or false evidence.

ABA Model Rule 3.3, Model Code Comparison (1983).

The ABA Model Rules also defined the triggering level of knowledge as "actual knowledge."

The ABA Model Rules define that term as follows:

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f).

The ABA Model Rules also defined a lesser degree of certainty that triggered another principle -- allowing lawyers to forgo presenting evidence without falling short of their duty of diligence.

> [A] lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

ABA Model Rule 3.3(c) (as of 1983). A comment provided some guidance.

> Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

ABA Model Rule 3.3 cmt. (as of 1983).

Although this provision did not explicitly state the corollary, the 1983 ABA Model Rule's Model Code Comparison thought that it did.

> Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer 'reasonably believes' is false. This gives the lawyer more latitude that DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer 'knows' is false.

ABA Model Rule 3.3 Model Code Comparison (1983).

The first sentence makes sense, although later-adopted ABA Model Rule comments explicitly stated as much. However, the second sentence does not make much sense. Allowing lawyers to present evidence that they "reasonably believe" is false does not give them more latitude than a prohibition on presenting evidence that they "know" is false. There is an enormous difference between "reasonably believing"

evidence is false and "knowing" evidence is false. The ABA Model Code permitted, and the ABA Model Rules permit, lawyers to present the former -- but not the latter.

As the ABA and the courts wrestled with lawyers' responsibility, they relied on the "actual knowledge" standard, but without defining what triggered such knowledge. This resulted in the spectrum of standards discussed below.

Restatement. The 2000 Restatement essentially mimics the 1983 ABA Model Rules approach.

Section 120 parallels the ABA Model Rules prohibition on lawyers offering knowing false testimony.

> A lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

Restatement (Third) of Law Governing Lawyers § 120(1)(c) (2000).

The Restatement also includes the discretionary language found in the ABA Model Rules.

> A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

Restatement (Third) of Law Governing Lawyers § 120(3) (2000).

The Restatement essentially follows the ABA Model Rules definition of "know," but then adds layers of uncertainty.

> A lawyer's obligations under Subsection (2) depend on what the lawyer knows . . . . A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document . . . . A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when

> facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphasis added).

Thus, the Restatement articulates an "actual knowledge" standard, but then adds other standards -- discussing willful ignorance, articulating a "firm factual basis" standard and saluting "client's own statements" as an example of what could create such a "firm factual basis."

In 2008, Professor Monroe Freedman described the Restatement's complex formulation.

> The Restatement takes its definition of "knowing" from the Model Rules. Using the phrases "actual knowledge" and "firm factual basis," the Restatement limits "firm factual basis" to facts actually "known to the lawyer" through personal observation and statements by the client that the testimony or other evidence is false. Both the Model Rules and the Restatement say also that "knowledge may be inferred from circumstances." However, that inference can be drawn only if the lawyer ignores what is "plainly apparent" and engages in "conscious ignorance." Moreover, despite the reference to "conscious ignorance," the lawyer may avoid "knowing" information that could be discovered through reasonably inquiry.

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133, 142-43 (2008) (footnotes omitted).

Case Law and Legal Ethics Opinions

Although perhaps the ABA thought that it was providing a useful level of knowledge standard on which lawyers could rely, courts and bars (and therefore practicing lawyers) obviously have disagreed over the years.

Courts and bars have often gone their own way, articulating their own standard. The possible spectrum ranges from mere suspicion to unmistakable explicit client intent to commit perjury. Courts and bars have articulated various standards reaching almost all the way across this spectrum.

The 2000 Restatement recognized these variations in its reporter's note.

> The statement of "knowing" use of false evidence is taken from ABA Model Rules of Professional Conduct, Rule 3.3(a) (1983) . . . . Some decisions may go beyond the Section and Comment and suggest a negligence standard for judging a lawyer's state of knowledge, at least for disciplinary purposes, although they can also be understood as articulating a version of the conscious-avoidance doctrine. . . . Several federal courts of appeals have adopted the "firm factual basis" standard referred to in the Comment in the context of defendant perjury in criminal cases. . . . Several courts and commentators have urged an apparently more stringent "beyond a reasonable doubt" standard of knowledge in criminal-defense representations. . . . It is unclear from the authorities whether "firm factual basis" refers to the standard stated in Comment c or to a more stringent standard, such as that suggested by the evidentiary burden of "clear and convincing evidence." The objective of the ABA Model Rules standard is to describe the state of mind of an individual actor (the lawyer) rather than delineating an instruction to a jury. Thus, the Comment in effect takes the position that the unitary standard of "knowledge" should apply in both criminal and noncriminal representations.

The Restatement (Third) of Law Governing Lawyers § 120 reporter's note cmt. c (2000) (emphases added).

Three years later, an Orange County legal ethics opinion noted the same thing.

- Orange County LEO 2003-01 (2003) (analyzing possible different standards for when a lawyer "knows" that a client will commit perjury in the future, adopting the "narrative" approach; "The applicable evidentiary standard to trigger the attorney's duty is a matter of first impression in California. In order to preserve the balance between zealous advocacy and the need for

practical and clear guidance, this Opinion proposes the standard of actual knowledge. That is, the attorney must be informed by the client that the client is going to commit perjury. If the attorney merely has an articulable or reasonable suspicion that the intended testimony is perjurious, or even believes that such is likely (i.e., has probable cause or even clear and convincing evidence), but does not actually know that the client will commit perjury, then the attorney should aid the defendant in a fully professional examination and potential rehabilitation after cross-examination. In brief; the attorney is to maintain the role of a zealous advocate."; "What is a criminal defense attorney to do when a client indicates that he or she will commit perjury? Although an attorney clearly must not participate in the presentation of perjured testimony, at what point is perjury so certain that an attorney must act in a way that is inconsistent with the most zealous advocacy? And once perjury appears certain, what choices permit the most effective representation without attorney sponsorship or participation in the client's perjured testimony?"; "Although an attorney clearly must not participate in the presentation of perjured testimony, on what basis can an attorney conclude that a defendant is going to testify falsely? No controlling precedent provides guidance on this critical issue. Commentators and courts in other jurisdictions have set forth a variety of standards for determining when an attorney 'knows' the client intends to testify falsely, including 'good cause to believe' a client intends to testify falsely, State v. Hischke, 639 N.W.2d 6, 10 (Iowa 2002); 'compelling support' for concluding that the client will perjure himself, Sanborn v. State, 474 So.2d 309, 313 n.2 (Fla. Dist. Ct. App. 1985); 'knowledge beyond a reasonable doubt,' Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989); 'a firm factual basis,' United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977); 'a good faith determination,' People v. Bartee, 566 N.E.2d 855, 857 (Ill Ct. App. 1991), and 'actual knowledge,' United States v. Del Carpio-Cotrina, 733 F.Supp. 95, 99 (S.D. Fla. 1990). See generally, Commonwealth v. Mitchell, 781 N.E.2d 1237, 1246-47 (Mass.) (surveying the range of standards), cert. denied, 123 S. Ct. 2253 (2003)."; "This Opinion adopts the most stringent standard: 'before defense attorneys can refuse to assist a client in testifying, they must know that the client will testify falsely based on the client's affirmative statement of intent to lie.' Wisconsin v. McDowell, 669 N.W. 2d 204, 223 (Wis. Ct. App. 2003). A lesser standard fails to provide bright-line guidance, or else imposes the ill-fitting duty of investigator upon the defense attorney: 'Except in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts' pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.' Nix, 475 U.S. at 189 [Nix v. Whiteside, 475 U.S. 157 (1980)] (citation and footnote omitted). As explained recently by a Wisconsin appellate court: 'With a lessor standard, on what would counsel case a 'reasonable belief'? How, really, would counsel 'know,' absent an admission from defendant? . . . . [F]ar more realistic for counsel to maintain

> the unique humility of 'not knowing,' absent an admission by the client.' Wisconsin v. McDowell, 669 N.W. at 223." (emphasis added)).

The uncertainty has continued. In 2004, an Illinois appellate court gave a snapshot of courts' continuing variations as of that time.

> [W]e note that no other jurisdiction has adopted Illinois' good-faith-determination standard. Instead, our research has revealed that standards adopted by other jurisdictions include the following: (1) actual knowledge, meaning that the defendant has made an 'unambiguous' statement directly to the attorney regarding the intent to commit perjury (State v. McDowell, 2004 WI 70 P43, 272 Wis. 2d 488, 681 N.W.2d 500, 513; (2) a 'firm factual basis' for believing that the defendant will testify falsely (Long, 857 F.2d at 446 [United States v. Long, 857 F.2d 436 (8th Cir. 1988)]; see also Commonwealth v. Mitchell, 438 Mass. 535, 551-52, 781 N.E.2d 1237, 1250-51 (2003); State v. James, 48 Wn. App. 353, 367, 739 P.2d 1161, 1169 (1987)); (3) 'compelling support' for the attorney's conclusion regarding what is true and what is not true (Sanborn v. State, 474 So. 2d 309, 313 n.2 (Fla. App. 1985)); (4) 'good cause to believe the defendant's proposed testimony would be deliberately untruthful' (State v. Hischke, 639 N.W.2d 6, 10 (Iowa 2002)); and (5) knowledge beyond a reasonable doubt that the defendant has committed, or is going to commit, perjury (Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989)). Many of the decisions cited above provide insightful analysis on this issue.

People v. Calhoun, 815 N.E.2d 492, 502 (Ill. App. Ct. 2004).

In 2010, the Connecticut Supreme Court described the continuing "myriad of standards."

> Courts in other jurisdictions have set forth, and commentators have suggested, a myriad of standards for determining when an attorney 'knows' his or her client intends to testify falsely. These standards include: 'good cause to believe,' 'knowledge beyond a reasonable doubt,' 'a firm factual basis,' and 'a good faith determination' that a client intends to testify falsely.

State v. Chambers, 994 A.2d 1248, 1259 n.13 (Conn. 2010) (emphasis added; citations omitted).[1]

This remarkable variation of states' definition of the key knowledge requirement renders even more confusing an inherently complex basic issue -- what lawyers must or may do when their clients intend to commit perjury.

As explained above, courts' analyses reflect a spectrum of knowledge.

First, some courts merely require a "good faith determination" that the client intends to commit perjury.

In People v. Calhoun, 815 N.E.2d 492 (Ill. App. Ct. 2004), a convicted burglar sought a new trial, claiming that his lawyer provided ineffective assistance of counsel by refusing to allow his client to present testimony that the lawyer thought was false -- because it conflicted with other witnesses' recollections. The appellate court ultimately agreed with the defendant, and granted a new trial. The court quoted the lawyer's explanation of what he had told his client:

> "I may have told him that he may have a better chance at telling the jury anything and everything that he wanted to, but it would be a narrative, it wouldn't be a question and answer period from me, it would be me getting up and asking him to give his own version, but we needed the court's consent to do that. And if we did that and that was allowed, it was my opinion to him that the jury would sense that something

[1] State v. Chambers, 994 A.2d 1248, 1250, 1259 n.13 (Conn. 2010) (affirming a criminal conviction and rejecting criminal defendant's "claims that the trial court deprived him of his constitutional rights to due process and a fair trial after his trial counsel had invoked rule 3.3(a)(3) of the Rules of Professional Conduct on the basis of counsel's conclusion that the defendant intended to offer false testimony. In advancing this claim, the defendant raises issues relating to the standard for determining whether counsel properly has invoked [R]ule 3.3(a)(3), the procedures required to determine whether that standard is met and the procedures to be followed at trial once that standard has been met." (footnote omitted); noting that "[c]ourts in other jurisdictions have set forth, and commentators have suggested, a myriad of standards for determining when an attorney 'knows' his or her client intends to testify falsely. These standards include: 'good cause to believe,' 'knowledge beyond a reasonable doubt,' 'a firm factual basis,' and 'a good faith determination' that a client intends to testify falsely." (citations omitted)).

> funny was going on and they might not like it and they would more so scrutinize his testimony."

Id. at 495.

The court emphasized that the lawyer's decision to discourage his client's testimony was not based on the client's changing story -- but rather on his inconsistency with other witnesses.

> Prizy [lawyer] acknowledged that his sense that defendant would be committing perjury was based on the conflict between what defendant said and what the other witnesses said. Defendant never told Prizy that his version was a lie, nor does the record indicate that defendant deviated in what he wanted to tell the jury from what he had been telling Prizy.

Id. at 496 (emphasis added).

The court acknowledged that the Nix case did not deal with this scenario, but that other courts had done so.

> Whiteside [Nix v. Whiteside, 475 U.S. 157 (1986)] thus did not address what, if anything, short of a defendant's announced intention to commit perjury, constitutes a sufficient basis upon which defense counsel can conclude that his client intends to commit perjury and take those steps the Court deemed appropriate. This is essentially the question now before us -- that is, was the information known to Prizy sufficient to show that defendant's testimony would be perjurious so as to justify Prizy's act of persuading defendant not to testify by threatening to withdraw his assistance? Although the United States Supreme Court has not addressed this question, Illinois and other state and federal courts have.

Id. at 498 (emphasis added).

The court adopted what amounted to a middle-ground approach, finding that a criminal defense lawyer had discretion to refuse his client's desire to testify even without the client's stated intent to present false testimony.

> Although our supreme court has held that defense counsel has 'broad discretion' in determining when a client will commit perjury, such discretion is not unlimited. A good-faith determination that a client will commit perjury cannot be based merely on defense counsel's assessment of the evidence. The simple fact that the testimony of other witnesses will contradict the defendant's version of events cannot serve as the basis for defense counsel's conclusion that his client will commit perjury. To conclude otherwise would effectively be to give defense counsel unlimited discretion to reach such a conclusion, given that such testimonial conflicts arise in most, if not all, criminal cases. Such conflicts are for the jury to resolve. Moreover, defense counsel's responsibility to zealously represent his client does not dissipate simply because counsel does not believe his client's story or the weight of the evidence lies in the State's favor. We thus hold that defense counsel's good-faith determination that his client will commit perjury must rest on some articulable basis, apart from counsel's assessment of the evidence.

Id. at 500 (emphases added).

However, just a few pages later, the court labeled as "persuasive" the Fourth Circuit's conclusion in United States v. Midgett, 342 F.3rd 221, 326 (4th Cir. 2003), which the Illinois court quoted.

> "In this situation, [the defendant] never indicated to his attorney that his testimony would be perjurious. Thus, his lawyer had a duty to assist [him] in putting his testimony before the jury, which would necessarily include his help in [the defendant's] direct examination."

Id. at 501 (quoting United States v. Midgett, 342 F.3d 321, 326 (4th Cir. 2003)) (emphasis added). Thus, the court's effort to adopt a definable "good-faith determination" standard left remaining uncertainty.

Second, some courts have picked up on the "firm factual basis" standard, which the Restatement articulates.

- Commonwealth v. Mitchell, 781 N.E.2d 1237, 1244-45, 1245, 1246 (Mass. 2003) ("After both the Commonwealth and defense had rested, the defendant's trial counsel and the prosecutor approached the bench, where the defendant's trial counsel informed the judge that the defendant now wished to testify. In the absence of an objection by the prosecutor, the judge reopened the evidence to permit the defendant (and Smith, [defendant's] brother-in-law) to testify. The defendant's trial counsel stated that he had concerns about participating in a fraud on the court and could not reveal more without violating the attorney-client privilege, but that he wanted to put the defendant on the stand, ask him his name, and let him tell his story to the jury. The judge then took a recess to read rule 3.3 (e). When the sidebar conference resumed, the defendant's trial counsel indicated that he would remain as counsel in order not to prejudice the defendant. He also assured the judge that he had tried to dissuade the defendant from testifying falsely. The judge instructed the defendant's trial counsel to remain standing during the defendant's narrative testimony on direct and to make objections to the prosecutor's cross-examination one question at a time, as appropriate, keeping in mind that he could not assist the defendant in presenting false testimony."; "The defendant's trial counsel did not argue the defendant's testimony during his closing argument, but argued as summarized above. The defendant's request to make an unsworn statement to the jury was denied by the judge."; "The judge rejected the defendant's proposed standard -- knowledge beyond a reasonable doubt -- concluding that 'such a standard is unworkable, as it will be all but impossible, particularly in the crucible of a trial where the evidence is often conflicting and counsel is under enormous stress, for counsel to ever know beyond a reasonable doubt that a defendant's proposed testimony is false.' The judge adopted the 'lesser but still demanding requirement that counsel have a "firm factual basis" for concluding that the defendant will commit perjury' before invoking rule 3.3 (e). The judge rejected the defendant's argument that his trial counsel was required to undertake an independent investigation of the facts before concluding that the defendant's proposed testimony would be perjurious. The judge concluded that the defendant's trial counsel had a 'firm factual basis' supporting his decision." (emphasis added)).

Third, some courts have articulated an apparently higher standard -- requiring "actual knowledge." However, these courts do not provide much guidance about what that means.

- Muff v. Dragovich, Civ. A. No. 05-5251, 2007 U.S. Dist. LEXIS 21420, at *35, *36, *36-37 (E.D. Pa. Mar. 12, 2007) (finding that a lawyer had not provided a criminal defendant ineffective assistance of counsel; by convincing the client not to lie on the stand; "Muff also submits that her counsel was ineffective

when he failed to dissuade her from testifying falsely."; "Rule 3.3 prohibits a lawyer from offering testimony from a witness only when he knows that that testimony would be false. There is no indication that trial counsel knew that Muff's testimony was false, even though he may have reasonably believed that it was. . . . According to Muff, trial counsel conceded that he knew Muff's testimony was false while testifying at the PCRA hearing. She mischaracterizes his testimony. The colloquy reads: (Q) Do you think [Ms. Muff's version of events] had problems? (A) Yes, it had problems, yes."; "N.T., 9/25/03, PCRA Hr'g, p. 25. Admitting that a defendant's testimony 'had problems' is a far cry from an admission that counsel knew that her testimony was actually untrue. Although counsel certainly recognized the inconsistencies between Muff's testimony and the medical evidence, each time he presented her with factual scenarios which would have indicated even some criminal culpability, Muff insisted 'that's not what happened.'. . . As there is no evidence suggesting that counsel knew his client would testify falsely, Muff's ineffective assistance of counsel argument fails." (emphases added)).

- State v. Colson, 650 S.E.2d 656, 657, 658, 658-59, 659 (N.C. Ct. App. 2007) (granting a new trial to a criminal defendant found guilty of robbery with a dangerous weapon, because the court allowed a lawyer to withdraw as counsel for the defendant; explaining that on remand the lawyer representing the criminal defendant may not refuse to offer evidence in a criminal matter that the lawyer reasonably believes is false, but may not knowingly offer false evidence; "On September 2003, the day before trial was to begin, Leas moved to withdraw as counsel and informed the court that he could 'no longer competently and professionally represent [defendant].'"; "Leas told the court that defendant wished to testify in his own defense and that in Leas's opinion defendant's testimony would be false. The trial judge stated that a 'mere disagreement between the defendant and court appointed counsel' was not sufficient to grant Leas's motion to withdraw. The trial judge explained to defendant that Leas could not knowingly present evidence to the court that Leas believed to be false and that another lawyer could not be appointed to do the same thing Leas was prohibited from doing. The judge told defendant that if he insisted on testifying in his own behalf, defendant could discharge Leas as counsel as proceed pro se." (emphasis added); "Defendant responded to the trial court that he wanted to testify on his own behalf and wanted Leas or other counsel to represent him. The record shows further questions and conversations ensued until defendant indicated he would testify and would like to proceed without a lawyer. The trial court allowed Leas to withdraw as counsel and placed him on standby to assist defendant if he had any legal questions during trial."; "Defendant argues the trial court erred in requiring him to choose between testifying or proceeding to a jury trial without the assistance of counsel, in the absence of a clear indication that he wished to and understood the consequences of proceeding pro se. We

agree."; "The record reveals the trial court forced defendant to choose between testifying in his own behalf or being represented by counsel at trial. By choosing to exercise his constitutional right to testify in his own defense, defendant was forced to relinquish his constitutional right to the assistance of counsel." (emphasis added); "Forcing defendant to elect between having counsel at trial and testifying in his own behalf was improper. . . . Forcing defendant to choose between testifying or relinquishing his right to be represented by counsel constitutes constitutional error." (emphasis added); "Recognizing this issue may arise on remand, we turn to the issue of counsel's role on remand. Rule 3.3(a)(3) of the North Carolina State Bar Rules of Professional Conduct (2007) states: A lawyer shall not knowingly: offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal manner, that the lawyer reasonably believes is false.'"; "(Emphasis supplied). Rule 3.3, Comment 9, of the North Carolina State Bar Rules of Professional Conduct (2007) offers further guidance: 'Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.'" (emphasis added); "Defendant was denied his constitutional right to counsel and is entitled to a new trial.").

- Doe v. Fed. Grievance Comm. (In re Grievance Comm. of the U.S. Dist. Ct.), 847 F.2d 57, 61-62, 62, 62-63, 63 (2d Cir. 1988) ("Determining whether an attorney has received 'information clearly establishing' a fraud on the court -- and thus triggered his duty to disclose that information to the affected tribunal -- is a 'difficult task.' ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). Our inquiry into the term's meaning is made even more difficult because it is not used in any other Code provision and was not included in any provision of the Code's predecessor, the Canons of Professional Ethics (1908). Nor is the term included in any professional or the Code's successor, the Model Rules of Professional Conduct (1983), and our exhaustive research has uncovered no court or professional ethics committee decision that has definitively interpreted what the term means. Thus, we are left to examining the Code to determine the drafter's intent, reviewing the context in which the term has been applied, and searching out definitions of the term adopted in other jurisdictions. We do, however, have the benefit of the ethics professor's expert opinion on this subject."; "We note that at least one jurisdiction has endeavored to provide its attorneys with some guidance in this area. In Virginia, an attorney is required to reveal 'information which clearly establishes that his client has, in the course of the

representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal,' DR 4-101(D)(1), Revised Virginia Code of Professional Responsibility (1983) (emphasis added). Included in this rule is a definition for the term 'information clearly establishing' which provides that 'information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.' Id. (emphasis added). Thus, Virginia has adopted an actual knowledge standard for determining when an attorney has received sufficient information to 'clearly establish' that his client has committed a fraud."; "Consistent with Virginia's approach are decisions from other jurisdictions arising in the context where an attorney suspects that his client intends to commit perjury. Those cases permit the attorney to attempt to rectify or reveal the client's perjury only if the attorney has information establishing a 'firm factual basis' that the client will commit perjury.'" (emphasis added); "Our experience indicates that if any standard less than actual knowledge was adopted in this context, serious consequences might follow. If attorneys were bound as part of their ethical duties to report to the court each time they strongly suspected that a witness lied, courts would be inundated with such reports. Court dockets would quickly become overburdened with conducting these collateral proceedings which would necessarily hold up the ultimate disposition of the underlying action. We do not believe that the Code's drafters intended to throw the court system into such a morass. Instead, it seems that the only reasonable conclusion is that the drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal." (emphases added); "[W]e simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention." (emphasis added)).

Fourth, some courts have adopted a standard at the far end of the spectrum -- requiring clients' explicit threat to lie on the stand before triggering lawyers' need to take whatever steps that the court or bar considers ethically acceptable.

The United States Supreme Court's Nix decision seemed to use this standard.

- Nix v. Whiteside, 475 U.S. 157, 174 (1986) ("[T]he responsibility of an ethical lawyer, as an officer of the court and key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worth of the name can tolerate a lesser standard." (emphasis added)).

Other courts have followed this approach. However, some have mentioned clients' stated intent to commit perjury as an example of what might provide the type of actual knowledge triggering lawyers' ethics responsibility -- rather than explaining that such an explicit threat is the only way a lawyer could obtain such actual knowledge.

- United States v. Long, 857 F.2d 436, 445, 445-46 (8th Cir. 1988) ("The Supreme Court's majority opinion in Whiteside emphasizes the necessity of such caution on the part of defense counsel in determining whether a client has or will commit perjury. In discussing the attorney's duty to report possible client perjury, the majority states that it extends to 'a client's announced plans to engage in future criminal conduct.' 475 U.S. at 174. (emphases added). Thus, a clear expression of intent to commit perjury is required before an attorney can reveal client confidences."; "As Justice Blackmun, observes [Nix v. Whiteside, 475 U.S. 157, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986)], an attorney who acts on a belief of possible client perjury takes on the role of the fact finder, a role which perverts the structure of our adversary system. A lawyer who judges a client's truthfulness does so without the many safeguards inherent in our adversary system. He likely makes his decision alone, without the assistance of fellow fact finders. He may consider too much evidence, including that which is untrustworthy. Moreover, a jury's determination on credibility is always tempered by the requirement of proof beyond a reasonable doubt. A lawyer, finding facts on his own, is not necessarily guided by such a high standard. Finally, by taking a position contrary to his client's interest, the lawyer may irrevocably destroy the trust the attorney-client relationship is designed to foster. That lack of trust cannot easily be confined to the area of intended perjury. It may well carry over into other aspects of the lawyer's representation, including areas where the client needs and deserves zealous and loyal representation. For these reasons and others, it is absolutely essential that a lawyer have a firm factual basis before adopting a belief of impending perjury." (emphasis added)).

- United States v. Midgett, 342 F.3d 321, 324-25, 325-26, 326 (4th Cir. 2003) ("The question of what a lawyer should do when confronted by potentially perjurious testimony has long caused consternation in the legal profession, producing heated debate and little consensus. On the one hand are the series of constitutional rights to which a defendant is entitled and for which the defendant's lawyer is called to provide zealous advocacy; on the other hand are the lawyer's obligations to the court to seek the furtherance of justice. Similarly, the court itself is obliged to ensure that the constitutional rights of the defendant are protected, while also seeing that proceedings are conducted fairly and truthfully. Midgett argues that these obligations were not adequately met when his lawyer, disbelieving Midgett's proffered testimony,

> sought to withdraw from representing him and approached the court to discuss the lack of corroborative evidence in support of Midgett's case. Likewise, Midgett argues that the court should not have confronted him with a choice between exercising his right to take the stand and his right to be represented by counsel. Under these circumstances, we agree."; "The question, then, is whether the information known to defense counsel was sufficient to show that Midgett's testimony would be perjurious so as to bring this case within the rule set forth in Nix [Nix v. Whiteside, 475 U.S. 157 (1986)]. We conclude that it was not."; "In this situation, Midgett never indicated to his attorney that his testimony would be perjurious. Thus, his lawyer had a duty to assist Midgett in putting his testimony before the jury, which would necessarily include his help in Midgett's direct examination." (emphasis added); "Defense counsel's mere belief, albeit a strong one supported by other evidence, was not a sufficient basis to refuse Midgett's need for assistance in presenting his own testimony."; "Far-fetched as Midgett's story might have sounded to a jury, it was not his lawyer's place in these circumstances to decide that Midgett was lying and to declare this opinion to the court.").

One state's ethics rules mention clients' explicitly-stated intent to commit perjury.

- Virginia Rule 1.6(c)(1) ("A lawyer shall promptly reveal . . . the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel." (emphasis added)).

- Virginia Rule 1.6(c)(2) ("A lawyer shall promptly reveal . . . information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud." (emphasis added)).

The Virginia Bar has applied this demanding standard when analyzing lawyers' knowledge of past client perjury. When dealing with clients' future perjury, a 1990 Virginia legal ethics opinion apparently did not require the clients' stated intent to commit perjury -- instead relying on the inherently inconsistent earlier client testimony.

- Virginia LEO 1362 (7/17/90) (analyzing the duties of a lawyer who represented a husband and wife: (1) in successfully obtaining a judgment in an action brought by a bank against both of them, based on the husband's testimony that he was unaware that his wife had signed his name to the loan documents; and (2) in the criminal trial in which the wife was accused of forgery, at which both the husband and wife testified that the wife signed her husband's name with his authorization; concluding that "the conflicting testimony offered by the husband at the civil and criminal indictment proceedings clearly indicates that he was not testifying truthfully on at least one occasion."; "The committee is of the opinion that it would be improper for an attorney to put on a witness whose testimony is contradictory to earlier statements made under oath without first determining which of the two statements is truthful, and then, using the procedure outlined above, rectifying any earlier false testimony presented. The committee believes that the only way the attorney can prove the veracity of the witness' second statement would be through the witness' renunciation of his first statement."; "Alternatively, the attorney may move the court for leave to withdraw from the case. If leave is granted, the attorney may so withdraw and thus preserve the secret of the client's first false statement since it would constitute the past crime of perjury and would, therefore, not be an intended crime which must be disclosed.").

As in other states, Virginia's attempt to articulate a definable and consistent standard has failed.

Where does this leave lawyers hoping for some clear guidance? As in other areas (especially in the criminal law), lawyers must check the case law for any guidance, and will usually look in vain for any definite ground rules. This sort of confusion would be troubling in any ethics context, but it is even more distressing because of the high stakes involved (both for the lawyer and the client) in the context of clients' possible perjury.

Professor Freedman's Hypothesis

Professor Monroe Freedman has postulated that courts deliberately set a very high standard for the level of lawyers' knowledge triggering their ethics responsibilities.

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133 (2008).

Among other things, Professor Freedman noted that Nix v. Whiteside, 475 U.S. 157 (1986) received notoriety for supposedly acknowledging lawyers' duty to disclose intended client perjury. However, Professor Freedman argued that bars and commentators have misread the Nix case -- because the lawyer in that case had only threatened to disclose his client's intended perjury. Id. at 143-44.

Professor Freedman highlighted the Department of Justice's own narrow reading of Nix.

> [S]oon after Nix, the Deputy Attorney General who won the case was quoted in the ABA Journal as saying that if the lawyer does not "know for sure" that a witness's evidence is false, the lawyer should present the evidence to the court. As long as the client "never admits that [the story] is false," he added, most lawyers "suspend judgment and do the best they can." Any different standard of "knowing," he explained, would be "at war with the duty to represent the client zealously."

Id. at 144 (emphasis added; citations omitted).

Professor Freedman also noted that ABA LEO 353 (1987) articulated this higher standard.

> For example, in the words of ABA Formal Opinion 87-353, it will be "the unusual case" where the lawyer "does know" that a client intends to commit perjury. That opinion states that knowing can be established only by the client's "clearly stated intention" to perjure himself at trial.

Id. at 142 (emphasis added).

After explaining the widespread articulation of the knowledge standard as essentially requiring the clients' explicit threat, Professor Freedman provided his explanation of why authorities and courts have taken that approach.

Professor Freedman explained that the 1983 ABA Model Rules seem to require lawyers to disclose their clients' intent to commit perjury -- but that the ABA eventually manipulated the knowledge standard to gut such a requirement. Id.

> The reason the [ABA Model Rule] rule change is more apparent than real is that the lawyer has no obligation either to prevent client perjury or to report it to the court unless the lawyer "knows" that the client's testimony will be or has been perjurious. Moreover, the words "know" and "knowledge" have been defined in the Terminology section of the Model Rules in the most restrictive terms. Thus, "knowing" means "actual knowledge," and the ABA, the American Law Institute, and the courts have all made it clear that a lawyer will rarely "know" about client perjury.

Id. (emphasis added; footnote omitted). In his typical outspoken style, Professor Freedman labeled the ABA's tactic "disingenuous."

> [T]he bar and the courts have effectively maintained the practical result of the traditional view of the perjury trilemma. By disingenuously manipulating the meaning of "knowing," they have enabled lawyers to preserve client confidences and to continue to present clients' false testimony to courts in the ordinary manner.

Id. at 135-35 (emphasis added).

Professor Freedman thus concluded that bars' and courts' heightened knowledge standard essentially means that criminal defense lawyers have no practical duty to report their clients' intended perjury.

> On the basis of these authorities, a defense lawyer might well refrain from concluding that her client's testimony is perjurious, despite the fact that the client has told the lawyer inconsistent versions of the truth, and despite the fact

> that the client's testimony is preposterous, unsupported by any other evidence, and contradicted by credible evidence.

Id. at 147.

Professor Freedman self-satisfiably explained that this widely adopted heightened knowledge standard supported what he described in 1966 as the best standard for criminal defense lawyers whose clients intend to commit perjury.

> I favored the view that the lawyer who knows that the client intends to lie on the witness stand should make good faith efforts to dissuade the client from committing the perjury, but, if unsuccessful in those efforts, the lawyer should maintain confidentiality and should present the client's testimony at trial in the ordinary way.

Id. at 134-35. Professor Freedman explained that the demanding knowledge standard vindicated his decades-long view of what lawyers in that situation should do.

> As a practical matter, therefore, the disingenuous use of the "knowing" standard produces the same result under Model Rule 3.3 as the traditional model that I favor. That is, the defense lawyer will present the client's testimony, true or false, in the ordinary way. The difference is that under the traditional view, the defense lawyer recognizes that frequently she does know the truth, uses that knowledge to make good faith efforts to dissuade the client from committing perjury, but, if she is unsuccessful, presents the client's testimony in the ordinary way. Under Model Rule 3.3, however, the ordinary practice is for the lawyer to indulge the notion that she does not "know" that the testimony is false, and to present the client's perjury in the ordinary way. The end result, of course, is the same.

Id. at 147 (emphasis added).

Professor Freedman correctly read the case law. Many cases conclude that lawyers do not "know" of their clients' intent to present false testimony unless the client explicitly confesses as much.

As Professor Freedman noted, courts have required a very high level of lawyers' knowledge before imposing various ethics duties on those lawyers -- to refrain from presenting evidence, reporting clients' intent to perjury themselves, blowing the whistle on their clients' past perjury, etc. Although they have also condemned lawyers' willful ignorance of their clients' intent to commit perjury or past perjury, setting the bar this high essentially invites lawyers' willful ignorance. And as Professor Freedman has noted, such a high standard also frees lawyers to essentially present client testimony that they know is false.

Recent Developments

Ironically, even Professor Freedman might have understated the level of lawyer knowledge that courts require before implicating their ethics obligations.

In 2015, the First Circuit held that a lawyer could present evidence contrary to a client's admission of guilt -- because that explicit admission (in a proffer) might have itself been false, and provided to avoid the death sentence.

- United States v. Jimenez-Bencevi, 788 F.3d 7, 10, 18, 18-19, 19 (1st Cir. 2015) (reversing a criminal conviction and a life sentence, based on the trial court's improper treatment of the defendant's proffer "containing both a detailed admission of his guilt to all the crimes he was charged with"; among other things, noting that the defendant's lawyer had not acted unethically by putting on the stand an expert witness on the identity of a person shown in a surveillance video tape; "[T]he government argues that it was acceptable for the district court to require the proffer be disclosed because allowing Stokes [Defendant's expert] to testify without knowledge of the proffer would have created an ethical violation since Jimenez's counsel would be allowing the presentation of false testimony. We disagree."; "Here, Jimenez's counsel had reason to be skeptical of the admission and thus did not 'know' that Stokes's expert opinion was false. . . . Jimenez was desperate to avoid the death penalty and the government was adamant that it would not consider any plea agreement unless Jimenez admitted to all of the charges. Given all of this, Jimenez's counsel could reasonably conclude that Jimenez's admission might have been false and that he was simply stating whatever he had to in order to avoid the death penalty." (emphasis added); "[T]here is nothing to suggest that Stokes

believed his testimony was false. This is no different than an alibi witness believing, though possibly mistakenly, that he or she saw a defendant at one location despite a defendant's proffer to the contrary. Under the district court's and the government's rationale, the alibi witness would be unable to testify. This is not what our justice system requires."; "The government points to two district court cases which contrarily hold that a defense attorney is ethically bound from presenting evidence which conflicts with statements made during his client's proffer, even if that proffer is subject to direct-use immunity. . . . Both cases, however, carve out an exception for evidence presented with a 'good-faith basis.'. . . We believe that the situation presented here, for the reasons discussed above, would qualify as a 'good-faith basis' for presenting Stokes's expert opinion even though it is contrary to the proffer. But to the extent that it would not, we simply note that these cases are not binding on us, and we believe them to be incorrect." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(C) ACTUAL KNOWLEDGE FROM CLIENTS' EXPLICITLY STATED INTENT (PROBABLY)**.

B 12/15

Lawyers Learning of Clients' Fraud on Tribunals that Occurred Before the Representation

Hypothetical 4

You met early this morning with a prospective new client. He told you that a few weeks ago he won a million dollar verdict in a personal injury case in which another local lawyer represented him. But now he is worried that someone might discover why he won -- he deliberately lied on the stand about several important matters during the trial.

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS

Analysis

See the analysis to Hypothetical 8.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS**.

B 9/15

Lawyers Learning Before Proceedings Have Ended of Clients' Fraud on Tribunals During the Representation

Hypothetical 5

You met late this morning with one of your clients. You had successfully represented her earlier this week in a small breach of contract case. She told you that her conscience has been bothering her ever since the trial ended. To your surprise, your client then confessed to deliberately lying on the stand during the trial you just won.

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

(A) YOU MUST DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL

Analysis

See the analysis to Hypothetical 8.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL**.

B 9/15

Lawyers Learning After Proceedings Have Ended of Clients' Fraud on Tribunals During the Representation

Hypothetical 6

You met over lunch today with one of your clients. You had invited her to toast an important date -- yesterday was the last day the defendant could have appealed a $10 million verdict you had obtained for your client after a lengthy jury trial. After a few too many toasts, your client said: "What makes this day so sweet is that no one -- not even you -- suspected that most of my testimony was a lie."

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS

Analysis

See the analysis to Hypothetical 8.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS**.

B 9/15

Lawyers Learning After Proceedings Have Settled of Clients' Fraud on Tribunals During the Representation

Hypothetical 7

You met this afternoon with one of your clients. You thought he might be coming to give you a gift or otherwise thank you for representing him in a case that settled very favorably earlier this week. Instead, he apparently wanted to gloat over your initial pessimistic view of the case. He told you that you might have been right about the law, but that you had underestimated his ability to make up facts that he testified about at his deposition. When you asked him what he meant, he surprised you by saying that most of his deposition testimony resulting in the favorable settlement was a lie.

What do you do?

(A) You must disclose your client's fraud on the tribunal.

(B) You may disclose your client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your client's fraud on the tribunal, unless your client consents.

(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS

Analysis

See the analysis to Hypothetical 8.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS**.

B 9/15

Lawyers Learning After the Representation Has Ended of Clients' Fraud on Tribunals After the Representation (on Successor Counsel's Watch)

Hypothetical 8

After a long and stressful day, you turned on the local news after dinner. The lead story described a $10 million personal injury plaintiff's verdict for one of your former clients. You had only represented her for a short time, and had withdrawn before you filed a lawsuit -- because she had told you that she intended to fake paralysis to increase her damages. The news story showed her leaving the courthouse in a wheelchair and quoted her statement that she was happy the defendant had to pay such a large amount for having caused her paralyzing accident.

What do you do?

(A) You must disclose your former client's fraud on the tribunal.

(B) You may disclose your former client's fraud on the tribunal, but you don't have to.

(C) You may not disclose your former client's fraud on the tribunal, unless your client consents.

(C) YOU MAY NOT DISCLOSE YOUR FORMER CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

As in other areas, bars dealing with clients' past fraud on tribunals have struggled for decades to balance lawyers' confidentiality duty and the laudable desire to remedy criminal conduct that has poisoned the judicial process.

Interestingly, some of the earlier ethics codes emphasized disclosure -- but the ABA's elite (such as the ABA Standing Committee on Ethics and Professionalism, and its predecessors) found ways to avoid those pro-disclosure provision's application. After 1983, the roles seemed to switch. The ABA House of Delegates repeatedly opposed

rules requiring disclosure of protected client information in this context, while the ABA elite found ways to require or at least allow disclosure.

As the ABA struggled with its black letter rules, various ABA legal ethics opinions often contradicted those rules.

State ethics rules have generally followed the same path as the ABA's rules, but some states have taken a totally different approach.

ABA Canons

The 1908 ABA Canons of Professional Ethics included very explicit provisions that on their face required disclosure of clients' fraud on a tribunal.

In a canon dealing with lawyers' obligation to report other lawyers' misconduct, the Canons required lawyers to report perjury.

> Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

ABA Canons of Prof'l Ethics, Canon 29 (emphasis added)**.**

Although dealing with lawyers' misconduct, this canon obviously covered witnesses' perjury -- because lawyers rarely testify themselves, and therefore would be very unlikely to commit perjury. And the canon on its face covered perjury by clients

and nonclients. Interestingly, the canon mentioned lawyers' reporting perjury to a prosecutor, but not to the court itself.

ABA Canon 29 did not explicitly indicate that lawyers must disclose perjury. The 1908 Canons sometimes used language describing a mandatory duty, but usually used the softer "should" phrase. However, it would be difficult to construe the phrase "owe it to the profession and to the public" as anything other than a mandatory reporting duty.

In 1928, the ABA adopted another batch of canons. One of those canons dealt with the broader scope of trial-related fraud.

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

ABA Canons of Prof'l Ethics, Canon 41 (emphasis added). This broad rule presumably covered clients' and nonclients' "fraud or deception." Perjury undoubtedly fell within this description.

Just as Canon 29 required lawyers to report perjury to a prosecutor and not to the court, Canon 41 discussed disclosure to the "injured person or his counsel," rather than to the court or a prosecutor.

Canon 41 used the word "should" -- which might have made this disclosure discretionary rather than mandatory. That standard obviously fell somewhere between a mandatory reporting obligation and the type of permissive "may" standard appearing later in the ABA Model Code and the ABA Model Rules. However, it is probably safe to assume that ABA Canon 41's "should" standard required or at least very strongly

suggested disclosure. It certainly did not prohibit the disclosure. And as explained immediately below, seven years later the ABA interpreted this canon as requiring disclosure of fraud on a tribunal.

ABA Legal Ethics Opinions: 1938-1969

In the 41 years between the ABA's adoptions of Canon 41 and the ABA Model Code of Professional Responsibility, the ABA issued three legal ethics opinions dealing with clients' past fraud on tribunals.

Interestingly, all three opinions addressed clients' misstatements intended to improperly obtain divorces. This fact highlights the changing nature of American society, as well as the legal profession's struggle to apply ethics principles.

ABA LEO 268 (6/21/45)

In ABA LEO 268 (6/21/45), a prospective client confessed to a lawyer that he had not met the residency requirement for obtaining a divorce. The client ended up retaining someone else to represent him in the divorce. The first lawyer learned that the prospective client he had interviewed later filed for divorce using a false residency allegation, and asked the ABA if he had any disclosure duty.

The ABA explained that he did not.

> While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences. It is not infrequently the case that a lawyer who has been retained by a client accused of crime, having been told by the client facts which make it certain that the client is guilty, declines to represent the defendant, insomuch as a successful defense cannot be hoped for without suborning perjury under such circumstances. In such case, the lawyer is bound by the Canon not to disclose the information received from the

> client in confidence, though he ascertains that the client, having subsequently retained another lawyer, has, in his defense, stated the facts to be otherwise.

ABA LEO 268 (6/21/45) (emphases added). This conclusion makes sense, because the would-be client did not commit any tribunal-related fraud on the lawyer's watch.

However, ABA LEO 268 indicated that under the then-current ABA approach a lawyer had a duty to disclose clients' fraud that "is being practiced on the court." Using the term "is" does not clearly refer to past completed fraud, but it is safe to assume that the present tense points in that direction. The language apparently does not refer to clients' intent to commit a future fraud on the court -- the ABA knew how to address that scenario. And it seems likely that the lawyer would not know until after the client committed the fraud that it has occurred. So it is reasonable to interpret the discussion using the present tense "is" as referring to past fraud that the lawyer discovered during the proceeding.

Interestingly, the opinion indicated that lawyers would have to disclose fraud to the court, although Canon 29 required disclosure to the "prosecuting authorities," and Canon 41 discussed disclosure to the person "injured" by the fraud and to that person's lawyer. Perhaps the ABA assumed that lawyers in that context would also disclose the fraud to the tribunal itself.

ABA LEO 287 (6/27/53)

The ABA addressed the issue more directly eight years later. In ABA LEO 287 (6/27/53),[1] the ABA dealt with two distinct scenarios.

[1] ABA LEO 287 (6/27/53) (in a 4-1-1 opinion, addressing lawyers' obligation upon learning that client's fraud on the tribunal, and a court error; addressing an initial issue in a hypothetical; "The first, from the state committee, states the following facts and makes the following inquiries: Facts: An attorney

represents a client in a suit for divorce and a decree for divorce from bonds of matrimony is duty entered by the Court on November 6, 1952, in favor of the client on the grounds of willful desertion and abandonment by his wife as of March 15, 1950. The wife was represented by counsel in the divorce action and she was fully apprised of the evidence presented on behalf of her husband. Three months after entry of the decree the client again comes to the attorney seeking advice by reason of the following situation: The client tells the attorney that he, the client, gave false testimony at the taking of the deposition upon which his decree for divorce was based; that the date of desertion was not March 15, 1950, as he had testified, but was actually the early part of November 1951 (which, under the local law, would have made the action premature); that his former wife threatens to disclose the true facts to the court unless support money is forthcoming. The client has not remarried, nor has his former wife."; "Inquiries: What is the duty of the attorney to the court, as an officer of the court, after learning that the testimony of his client in the suit for divorce was false?"; "What is the duty of the attorney to his client, who, when seeking advice, disclosed the fact that he had testified falsely in the suit for divorce?"; concluding as follows: "An attorney who secured a divorce for a client should not reveal the truth to the court when the client informs him that he committed perjury in securing the divorce. He should advise the client to inform the court. If the client fails to do so, the attorney should cease representation."; quoting Canon 41 as providing guidance: "When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."; after appropriate steps; "We do not believe that Canon 41 was directed at a case such as that here presented but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other through fraud or deception."; "Nor do we not think that because the state is considered an interested party to proceedings to sever the matrimonial relation of its citizens the state or the court may therefore be treated as an 'injured person' within the meaning of Canon 41."; also relying on Canon 29, which states as follows: "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."; "On its face this provision would apparently make it the duty of the lawyer to disclose his client's prior perjury to the prosecuting authorities. However, to do so in this case would involve the direct violation of Canon 37."; "Accordingly, it is essential to determine which of the Canons controls. Neither Canon 41 nor Canon 29 specifically requires the lawyer to advise the court of his client's perjury, even where this was committed in a case in which the lawyer was acting as counsel and an officer of the court. We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 and 41 above quoted are sufficient to override the purpose, policy and express obligation under Canon 37."; also including a dissenting opinion: "We can not [sic] subscribe to the majority opinion. Canon 29 expressly provides: The counsel upon the trial of the case in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."; "No good reason exists for ignoring the plain and unmistakable mandate of this Canon. Canon 29 is based upon sound public policy which singles out perjury because perjury strikes at the roots of our American system of jurisprudence. Perjured testimony poisons the well-springs and makes a mockery of justice. Canon 29 enjoins lawyers, as officers of the court, to protect the cause of justice and to assist public authorities in stamping out perjury, no matter by whom committed. The sweeping provisions of Canon 29 do not give a lawyer his choice to report only that perjury which is committed by the opposite party, but requires him to report any perjury, including that committed by his own client or witnesses. No exception is made in Canon 29 as to the manner in which the knowledge of perjury is acquired by the lawyer. No longer is a trial supposed to be a "Game" to be played by unscrupulous laymen with lawyers as mere pawns. Canon 29 seeks to make a trial an organized search for the truth -- charging the lawyers with a duty of seeing that no litigant prevails through perjury.").

The first dealt with a divorce client who had made a false statement to obtain a divorce three months earlier, while the lawyer represented him. ABA LEO 287 posed the following simple question:

> What is the duty of the attorney to the court, as an officer of the court, after learning that the testimony of his client in the suit for divorce was false?

ABA LEO 287 (6/27/53). The ABA provided an equally blunt answer.

> An attorney who secured a divorce for a client should not reveal the truth to the court when the client informs him that he committed perjury in securing the divorce. He should advise the client to inform the court. If the client fails to do so, the attorney should cease representation.

Id. (emphases added).

ABA LEO 287 attempted to avoid the language of Canon 29[2] and Canon 41.[3] The ABA emphasized Canon 37, which at that time stated as follows:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers

[2] ABA Canons of Professional Ethics, Canon 29 ("Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." (emphasis added)).

[3] ABA Canons of Prof'l Ethics, Canon 41 ("When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps." (emphasis added)).

> that this obligation prevents the performance of his full duty to his former or to his new client.
>
> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

ABA Canons of Prof'l Ethics, Canon 37 (emphasis added).

ABA LEO 287 inexplicably concluded that Canon 37's confidentiality duty trumped Canon 29's disclosure duty.

> On its face this provision [Canon 29] would apparently make it the duty of the lawyer to disclose his client's prior perjury to the prosecuting authorities. However, to do so in this case would involve the direct violation of Canon 37.
>
> Accordingly, it is essential to determine which of the Canons controls. Neither Canon 41 nor Canon 29 specifically requires the lawyer to advise the court of his client's perjury, even where this was committed in a case in which the lawyer was acting as counsel and an officer of the court. We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 and 41 above quoted are sufficient to override the purpose, policy and express obligation under Canon 37.

ABA LEO 287 (6/27/53) (emphasis added).

This conclusion does not make sense. Canon 29 indicated that lawyers representing clients who have committed perjury "owe it to the profession and to the public" to disclose the perjury to the "prosecuting authorities." It is difficult to imagine that a lawyer would have a duty to disclose a client's perjury to prosecutors, but not to the court. And just eight years earlier, ABA LEO 268 explained that "ordinarily it is the duty" of such lawyers to disclose clients' fraud on the court.

In addition, the ABA elite obviously knew that the ABA Canons contained both Canon 37 and Canon 29. Although ABA LEO 287 described a lawyer's compliance with Canon 29's mandatory disclosure obligation to be in "direct violation" of Canon 37, the better reading would be that Canon 29 represented a specific limited exception to Canon 37's general confidentiality duty.

ABA LEO 287 likewise attempted to avoid what appeared to be the very clear language of Canon 41.

> We do not believe that Canon 41 was directed at a case such as that here presented but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other through fraud or deception. Nor do we not think that because the state is considered an interested party to proceedings to sever the matrimonial relation of its citizens the state or the court may therefore be treated as an 'injured person' within the meaning of Canon 41.

Id.

This conclusion does not make any sense either. Canon 41 addressed "fraud or deception" both "upon the court" as well as a "party." It is difficult to image that lying to the court to obtain a divorce does not meet that standard.

The ABA LEO 287 dissenter understandably pointed to Canon 29's plain language.

> We can not [sic] subscribe to the majority opinion. *Canon 29* expressly provides: The counsel upon the trial of the cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. No good reason exists for ignoring the plain and unmistakable mandate of this Canon. *Canon 29* is based upon sound public policy which singles out perjury because perjury strikes at the roots of our American system of jurisprudence. Perjured testimony poisons the

> well-springs and makes a mockery of justice. *Canon 29* enjoins lawyers, as officers of the court, to protect the cause of justice and to assist public authorities in stamping out perjury, no matter by whom committed. The sweeping provisions of *Canon 29* do not give a lawyer his choice to report only that perjury which is committed by the opposite party, but requires him to report any perjury, including that committed by his own client or witnesses. No exception is made in *Canon 29* as to the manner in which the knowledge of perjury is acquired by the lawyer. No longer is a trial supposed to be a "Game" to be played by unscrupulous laymen with lawyers as mere pawns. *Canon 29* seeks to make a trial an organized search for the truth -- charging the lawyers with a duty of seeing that no litigant prevails through perjury.

Id. (emphases added; emphasis in original indicated by italics). The first half of ABA LEO 287 thus seemed to rest on the ABA elite's misinterpretation of the ABA Canons and on flimsy logic.

The second half of ABA LEO 287 dealt with a criminal defendant who had lied to the court about having a criminal record.[4]

[4] ABA LEO 287 (6/27/53) (in a 4-1-1 opinion, addressing lawyers' obligation upon learning that client's fraud on the tribunal, and a court error; addressing an initial issue in a hypothetical; presenting the following hypotheticals: "The second, from the ethics committee of a local bar association, is as follows: "(1) A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you on probation.'"; "Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?"; "(2) Suppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose the court the true facts as to his client's criminal record?"; "(3) Assume further a situation in which the judge following the conviction asks the defendant's lawyer whether his client has a criminal record."; concluding as follows: "Where the court is about to impose a sentence based on the misinformation that the defendant has no previous criminal record, if the attorney for the defendant learns of the previous record through his client's communications, he has no duty to correct the misinformation. But if he learned of the record independently of his client's communications and he has reason to believe that the court is relying on his silence as corroboration, he should inform the court not to rely on his silence as corroboration."; finding that Canon 37 applied; "Turning to the second inquiry, relative to the convicted client up for sentence, whose lawyer sees the court put him on probation by reason of the court's misinformation as to his criminal record, known to the lawyer: If the client's criminal record was communicated by him to his counsel when seeking professional advice from him, Canon 37 would prevent its disclosure to the court unless the provisions of Canons 22,

This portion of ABA LEO 287 presented three scenarios in which a criminal defendant and his lawyer were standing in court preparing for the defendant's sentencing.

In the first scenario, the criminal records custodian incorrectly told the court that the lawyer's criminal client had no criminal record -- which prompted the court to place the client on probation. Thus, that scenario involved nonclients' misunderstanding, rather than clients' misstatements.

The second scenario is discussed below.

In the third scenario, the judge asked the lawyer about the custodian's statement to the court that the client had no criminal record. ABA LEO 287 essentially indicated that the lawyer should dodge the question, and advise the court not to rely on the lawyer's personal knowledge about the client's possible criminal record. The opinion also noted that the lawyer would have the same affirmative duty if the lawyer somehow felt that the court took the lawyer's silence as a corroboration of the custodian's erroneous statement to the court. Unfortunately, ABA LEO 287 did not provide any guidance about how a lawyer would decide whether the court was relying on the lawyer's silence as corroboration. But as in the first scenario, this third scenario did not involve the clients' misstatement to the court.

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29 and 41 require this. If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence. We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.").

In the second scenario, the court directly asked the defendant whether he had a criminal record -- and the defendant responded with a lie.

> A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you on probation. Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. . . . Suppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose the court the true facts as to his client's criminal record?

Id. (emphases added).

In addressing this second scenario, the ABA LEO 287 majority held that the criminal defendant's lawyer did not have to disclose the client's false response to the court.

> [T]he court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence.

Id. (emphasis added). As explained above, one would think that Canon 29's explicit disclosure duty would have trumped Canon 37's general confidentiality duty.

As in the divorce scenario, the ABA LEO 287 dissent vehemently disagreed.

> Under these circumstances can a lawyer stand idly by in open court and permit the court to be deceived at a time when the lawyer knows that the court is relying upon an untrue statement? In *Opinion 280* it was held that a lawyer

> could not remain silent when he knows of an essential decision not cited by his opponent, but is required to volunteer such citation no matter whether it affects his client adversely. We think that *Canons 29, 41, 15* and *22* require the lawyer to see that his client gives the court the truth about his criminal record or the lawyer must do so himself. Specifically, we think the answer should be in the affirmative to all three questions propounded in the second inquiry. The *method* by which the lawyer brings the true information to the knowledge of the court is a mere detail. Whether the lawyer asks for a recess to advise privately with his client about disclosing the truth, or whether the lawyer makes the suggestion to his client in open court, is merely a choice of procedure. In our opinion the lawyer's duty under these circumstances is to see that his client reveals the truth to the court about his criminal record, and if the client refuses, the lawyer's duty to do so becomes mandatory under *Canons 29* and *41*. We think that the majority opinion does obeisance to *Canon 37*. We concede that Canon 37 is based upon public policy. However, *Canons 29, 41, 15* and *22* are likewise based upon public policy. *Canon 37* is not superior to *Canons 29, 41, 15* and *22*, but must be interpreted in light of the mandatory provisions expressed in these Canons. *Canon 37* should not be stretched to require a lawyer to remain silent about perjury, fraud and deception when the clear mandate of *Canons 29* and *41* require a lawyer to guard the court and the public against these vicious practices. Accordingly, for all these reasons we respectfully dissent from the majority opinion and believe the lawyer should be guided by Canons 29 and 41.

Id.[5] (emphases added (emphasis in original indicated by italics).

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[5] The dissent referred to several other ABA Canons.

ABA Canon 15 contained general statements prohibiting lawyer or client misconduct. ABA Canons of Prof'l Ethics, Canon 15 ("Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause. It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause. The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such

Interestingly, the dissent clearly interpreted Canon 29 as requiring disclosure of clients' perjury -- despite that Canon's arguably ambiguous phrase explaining that lawyers "owe it to the profession and to the public" to disclose the perjury. As explained above, ABA LEO 268 (6/21/45) had reached the same conclusion. The dissent took that same position about Canon 41, although that Canon used the arguably discretionary word "should."

Overall, ABA LEO 287 clearly ignored the ABA Canons, thus emphasizing confidentiality at the expense of those Canons' disclosure duty.

ABA LEO 869 (10/1965)

In 1965, the ABA again dealt with a divorce client who had testified falsely.

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remedy or defense. But it is steadfastly to be borne in the mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.").

Canon 22 contained equally general statements prohibiting lawyer misconduct. ABA Canons of Prof'l Ethics, Canon 22 ("The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness. It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely. It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes. A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders. These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.").

In ABA Informal LEO 869 (10/65),[6] the ABA explained that a lawyer whose divorce client testified falsely would have to withdraw, but did not mention correcting the false testimony.

> If, however, any question [about the wife's admitted adultery] should be raised through proper questions directed to the plaintiff on the witness stand or through depositions or interrogatories (and this would be whether the divorce action was contested or uncontested), and if the plaintiff does not refuse to answer because of a constitutional right not to incriminate herself, but instead answers the question, the attorney should do everything in his power to persuade his client to tell the truth, and if she refuses to do so, the lawyer should not continue to represent the client. Of course, if the attorney is of the opinion that his client has a constitutional right not to answer the question, he should so advise his client and, if she desires to assert the right, aid her in doing so.

ABA Informal LEO 869 (10/1965) (emphasis added).

[6] ABA Informal LEO 869 (10/65) (holding the lawyer must withdraw from representing a client who has provided false testimony on the stand; not addressing the possibility the lawyer would have the duty to disclose the client's false testimony; "'Statement: Mrs. A has employed Lawyer Jones to obtain for her a divorce from Mr. A as well as custody of the children of the parties. Lawyer Jones files the suit for divorce and while the case is pending, Mrs. A confides to her attorney that she has become pregnant by another man other than her husband."; "It is the opinion of the Committee that, with regard to the divorce action, there is no duty on the part of the lawyer to reveal to the court, of his own volition, the fact that his client had become pregnant by a man other than her husband. If the grounds for divorce are the fault or wrongdoing of the defendant, then the plaintiff should be advised that if the defendant should plead the plaintiff's adultery as a defense in the action, such defensee could bar a recovery by the plaintiff."; "The best welfare of the children is for the courts to decide, and in order to make a wise decision, they should have all available information."; "However, the Committee is of the opinion that under the facts as stated in the question, the attorney is not bound by professional ethics to reveal his client's condition or conduct to the court, of his own volition. Under these circumstances, the Committee believes the lawyer is ethically bound not to reveal this information."; "If, however, any question should be raised through proper questions directed to the plaintiff on the witness stand or through depositions or interrogatories (and this would be whether the divorce action was contested or uncontested), and if the plaintiff does not refuse to answer because of a constitutional right not to incriminate herself, but instead answers the question, the attorney should do everything in his power to persuade his client to tell the truth, and if she refuses to do so, the lawyer should not continue to represent the client. Of course, if the attorney is of the opinion that his client has a constitutional right not to answer the question, he should so advise his client and, if she desires to assert the right, aid her in doing so.").

Thus, in three ethics opinions over 20 years, the ABA ethics committee essentially ignored two ABA Canons' explicit mandatory disclosure duty in the context of client perjury, and instead invited lawyers to keep it secret.

1969 ABA Model Code

The 1969 ABA Model Code of Professional Responsibility contained a straight-forward requirement to disclose clients' past fraud on tribunals.

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

ABA Model Code of Professional Responsibility DR 7-102(B)(1) (emphasis added).

ABA Model Code DR 7-102(B)(1) differed from the ABA Canons in several ways.

First, the ABA Model Code provision referred to "fraud upon a . . . tribunal." ABA Canon 29 referred to "perjury." Perjury is a term of art in the criminal world, which has specific elements that may or may not be part of the broader concept of "fraud." The ABA Model Code's reference matched ABA Canon 41's "fraud . . . upon the court."

Second, the ABA Model Code provision explicitly required that lawyers "shall reveal the fraud upon a . . . tribunal" if the client did not do so. ABA Canon 29 indicated that lawyers learning of clients' perjury "owe it to the profession and to the public" to disclose the perjury to the prosecution. ABA Canon 41 indicated that lawyers "should" disclose "fraud . . . upon the court" to the "injured person" (presumably the adversary) or his counsel. Although these provisions did not explicably require disclosure, various

legal ethics opinions (discussed above) interpreted them to require rather than just encourage disclosure.

Third, the ABA Model Code indicated that lawyers knowing of "fraud upon a . . . tribunal" must reveal the fraud "to the affected person or tribunal" if the client refused to do so. ABA Canon 29 discussed disclosure to the "prosecuting authorities." ABA Canon 41 indicated that lawyers knowing of "fraud . . . upon the court" should inform "the injured person or his counsel."

Although the ABA Model Code also contained a number of confidentiality provisions, DR 4-101(C)(2) gave lawyers discretion to reveal "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order." (emphasis added). The "shall reveal" language of the simultaneously adopted DR 7-102(B)(1) presumably trumped any confidentiality duty elsewhere in the Model Code. But the language of DR 4-101(C)(2) removed any doubt. In other words, the exception to the general confidentiality duty for disclosures "permitted" by the Model Code undoubtedly covered any mandatory disclosure required by the Model Code (as in the case of client fraud on tribunals).

In addition to these differences from the ABA Canons, the ABA Model Code provision introduced a new odd standard -- triggering lawyers' disclosure duty only if lawyers received information "clearly establishing" clients' "fraud upon a . . . tribunal." Most ethics rules dealing with lawyers' knowledge use a "knowing" standard, or a "reasonably should know" standard.

This term's use involves more than just an interesting historic relic. Although the 1983 ABA Model Rules eliminated that phrase (discussed below), it lingered in those states that maintained the ABA Model Code formulation after 1983.

For instance, New York did not abandon the ABA Model Code "clearly established" formulation until 2009. In 1998, the Second Circuit extensively discussed New York's "clearly established" standard -- accepting an ethics professor's explanation that the term essentially meant "actual knowledge," and that the ABA Model Code's "drafter's failure to use the actual term 'knowledge' in the rule reflected nothing more than poor draftsmanship."

- In re Grievance Comm. of United States Dist. Court, 847 F.2d 57, 58 n.1, 62, 61-62, 62, 63 (2nd Cir. 1988) (analyzing the knowledge requirement under what was then the New York ethics rules; "'DR 7-102(B) of the Code Provides that: 'A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify 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.'; '(2) A personal other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.'"; "Disciplinary Rule 7-102(B)(2) provides that, when a 'lawyer . . . receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal[, he] shall promptly reveal the fraud to the tribunal.' Under this rule, an attorney's ethical duty to report a fraud on the court is triggered once he receives 'information clearly establishing' the existence of a fraud on the court. The district court interpreted the term 'information clearly establishing' to mean that the lawyer must have 'clear and convincing evidence' that a fraud on the court has occurred before the obligation to disclose the fraud arises." (emphasis added); "Determining whether an attorney has received 'information clearly establishing' a fraud on the court -- and thus triggering his duty to disclose that information to the affected tribunal -- is a 'difficult task.' ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). Our inquiry into the term's meaning is made even more difficult because it is not used in any other Code provision and was not included in any provision of the Code's predecessor, the Canons of Professional Ethics (1908). Nor is the term included in any provision of the Code's successor, the Model Rules of Professional Conduct (1983), and our

> exhaustive research has uncovered no court or professional ethics committee decision that has definitively interpreted what the term means." (emphasis added); "When the ethics professor testified at the hearings before the Grievance Committee, he opined that the term 'information clearly establishing' requires that the attorney have actual knowledge of the alleged fraud. When questioned on this issue, a member of the Committee pointed out that if the drafters of the Code had intended that the knowledge standard govern DR 7-102(B), they would have used the term 'knowledge' or 'actual knowledge' in the rule, as was the case in other Code provisions. The professor responded, however, that the drafter's failure to use the actual term 'knowledge' in the rule reflected nothing more than poor draftsmanship rather than an intent to adopt some standard less than actual knowledge. The Grievance Committee apparently was satisfied with the professor's analysis because is agreed with his conclusions and adopted a knowledge standard for the purposes of the rule. So do we." (emphasis added); "Our experience indicates that if any standard less than actual knowledge was adopted in this context, serious consequences might follow. If attorneys were bound as part of their ethical duties to report to the court each time they strongly suspected that a witness lied, courts would be inundated with such reports. Court dockets would quickly become overburdened with conducting these collateral proceedings which would necessarily hold up the ultimate disposition of the underlying action. We do not believe that the Code's drafters intended to throw the court system into such a morass. Instead, it seems that the only reasonable conclusion is that the drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal." (emphasis added); "To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information of information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.").

This is a remarkable conclusion, which -- if accurate -- reflected poorly on the ABA's 1969 Model Code formulation.

Some states went even further. For instance, the Virginia ethics rule dealing with clients' past fraud on tribunals still contains the "clearly establishing" standard.

> A lawyer shall promptly reveal . . . information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud.

Virginia Rule 1.6(c)(2) (emphases added).[7]

Although the Virginia Rule does not explicitly indicate that clients' acknowledgement is the only fact that "clearly establishes" the client's past fraud, a 1990 Virginia legal ethics opinion (in a non-tribunal context) indicated as much.

> Disciplinary Rule 4-101(D)(2) mandates that a lawyer must reveal information which "clearly establishes" that his client has, during the course of the representation, perpetrated a fraud related to the subject matter of the representation upon the tribunal. The rule defines and limits the meaning of "clearly establishes" to when, and only when, "the client acknowledges to the attorney that he has perpetrated a fraud." Disciplinary Rule 4-101(C)(3) provides that a lawyer may reveal information which "clearly establishes" that his client has, in the course of his representation, perpetrated a fraud related to the subject matter of the representation on a third party. The Committee interprets the meaning of "clearly establishes" in this Disciplinary Rule as the same as defined in DR:4-101(D)(2), as to be only when "the client acknowledges to the attorney that he has perpetrated a fraud." To subscribe to a less stringent determination would create the anomalous situation where the attorney would be allowed to tell the third party of the fraud but, in the same situation, the attorney would be proscribed from revealing the same to the court. (See Doe v. Federal Grievance Committee, 847 F.2d 57, 62 (2d Cir. 1988)).

[7] Virginia Rule 1.6(b)(3) deals with clients' past fraud on other third parties. Virginia Rule 1.6(b)(3) ("To the extent a lawyer reasonably believes necessary, the lawyer may reveal . . . such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation."(emphasis added)).

Virginia LEO 1347 (6/28/90)[8] (emphases added). The Virginia Bar's opinion took a remarkable view -- finding that even the client's arrest and conviction "would not be relevant to the attorney's ethical duty," because only the client's acknowledgement can "clearly establish" the fraud.

> [A]bsent the client/corporate officer acknowledging that a fraud has been perpetrated upon a tribunal by himself or other officers, it would be improper for the attorney to reveal a client's confidences or secrets. . . . If a corporate officer has acknowledged that the insurance claim was fraudulent, it would be permissible for the attorney to reveal the fraud to the insurance company's attorneys. . . . It is the opinion of the Committee that the arrest, conviction, or acquittal of these people (or for that matter the Corporation itself) would not be relevant to the attorney's ethical duty because, as stated above, the only way to "clearly establish" the fraud is by the acknowledgment of the client.

Id. (emphases added). More recently, the Virginia Bar said essentially the same thing, although not as unequivocally.[9]

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[8] Virginia LEO 1347 (6/28/90) (analyzing a situation in which a lawyer represented a corporation in settling a claim with an insurance company after the corporation's offices were burglarized; noting that the lawyer later learned that corporate officers may have staged the burglary; explaining that a lawyer is permitted to reveal to a third party information which "clearly establishes" that the client has committed fraud; also explaining that a lawyer must reveal to a court information which "clearly establishes" that the client has committed fraud on the tribunal; concluding that the only information that "clearly establishes" the client's fraud is the client's acknowledgment to the lawyer that the client has committed a fraud; even the arrest or conviction of the client "would not be relevant to the attorney's ethical duty" because the "only way" to "clearly establish" the fraud is by the "acknowledgment of the client.").

[9]

> Rule 1.6 (c)(2) directs an attorney to disclose information "which clearly establishes that the client has, in the course of the representation, perpetrated fraud related to the subject matter of the representation upon a tribunal." That provision further clarifies that information clearly establishes fraud when "the client acknowledges to the attorney that the client has perpetrated a fraud." That is not the situation outlined in your hypothetical. The crux of the conundrum raised in your request is that the client in fact does not admit he knowingly failed to disclose the real estate. Thus, regardless of what hunch or assumption this attorney may have or wish to make, the attorney does not have information clearly establishing client fraud on the court. Therefore, this attorney must treat this failure to disclose as a client mistake.

As it turns out, the 1969 ABA Model Code's use of this new and undefined standard did not result in the type of confusion one might have expected -- because the ABA hurriedly stepped back from a mandatory disclosure obligation -- essentially mooting the "clearly established" standard's significance.

ABA's Erosion of the Disclosure Duty: 1969-1983

Just as the ABA elite (including those serving on the ABA ethics committee) gutted Canon 29's and Canon 41's mandatory disclosure duties, they reacted quickly to the 1969 ABA Model Code's mandatory disclosure duty.

Hofstra Law School Professor Monroe Freedman has described what happened soon after the ABA adopted its 1969 Model Code.

> [T]he ABA acted promptly to exclude criminal defense lawyers from the disclosure obligation of DR 7-102(B)(1). In 1971, the House of Delegates approved the ABA Standards Relating to the Defense Function, in which the ABA explained that the lawyer's obligation to reveal client fraud under the "and if" clause of DR 7-102(B)(1) did not relate to false testimony in a criminal case.

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133, 140 (2008). Although such standards did not represent official ABA policy, they certainly articulated at least one ABA entity's approach.

Virginia LEO 1777 (6/13/03) (analyzing a situation in which a bankruptcy lawyer who finished a representation and closed the file shortly after the discharge order but who later learned that his former client had inherited real estate that must be reported to the bankruptcy court because it was received within a specified "window" of time after the discharge order had a duty not to report the inheritance to the court; explaining that the "clearly established" standard for fraud that must be reported to a court requires the client to acknowledge the fraud; noting that the client here claimed that the failure to report within the required window of time was a mistake, and that the client did not understand that he had an obligation to report the inheritance until he talked to his former lawyer, after the "window" period had lapsed; explaining that "regardless of what hunch or assumption this attorney may have or wish to make, the attorney does not have information clearly establishing client fraud on the court," and therefore may not reveal it to the court; concluding that lawyers may not reveal "mistakes made by former clients after termination of the attorney-client relationship.").

Just a few years later, the ABA officially retreated from a mandatory disclosure duty. However, at least this time the ABA actually amended its Model Code, rather than just ignored its official Canons or Model Code in strained and intellectually insupportable legal ethics opinions.

In 1974, the ABA House of Delegates added an exception to the disclosure duty -- so it then read as follows.

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

ABA Model Code of Professional Responsibility DR 7-102(B)(1) (emphasis added)**.**

The ABA's choice of the phrase "privileged communication" was somewhat odd, but anyone who had read the ABA Model Code would have known exactly what that meant.

Under DR 4-101(A) the ABA Model Code carefully defined privileged communications as "confidences" -- explicitly distinguishing those from the broader concept of "secrets."

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

ABA Model Code of Professional Responsibility DR 4-101(A) (emphasis added).

Although one might wonder why the ABA did not use the word "confidence" in the 1974 Model Code amendment, no one could rationally contend that the term

"privileged communication" in the 1974 ABA Model Code amendment extended beyond the narrow range of attorney-client privileged communications.

Thus, the ABA's 1974 Model Code amendment deliberately chose to tiptoe back from a mandatory disclosure obligation in all situations. If a lawyer knew that her client had defrauded the court on the lawyer's watch, the lawyer could keep the fraud secret -- if the lawyer knew of the fraud only through a privileged communication with her client.

In a 1975 informal legal ethics opinion, the ABA applied this new black letter exception -- finding that a lawyer had no disclosure duty after learning from his client in a privileged communication that the client had committed perjury.

> If the attorney does not know in advance that the client intends to use perjured testimony or false evidence, but finds in the course of the trial of the case that the client has done this, either by his own admissions or by the obviously false nature of the testimony or evidence, then the lawyer, pursuant to the provisions of DR 7-102(B), has the primary duty to protect the confidentiality of any privileged communication from his client. Subject, however, to affording the client proper protection on the basis of any privileged communication, the lawyer does have the obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client. . . . In other words, the confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal.

ABA Informal LEO 1314 (3/25/75)[10] (emphases added).

[10] ABA Informal LEO 1314 (3/25/75) (holding that a lawyer learning of a client's fraud on a tribunal did not have to disclose it; "The Board of Governors of your State Bar requests an opinion from our Committee concerning the application of DR 7-102(A)(4) and DR-102(B)(1) in regard to the situation where a defendant in a criminal case, whether it be in a traffic case or a felony case, insists upon taking the stand and giving perjured testimony. In addition the Board has asked for our opinion as to what the responsibility of a lawyer representing a defendant in a criminal case is when the defendant takes the stand and gives perjured testimony. You ask, 'does the lawyer at that time have a duty to inform the

But just six months later, the ABA elite were at it again -- further restricting lawyers' disclosure duty when a client defrauded a court on the lawyer's watch.

Although the ABA House of Delegates could not have been any clearer in excepting only "confidences" (privileged communications) from lawyers' duty to disclose clients' past fraud on a tribunal, the ABA Committee on Professional Ethics undertook perhaps the most significant (and most crude) sleight of hand in ABA history -- expanding the meaning of "privileged communications" to also include "secrets."

ABA LEO 341 (9/30/75) started with the recently changed black letter language.

> This opinion is made in response to several inquiries regarding effect of the February 1974 amendment to DR 7-102(B), which presently reads: (B) A lawyer who receives information clearly establishing that (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. [Underscored language added by amendment February 1974.]

ABA LEO 341 (9/30/75).

Court that he believes his client has committed perjury?'"; "It is the view of this Committee that DR 7-102(A) and more particularly subpoints (4), (6), and (7) thereof, clearly and unequivocally prevent an attorney from knowingly using perjured testimony or false evidence or participating in the creation or preservation of evidence when he knows or it is obvious that the evidence was false. This, of course, means that if the attorney knows in advance that his client intends to use false or perjured testimony, it is his duty to advise the client that the lawyer must take one of two courses of action: (1) Withdraw at that time in advance of the submission of the perjured testimony or false evidence; or (2) Report to the court or tribunal the falsity of the testimony or evidence, if the client insists on so testifying."; "If the attorney does not know in advance that the client intends to use perjured testimony or false evidence, but finds in the course of the trial of the case that the client has done this, either by his own admissions or by the obviously false nature of the testimony or evidence, then the lawyer, pursuant to the provisions of DR 7-102(B), has the primary duty to protect the confidentiality of any privileged communication from his client. Subject, however, to affording the client proper protection on the basis of any privileged communication, the lawyer does have the obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client. . . . In other words, the confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal.").

Amazingly, ABA LEO 341 postulated that the ABA's original 1969 adoption of DR 7-102(B) without the newly-added language was a mistake.

> When DR 7-102(B) was added to the Code of Professional Responsibility prior to its adoption in August 1969, the full significance of DR 4-101(C) apparently was not appreciated, even though the Preliminary Draft contained a virtually identical provision stating that "[a] lawyer may reveal . . . [confidences] or secrets when permitted [under] Disciplinary Rules or required by law or court order." That provision of DR 4-101(C), while quite proper in the Preliminary Draft, had the unacceptable result when combined with new DR 7-102(B)(1) of requiring a lawyer in certain instances to reveal privileged communications which he also was duty-bound not to reveal according to the law of evidence. The amendment of February 1974 was necessary in order to relieve lawyers of exposure to such diametrically opposed professional duties. (emphasis added)

Id. (emphasis added; footnote omitted).

The opinion explicitly stated that adding the disclosure duty exception based on "a privileged communication" restored the "traditional" ABA approach -- which supposedly did not even permit disclosure, let alone require it.

> One effect of the 1974 amendment to DR 7-102(B)(1) is to reinstate the essence of Opinion 287 which had prevailed from 1953 until 1969. It was unthinkable then and now that a lawyer should be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client and the lawyer is not now in that untenable position. The lawyer no longer can be confronted with the necessity of either breaching his client's privilege at law or breaching a disciplinary rule.
>
> . . .
>
> The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duly imposed by DR 7-102(B). The many

> annotations to DR 4-101 reflect this policy. Of course, there will be situations where a lawyer may reveal the secrets and confidences of his client. Some of these are recognized in DR 4-101(C).

Id. (emphasis added). This comment was especially ironic, because the 1953 ABA LEO 287 itself ignored the ABA Canons' apparent requirement to disclose clients' past perjury or fraud on tribunals.

ABA LEO 341 then dealt with the 1974 black letter amendment's limitation of the disclosure duty exception to a "privileged communication."

As explained above, the 1969 ABA Model Code carefully defined both "confidences" and "secrets."

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

ABA Model Code of Professional Responsibility DR 4-101(A).

The 1974 amendment to ABA Model Code DR 7-102(B)(1) limited the exception to "a privileged communication" -- thus obviously referring to "confidences" and deliberately excluding "secrets." In other words, lawyers' duty to disclose client fraud "upon a person or tribunal" evaporated only when the lawyer learned of the client's fraud in a privileged communication with the client.

ABA LEO 341 ignored this deliberate language, and expanded the disclosure duty exception to include "secrets."

> The 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.

ABA LEO 341 (9/30/75).

The legal ethics opinion half-heartedly explained that lawyers' disclosure duty should not rest on states' differing interpretations of the attorney-client privilege.

> An interpretation of the 1974 amendment which would limit its scope to the attorney-client privilege as it exists in each jurisdiction and the Federal Rules of Evidence is undesirable because the lawyer's ethical duty would depend upon the rules of evidence in a particular jurisdiction. There may be significant problems in knowing which jurisdiction's evidentiary rule would be applied in a given case and the scope of that privilege may vary widely among jurisdictions. Furthermore, limiting the 1974 amendment to the scope of the attorney-client privilege raises problems as to the difference between waiver of privilege by a client and a consent to the lawyer's disclosure of a confidence.

Id. (emphasis added; footnote omitted).

ABA LEO 341's rationale for its implicit ethics rule amendment made little sense. Not only did this explanation demean lawyers' ability to practice law, it also ignored the ABA Model Code's unchanged reference to "confidences" -- defined as information "protected by the attorney-client privilege under applicable law." Lawyers thus had to determine applicable privilege law when analyzing their underlying confidentiality obligation -- so presumably they could conduct the same exercise when applying the exception.

The legal ethics opinion concluded with a defense of its remarkable expansion of the disclosure duty exception.

> The Committee believes that this interpretation does not go too far in relieving a lawyer of any responsibility to others because it does not alter the standing sanctions against the lawyer's involvement in a fraud nor alter the lawyer's duty

> under DR 7-102(B) when his information is obtained outside the confidential relationship.

Id.

An ABA legal ethics opinion issued twelve years later (discussed more fully below) put as good a spin as possible on this 1975 ABA move.

> The validity of Formal Opinion 287 in this regard was initially put in question in 1969 when the ABA adopted DR 7-102(B)(1). This provision required a lawyer to reveal to an affected person or tribunal any fraud perpetrated by the client in the course of the representation discovered by the lawyer. Because of its apparent inconsistency with DR 4-101, prohibiting a lawyer from revealing a confidence or secret of the client, DR 7-102(B)(1) was amended in 1974 to provide an exception to the duty to reveal the client's fraud when the information is protected as a privileged communication. Formal Opinion 341 (1975) interpreted the words "privileged communication" to encompass confidences and secrets under DR 4-101, thereby making the amendment consistent with Formal Opinion 287.

ABA LEO 353 (4/20/87) (emphasis added).

This was an embarrassingly transparent intellectual dodge. As explained above, the words "privileged communications" could not be any clearer -- such communications did not include "secrets" as defined in the ABA Model Code. The ABA House of Delegates could obviously have included "secrets" in its 1974 amendment, but deliberately chose not to. And the ABA's description of what the ABA ethics committee did in ABA LEO 341 was awkward at best -- that committee's job was (and is) not to make black letter ABA Model Code provisions "consistent" with its legal ethics opinions. The committee must do exactly the opposite.

In 1981, Professor William Hodes described the ABA's double whammy of the 1974 ABA Model Code amendment and 1975 ABA LEO 341.

> Although the Standards thus spoke with two voices, the official Code contained unequivocal language prohibiting the lawyer from presenting perjured testimony and requiring disclosure. Then, in 1974, the ABA amended the Disciplinary Rule to add an exception that accomplished a complete reversal of the thrust of the Rule: the lawyer must reveal the fraud of the client "except when the information [establishing the fraud] is protected as a privileged communication." The next year, Formal Opinion 341 confirmed this about-face by interpreting the exception extremely broadly, stating that the words "privileged communication" were meant to include not only information coming to the lawyer's attention via the client, but also information coming from third parties, unless "not in connection with" representation of the client." Since the lawyer would normally not even know of the client but for the professional relationship, it is virtually impossible to imagine a case in which DR 7-102(B)(1), as amended and as interpreted, would require disclosure.

W. William Hodes, The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod, 35 U. Miami L. Rev. 739, 778 (1981) (emphases added; footnotes omitted).

Hofstra University Law Professor Monroe Freedman offered a more biting explanation of ABA LEO 341.

> In Formal Opinion 341 (1975), the ABA Committee on Professional Ethics considered whether the phrase "privileged communication" in the new "except" clause referred only to clients' "confidences" or, more broadly, to client' "secrets" as well. The committee determined that the "except" clause includes secrets, which means that a lawyer is forbidden to reveal a client's fraud on a tribunal or third party if doing so would be "embarrassing" to the client. As Professor Geoffrey Hazard has wryly remarked, "fraud is always embarrassing," and the ABA's amendment to DR 7-102(B)(1) therefore "eviscerated the duty to report fraud."

Monroe H. Freedman, Getting Honest About Client Perjury, 21 Geo. J. Legal Ethics 133, 140 (2008) (emphasis added).

The ABA's tortured approach to this issue highlighted the difficulty of balancing lawyers' duties of confidentiality and candor to tribunals. ABA Canon 29 seemed to require lawyers' disclosure of past client perjury, but several ABA legal ethics opinions eliminated that explicit requirement. And when the 1969 ABA Model Code explicitly required that same disclosure, within just a few years the ABA had retreated from that position by excepting from the disclosure duty any "privileged communications." And just one year after that, the ABA magically expanded the excepted protected client information to include "secrets." This essentially gutted the ABA Model Code's original and even its amended disclosure duty.

Given the ABA's ethics committee's repeated and often clumsy efforts to undercut the explicit Canons and the Code provisions, the disclosure duty's history up to that point seems to represent the ABA elite's triumph over the House of Delegates.

Regardless of the political reasons behind the ABA's zigzag approach, it unfortunately caused enormous professional confusion.

Many states did not follow the ABA's serpentine course. This meant that states' ethics rules (which actually governed lawyers' conduct, unlike the ABA Model Code) began to diverge from each other. Professor Hodes noted this confusing development in a 1981 law review article.

> Lawyers practicing in only one state may be unaware that only twelve states have adopted the 1974 amendment. Presumably this means that Formal Opinion 341 is completely irrelevant in the other states, and in those states the 1969 version of DR 7-102(B)(1) still controls and unequivocally requires an attorney to reveal his client's perjury.

> Meanwhile, the Defense Function Standards persisted in the so-called compromise position of neither disclosing the perjury nor actively assisting it, but withdrew the commentary that expressed the view that DR 7-102(B)(1) did not apply to criminal cases. That commentary was never authoritative with respect to the Code, but its withdrawal caused further confusion as to what was proper conduct for a lawyer. The amended Code, as interpreted, prohibited disclosure; the Defense Function Standards prohibited disclosure, but counseled action that virtually guaranteed it. At the same time, nearly seventy-five percent of the states adhered to a mandatory disclosure rule, at least on paper.

W. William Hodes, The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod, 35 U. Miami L. Rev. 739, 779 (1981) (emphasis added; footnotes omitted).

But even the ABA Model Code itself generated confusion. Professor Hodes noted the ambiguous nature of the ABA Model Code's rule on disclosing client perjury -- explaining that two leading 1970s-era ethics scholars reached opposite conclusions about lawyers' disclosure duty in the face of their client's past fraud on tribunals.

> Professor Wolfram traced the entire checkered career of the client perjury provisions through a series of conflicting opinions. Wolfram, Client Perjury, 50 S. CAL. L. REV. 809 (1977). He states that trying to conjure up situations in which there would be a duty to disclose, under the Committee's reading, "has become something of a law school parlor game." Id. at 837 n.106. My students and I have played and lost.
>
> Professor Rotunda latched on to another sentence in the same paragraph in Opinion 341 and showed that the now familiar circularity might still be present. Rotunda, Officers, Directors, and Their Professional Advisors -- Rights, Duties, and Liabilities, 1 CORP. L. REV. 34 (1978), Amended DR 7-102(B)(1) still mandates disclosure of that which is not privileged under Canon 4, but Canon 4 allows disclosure of what the law requires the lawyer to reveal, or of the intention of the client to commit a crime, including perjury. See id. at 38-39.

> The opinion elsewhere recognizes this circularity, and implies that the purpose of the 1974 amendment was to cut the knot and end up with a nondisclosure rule. . . . Professor Rotunda has thus probably been too generous in allowing play to Opinion 341. That is not the point, however. The point is that if two experts in the field can disagree over the impact of an opinion that was supposed to clarify an amendment which was not clear upon first reading, it is unfair to expect practicing lawyers to perform this kind of fine textual analysis on the daily basis, especially upon pain of a disciplinary proceeding if they err.

Id. at 778 n.34 (emphases added).

Thus, the ABA's twisted approach to clients' past fraud on tribunals seemed to represent the elite's effort to emphasize confidentiality at the expense of disclosure. Whatever the reasoning or policy justifications, the ABA's process resulted in such confusion that two leading ethics experts applying the same rule came to different conclusions about lawyers' duties. And as explained above, nearly three quarters of the states rejected the ABA approach.

1980s Profession-Wide Debate

Starting in 1980, the ABA and the profession generally undertook a wide-ranging, vigorous and lengthy debate about the profession's ethics rules.[11] Not surprisingly, much of the debate focused generally on confidentiality and specifically on lawyers' responsibility upon learning of clients' past fraud on tribunals.

Not surprisingly, various bar groups thrust themselves into the wide-ranging debate.

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[11] Stephen Gillers, Model Rule 1.13(c) Gives the Wrong Answer To the Question of Corporate Counsel Disclosure, 1 Geo. J. Legal Ethics 289, 291 (1987) ("The Model Rules went through many drafts with various circulations. The first to receive public circulation was dated January 30, 1980. The second major release, dated May 30, 1981, contained changes responsive to comments on the 1980 draft. The proposed final draft, dated June 30, 1982, responded to criticisms of the 1981 draft. The 1982 draft was further amended before the Model Rules were adopted on August 2, 1983." (footnotes omitted)).

Among the most vigorous participants in this widespread conversation was the American Trial Lawyers, which publicized suggested revisions to the then-current ABA Model Code provisions. The American Trial Lawyers' Proposed Code reflected the efforts of a lawyer professional long noted for his obsession with confidentiality. A 2009 law review article explained the Proposed Code's genesis,

> Monroe Freedman, a well-known proponent of a vision of lawyering that promotes (almost exclusively) client autonomy, including a very strong duty of client confidentiality, was also shown a copy of the working draft. Freedman leaked the working draft at the ABA's 1979 annual meeting. He then began working on an alternative code as the Reporter for the Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyers Foundation. The Public Discussion Draft of the ATLF's American Lawyer's Code of Conduct, dated June 1980, included two alternatives (named Alternative A and Alternative B) regarding the rule of client confidentiality and its exceptions. Neither permitted a lawyer to disclose a client confidence "to prevent or rectify the consequences of a deliberately wrongful act by the client." Alternative B did not permit a lawyer to disclose a client confidence even "when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life."

Michael Ariens, "Playing Chicken": An Instant History of the Battle Over Exceptions to Client Confidences, 33 J. Legal Prof. 239, 258 (2009) (footnotes omitted). The American Trial Lawyers eventually pushed the more moderate version of its Proposed Code, which permitted (but did not require) disclosure of client confidences to save a life from imminent danger. But the existence of an alternative set of rules that would not even have permitted that disclosure highlighted the group's emphasis on confidentiality.

Given this background, the American Trial Lawyers' Proposed Code took a very aggressive approach from the very beginning. For instance, its preamble criticized the common understanding of the term "officer of the court."

> Recognizing that the American attorney functions in an adversary system, and that such a system expresses fundamental American values, helps us to appreciate the emptiness of some clichés of lawyers' ethics. It is said, for example, that the lawyer is an "officer of the court," or an "officer of the legal system." Out of context, such phrases are at best meaningless, and at worst misleading. In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Preamble, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphases added).

The Proposed Code explicitly distinguished its approach from the ABA's Model Code.

> The Rules to this Chapter are more protective of confidentiality than the Code of Professional Responsibility or the A.B.A. Commission's Rules. The exceptions permit divulgence, but to not require it, under compulsion of law; to avoid proceeding before a corrupted judge or juror; to defend the lawyer or the lawyer's associates against formally instituted charges of misconduct, or charges made by the client; and to prevent imminent danger to human life. . . . Also, withdrawal is permitted in non-criminal cases, even when a confidence might thereby be divulged indirectly, when the client has induced the lawyer to act through material misrepresentation.

Id. Ch. 1, cmt. (emphasis added).

The American Trial Lawyers' Proposed Code explained the basis for this confidentiality emphasis.

> It is sometimes suggested that confidentiality is inimical to the truth-seeking function of our system of justice. That is true, however, only in a superficial and short-sighted sense. Certainly, under the adversary system, lawyers frequently have knowledge that the court or other parties would want to have. Most often, however, lawyers have such knowledge precisely because of the established rule of confidentiality. If we were to remove that safeguard, by permitting lawyers to divulge their clients' confidences, lawyers would come to have few truths to divulge.

Id. (emphasis added).

The American Trial Lawyers Proposed Code contained three scenarios indicating that lawyers had no duty or even discretion to disclose clients' past fraud on a tribunal.

> A lawyer representing the wife in a divorce and custody case learns from his client that she had sexual relations with a man other than her husband during the time of separation. The client insists upon not disclosing that fact. The lawyer knows that the judge would want to know it, and would weigh it against the wife in deciding custody. The lawyer would commit a disciplinary violation by informing the judge.
>
> . . .
>
> The same facts as 1(a), and the wife testifies falsely on deposition that she has not had sexual relations with anyone other than her husband during the marriage. The lawyer would commit a disciplinary violation by revealing the perjury.
>
> . . .
>
> A lawyer representing the husband in a divorce case learns that his client's tax returns have understated his income. At deposition, the client produces his tax returns, and testifies that they are complete and accurate. The lawyer would commit a disciplinary violation by revealing

> knowledge of the false returns to the wife, her lawyer, the judge, or the Internal Revenue Service.

Id. Ch. 1, Illus. 1(a) -1(c) (emphases added).

Thus, the American Trial Lawyers' Proposed Code would have prohibited lawyers from disclosing their clients' knowing perjury.

1983 ABA Model Rules

Not surprisingly, the ABA House of Delegates also vigorously debated these issues before adopting the ABA Model Rules.

A 2009 law review article described the final flurry of activity.

> The day after the vote to amend Proposed Model Rule 1.6, the House addressed Proposed Model Rule 3.3, which prohibited a lawyer from offering "evidence that the lawyer knows to be false," and required a lawyer who learned after the fact that he or she had offered false material evidence to take "reasonable remedial measures" "even if compliance requires disclosure of information otherwise protected by Rule 1.6 Five separate amendments to bar a lawyer from disclosing client perjury on the ground that this was contrary to the lawyer's duty to keep confidences under Rule 1.6 were voted down. The House instead adopted the Kutak Commission proposal requiring a lawyer to disclose to the tribunal false evidence, including perjurious testimony of the client.

Michael Ariens, "Playing Chicken": An Instant History of the Battle Over Exceptions to Client Confidences, 33 J. Legal Prof. 239, 263 (2009) (emphasis added; footnotes omitted).

The final as-adopted version of the pertinent ABA Model Rule was unclear at best.

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer . . . has offered

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

ABA Model Rule 3.3(a)(4)[12] (emphasis added).

ABA Model Rule 3.3(a)(4) differed from the old ABA Model Code provision in several ways, although the comments make the differences less clear.

First, the ABA Model Code focused on clients who had engaged in tribunal-related misconduct, which the lawyer later discovered. The ABA Model Rule focuses on the lawyer's affirmative conduct of presenting evidence to the tribunal. Not surprisingly, this has resulted in a debate about when a "lawyer has offered false evidence."

Second, the ABA Model Code described lawyers' responsibility if the client has "perpetrated a fraud" upon a tribunal (which itself differed from ABA Canon 29's use of the term "perjury," instead adopting the "fraud" standard of ABA Canon 41). The ABA Model Rule instead addresses false evidence. That presumably eliminates the sort of intent element that fraud (and especially perjury) intrinsically include.

Third, the ABA Model Code used the strange "clearly established" standard as the trigger for lawyers' disclosure duty. The ABA Model Rules use a "knowingly" standard -- which appears elsewhere in the Model Rules.

Interestingly, the comments accompanying the 1983 black letter ABA Model Rules did not all follow the black letter rules' approach. These mismatches might have resulted from the ABA's bifurcated focus on the black letter rules and on the comments.

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[12] As discussed below, in 2002 this provision was renumbered to (b)(3).

The former and the latter were approved at different ABA House of Delegates meetings.[13]

In addition, the House of Delegates only debated the comments for four hours at that later meeting.[14] One might reasonably conclude that the comments thus largely reflected the ABA elite's thinking.

Two then-unnumbered comments dealt with clients' past false evidence.

> When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the

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[13] Robert W. Meserve, ABA Model Rules of Prof'l Conduct & Code of Judicial Conduct, As amended August 1984, Chairman's Introduction ("The proposed Final Draft was submitted to the House of Delegates for debate and approval at the 1982 Annual Meeting of the Association in San Francisco. Many organizations and interested parties offered their comments in the form of proposed amendments to the Final Draft. In the time allotted on its agenda, however, the House debated only proposed amendments to Rule 1.5. Consideration of the remainder of the document was deferred until the 1983 Midyear Meeting in New Orleans. The proposed Final Draft, as amended by the House in San Francisco, was reprinted in the November[] 1982 issue of the ABA Journal. At the 1983 Midyear Meeting the House resumed consideration of the Final Draft. After two days of often vigorous debate, the House completed its review of the proposed amendments to the blackletter Rules. Many amendments, particularly in the area of confidentiality, were adopted. Debate on a Preamble, Scope, Terminology, and Comments, rewritten to reflect the New Orleans's amendments, was deferred until the 1983 Annual Meeting in Atlanta, Georgia. On March 11, 1983 the text of the blackletter Rules as approved by the House in February, together with the proposed Preamble, Scope, Terminology, and Comments, were circulated to members of the House, Section and Committee chairmen, and all other interested parties. The text of the Rules reflected the joint efforts of the Commission and the House Drafting Committee to incorporate the changes approved by the House and to ensure stylistic continuity and uniformity. Recipients of the draft were again urged to submit comments in the form of proposed amendments. The House Committees on Drafting and Rules and Calendar met on May 23, 1983 to consider all of the proposed amendments that had been submitted in response to this draft. In addition, discussions were held among concerned parties in an effort to reach accommodation of the various positions. On July 11, 1983 the final version of the Model Rules was again circulated. The House of Delegates commenced debate on the proposed Preamble, Scope, Terminology, and Comments on August 2, 1983. After four hours of debate, the House completed its consideration of all the proposed amendments and, upon motion of the Commission, the House voted to adopt the Model Rules of Professional Conduct, together with the ancillary material as amended. The task of the Commission had ended and it was discharged with thanks." (emphases added)).

[14] Id.

> persuasion is ineffective, the lawyer must take reasonable remedial measures.
>
> Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

1983 ABA Model Rules of Professional Conduct, Rule 3.3 cmt. "False Evidence"[15] (emphases added).

These comments did not precisely match the black letter rule. The rule does not limit the lawyer's remedial obligation to the client's false evidence, but the first comment addressed the situation "[w]hen false evidence is offered by the client. . . ."

Another comment was labeled "Remedial Measures."

> If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to

[15] These were later numbered as cmts. [6] and [11].

> the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

1983 ABA Model Rules of Professional Conduct, Rule 3.3 cmt. "Remedial Measures"[16] (emphasis added).

As with the other comments, this comment did not exactly match up with the black letter rule. The rule addressed false evidence, without limiting its reach to the client's false evidence. The comment used the phrase "perjured testimony or false evidence." The reference to perjury harkened back to the ABA Canons, although perhaps it was intended to describe a subset of "false evidence." The requirement that lawyers "remonstrate with the client" again focused on the client's improper conduct, although the black letter rule is not so limited. And the comment's explanation that the lawyer "should make disclosure to the court" was inconsistent with the comment discussed immediately below.

The next comment addressed the criminal context -- advising that constitutional requirements might affect lawyers' ethics duty.

> The general rule -- that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client -- applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an

[16] This eventually became cmt. [10].

> accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

1983 ABA Model Rules of Professional Conduct, Rule 3.3 cmt. "Constitutional Requirements"[17] (emphases added).

This comment also failed to follow the black letter rule and even the other comments.

First, this comment described the "general rule" as requiring lawyers' disclosure of clients' perjury, while the preceding comment indicated that lawyers "should" disclose "perjured testimony" to the court.

Second, this comment mentioned only "perjury," while the preceding comment addressed "perjured testimony or false evidence."

Third, this comment discussed the "existence of perjury" about a material fact -- "even that of a client." This seemed to indicate that nonclients' perjury would trigger the same lawyer obligations. But the preceding comment described lawyers' remonstration "with the client" in the case of perjury or false evidence -- seemingly limiting the comment's application to clients.

The 1983 ABA Model Rules' "Model Code Comparison" provided an interesting description of differences between the ABA Model Code provisions as of 1983 and the new ABA Model Rules.

> With regard to paragraph (a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not 'knowingly use' perjured testimony or false evidence. <u>The second sentence of</u>

[17] This eventually became cmts. [7] and [9].

> paragraph (a)(4) resolves an ambiguity in the Model Code concerning the action required of a lawyer who discovers that the lawyer has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, did not expressly deal with this situation, but the prohibition against 'use' of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provided that a lawyer 'who receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud upon . . . a tribunal shall [if the client does not rectify the situation] . . . reveal the fraud to the . . . tribunal. . . .' Since use of perjured testimony or false evidence is usually regarded as 'fraud' upon the court, DR 7-102(B)(1) apparently required disclosure by the lawyer in such circumstances. However, some states have amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the 'information is protected as a privileged communication.' This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer had a duty to disclose the perjury.

1983 ABA Model Rules of Professional Conduct, Rule 3.3, Model Code Comparison (emphases added).

This Comparison was remarkable. The pre-Model Rules legal ethics opinions did not focus on DR 7-102(A)(4), but rather on DR 7-102(B)(1) -- as adopted in 1969. That provision did not "apparently" require disclosure of clients' past fraud on a tribunal, it explicitly required such disclosure.

The Comparison's discussion of the 1974 ABA Model Code amendment is even more astounding. That amendment attempted to curtail lawyer's disclosure obligation, consistent with the several intellectually questionable ABA legal ethics opinions cutting back on the disclosure duty. But the Comparison indicated that the amendment might

have been "empty" -- because the crime-fraud exception might have trumped any privilege protection referred to in the ABA Model Code amendment's exception to the disclosure duty. But that doesn't make any sense. The crime-fraud exception applies only when a litigant's adversary seeks discovery of communications that the litigant has withheld as privileged. A litigant's lawyer cannot abandon a privilege claim after concluding that the adversary probably would win a crime-fraud exception argument. The litigant's lawyer must assert the privilege protection, unless it is frivolous. Only if the adversary successfully argues for the application of the crime-fraud exception does the litigant's lawyer have a duty to turn over the privileged communications. And all of this plays out in the world of privilege anyway, not in the ethics context. So the crime-fraud exception has no bearing on lawyers' ethics duties.

A 2015 opinion properly rejected this identical argument -- using blunt language.

- Hays v. Page Perry, LLC, Civ. A. No. 1:13-CV-3925-TWT, 2015 U.S. Dist. LEXIS 32381, at *18-19 (N.D. Ga. Mar. 17, 2015) (holding that a law firm representing an investment services company had no duty to report a constituent's fraud; "The Plaintiff then argues that there are no confidentiality issues due to the crime-fraud exception to the attorney-client privilege. This is absurd. The Plaintiff claims that, because the Defendants' services allegedly facilitated DeHaan's [plaintiff's former manager] fraudulent activity, the information acquired by the Defendants was not confidential. The Plaintiff conflates attorney-client confidentiality with the attorney-client evidentiary privilege. The attorney-client privilege allows a party to prevent the discovery of certain pieces of evidence during a judicial proceeding. If an exception is established -- e.g., the crime-fraud exception -- then the privilege becomes inapplicable. Obviously, neither this privilege nor its exceptions are relevant here. That certain confidential information may be discoverable does not mean that attorneys may volunteer such information outside of a judicial proceeding, much less be required to do so under the threat of civil penalties. They could be disbarred for disclosing confidential information. For these reasons, the Plaintiff's malpractice claim based upon the Defendants' failure to report DeHaan's and Lighthouse's violations was properly dismissed." (emphases added; footnotes omitted).

The ABA Model Rules utterly failed if the ABA intended them to provide clear guidance to lawyers facing this dilemma. After all, the ABA knew how to mandate lawyers' disclosure of clients' fraud on tribunals. It had done that in the original 1969 ABA Model Code. So the ABA's ambiguity undoubtedly resulted from a policy decision to avoid such a mandatory obligation. This accounts for various comments' use of the word "should" and the phrase "if necessary" in addressing lawyers' disclosure obligation. The black letter rule offered no clear guidance, and the comments were equally mealy-mouthed.

As with the ABA's entire post-1908 handling of lawyers' duties upon learning of a client's past fraud on tribunals, the 1983 ABA Model Rules, the accompanying comments, and even the ABA Model Code Comparison only compounded the ambiguity and confusion.

A 1983 New York Times article appearing just after the ABA adopted the Model Rules highlighted this lack of clarity -- even the incoming ABA president apparently could not get things straight.

- Stuart Taylor, Jr., Lawyers Vote For Disclosure If Needed To Correct Perjury, N.Y. Times, Feb. 9, 1983 ("The American Bar Association today endorsed in principle a proposal requiring lawyers to disclose their clients' secrets, if needed, to correct perjured testimony."; "But later the association, in considering a rule for situations outside the court, voted to bar disclosure of clients' secrets to others even if, by not doing so, the lawyer allowed the client to commit a nonviolent criminal or fraudulent act."; "The combined effect of the rules and amendments approved Monday and today would be to keep lawyers from 'blowing the whistle' on clients who had stolen or were about to steal large sums of money but to require them to inform the authorities in cases where they know their clients were lying in court."; "In its action today, the association's 383-member House of Delegates defeated several amendments designed to bar lawyers from disclosing perjury. In doing so, the delegates recognized a narrow exception to a rule approved Monday that set an almost absolute obligation by lawyers to keep clients' criminal affairs

> confidential."; "At a news conference today, John C. Shepherd, who is scheduled to become president of the A.B.A. in 1984, contradicted himself repeatedly about whether, under the Monday amendment, lawyers could inform on clients who were committing fraud."; "Mr. Shepherd initially said a lawyer would be permitted, although not required, to disclose information in such a situation. This is contrary to the rule's clear language." (emphasis added)).

The incoming ABA president's inability to articulate lawyers' duties in such a high-stakes ethics scenario demonstrated the ABA's failure to provide guidance that ordinary lawyers could understand and follow.

ABA Legal Ethics Opinions (1983-2000)

Between the ABA's adoption of the 1983 ABA Model Rules and the Restatement's 2000 publication, the ABA issued three legal ethics opinions focusing on these issues.

ABA LEO 353 (4/20/87)

Four years after adopting its ambiguous ABA Model Rules provision, the ABA issued an extensive legal ethics opinion revisiting several pre-Model Rules legal ethics opinions, and attempting to explain ABA Model Rule 3.3(a)(4)'s impact.

ABA LEO 353 (4/20/87) constituted one of the ABA's most extensive analyses of a new rule, and included an unusual (and welcome) reiteration of scenarios addressed in several earlier legal ethics opinion (discussed above), as well as the answers under the new ABA Model Rule 3.3(a)(3).

Interestingly, ABA LEO 353 seemed to reverse the trend of the pre-1983 legal ethics opinions. In those earlier opinions, the ABA elite undercut and ultimately gutted various Canon and Model Code disclosure provisions. After 1983, the elite seemed to go in a different direction -- maximizing and expanding lawyers' disclosure obligations.

ABA LEO 353 framed the societal debate underlying lawyers' dilemma when a client committed perjury -- defending a generally pro-disclosure approach.

> [A] question may be raised whether this application [ABA Model Rule 3.3(a)(3)] is incompatible with the adversary system and the development of effective attorney-client relationships. . . . However, neither the adversary system nor the ethical rules permit the lawyer to participate in the corruption of the judicial process by assisting the client in the introduction of evidence the lawyer knows is false. A defendant does not have the right, as part of the right to a fair trial and zealous representation by counsel, to commit perjury. And the lawyer owes no duty to the client, in providing the representation to which the client is entitled, to assist the client's perjury. On the contrary, the lawyer, as an officer of the court, has a duty to prevent the perjury, and if the perjury has already been committed, to prevent its playing any part in the judgment of the court. This duty the lawyer owes the court is not inconsistent with any duty owed to the client. More particularly, it is not inconsistent with the lawyer's duty to preserve the client's confidences. For that duty is based on the lawyer's need for information from the client to obtain for the client all that the law and lawful process provide. Implicit in the promise of confidentiality is its nonapplicability where the client seeks the unlawful end of corrupting the judicial process by false evidence.

ABA LEO 353 (4/20/87) (emphases added).

ABA LEO 353 also acknowledged the issue's constitutional dimensions, noting that constitutional provisions might trump the ethics rules.

> Some states . . . may rely on their own applicable constitutional provisions and may interpret them to prohibit such a disclosure to the tribunal by defense counsel. In a jurisdiction where this kind of ruling is made, the lawyer is obligated, of course, to comply with the constitutional requirement rather than the ethical one.

Id.

In discussing recently-enacted ABA Model Rule 3.3(a)(4), ABA LEO 353 attempted to explain the relationship between the black letter rule and the

accompanying comments -- which were so confusing that even an ABA president did not understand them (as discussed above).

ABA LEO 353 noted that the black letter rule did not require automatic disclosure of clients' past fraud on tribunals, but explained that the comment ultimately did.

> While (a)(4), itself, does not expressly require disclosure by the lawyer to the tribunal of the client's false testimony after the lawyer has offered it and learns of its falsity, such disclosure will be the only "reasonable remedial [measure]" the lawyer will be able to take if the client is unwilling to rectify the perjury. The Comment to Rule 3.3 states that disclosure of the client's perjury to the tribunal would be required of the lawyer by (a)(4) in this situation.

Id.[18] (emphasis added).

Given the stark black letter disclosure requirements in the ABA Canons and the ABA Model Code, this sort of ambiguous disclosure duty seemed odd when the ABA adopted it, and this "explanation" did not do much to clear things up.

ABA LEO 353 next introduced an entirely new ABA Model Rule, which had traditionally played no role in analyzing lawyers' disclosure obligation in this setting.

As adopted in 1983, ABA Model 3.3(a)(2) indicated that

> A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

ABA Model 3.3(a)(2).

ABA LEO 353 explained that this provision somehow included a disclosure duty -- without actually saying it.

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[18] As explained above, the mismatch might reflect the ABA's consideration of the comments at a different meeting than that at which the House of Delegates adopted the rules. In addition, the comments might reflect the ABA elite's efforts to maximize disclosure.

> Although Rule 3.3(a)(2), unlike 3.3(a)(4), does not specifically refer to perjury or false evidence, it would require an irrational reading of the language: "a criminal or fraudulent act by the client," to exclude false testimony by the client. While broadly written to cover all crimes or frauds a client may commit during the course of the proceeding, Rule 3.3(a)(2), in the context of the whole of Rule 3.3, certainly includes perjury.

ABA LEO 353 (4/20/87).

After acknowledging that the black letter rule did not explain "what conduct of the lawyer would constitute" unethical assistance, ABA LEO 353 attempted to explain the interplay of the two rules.

> Certainly, the conduct proscribed in Rule 3.3(a)(4) -- offering evidence the lawyer knows to be false -- is included. Also, a lawyer's failure to take remedial measures, including disclosure to the court, when the lawyer knows the client has given false testimony, is included. It is apparent to the Committee that as used in Rule 3.3(a)(2), the language "assisting a criminal or fraudulent act by the client" is not limited to the criminal law concepts of aiding and abetting or subornation. Rather, it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary under Rule 3.3(a)(2) to avoid assisting the client's criminal act.

Id. (emphases added).

ABA LEO 353's reliance on ABA Model Rule 3.3(a)(2) seems misplaced at best. It would not have made any sense for the ABA Model Rules to have explicitly required disclosure of clients' past fraud on tribunals in this provision, when the ABA could have explicitly required disclosure just two sentence later -- in the rule obviously focusing on lawyers who learn that they have presented false evidence to the court. And ABA LEO

353's use of the word "[c]ertainly" was ironic -- the ABA could simply have stated as much, rather than relying on such an extreme example of reading between the lines.

ABA LEO 353 then boldly claimed that its articulation of lawyers' duty simply followed the new ABA Model Rules -- although that might be a stretch.

> [T]he obligation of a lawyer to disclose to the tribunal client perjury committed during the proceeding, which the lawyer learns about prior to the conclusion of the proceeding, represents a reversal of prior opinions of this Committee given under earlier rules of professional conduct. However, the Committee has done nothing more in this opinion than apply the ethical rule approved by the American Bar Association when it adopted Rule 3.3(a) and (b) of the Model Rules of Professional Conduct.

Id.

Elsewhere, ABA LEO 353 repeated these unambiguous statements of lawyers' disclosure obligation.

> Model Rule 3.3(a) and (b) represent a major policy change with regard to the lawyer's duty as stated in Formal Opinions 287 and 341 when the client testifies falsely. It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury. . . . If, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client's perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation.

Id. (emphases added).

After attempting to reconcile the inconsistencies between ABA Model Rule 3.3 and its comments, ABA LEO 353 then revisited several earlier ethics opinions and explained how the new rule would change the ABA's earlier analysis.

ABA LEO 353 first reviewed the conclusions articulated 34 years earlier in ABA LEO 287 (6/27/53). ABA LEO 353 noted that under ABA LEO 287 lawyers had no duty to disclose a client's confession three months after obtaining a divorce decree that he had testified falsely about the date of his desertion. ABA LEO 353 correctly recited that earlier legal ethics opinion's reliance on that lawyer's confidentiality duty.

> Formal Opinion 287 concludes that Canon 37 of the ABA Canons of Professional Ethics (dealing with the lawyer's duty to not reveal the client's confidences) prohibits the lawyer from disclosing the client's perjury to the court.

Id.

ABA LEO 353 reached the same conclusion, but based on when the client confessed -- rather than on the lawyer's confidentiality duty.

> In this factual situation, Model Rule 3.3 also does not permit the lawyer to disclose the client's perjury to the court, but for a significantly different reason. Contrary to Formal Opinion 287, Rule 3.3(a) and (b) require a lawyer to disclose the client's perjury to the court if other remedial measures are ineffective, even if the information is otherwise protected under Rule 1.6, which prohibits a lawyer from revealing information relating to representation of a client. However, under Rule 3.3(b), the duty to disclose continues only "to the conclusion of the proceeding . . . ." From the Comment to Rule 3.3, it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client's unlawful conduct. Therefore, on the facts considered by Formal Opinion 287, where the lawyer learns of the perjury after the conclusion of the proceedings -- three months after the entry of the divorce decree -- the mandatory disclosure requirement of Rule 3.3 does not apply and Rule 1.6, therefore, precludes disclosure.

Id. (footnotes omitted).

ABA LEO 353 then turned to the second scenario addressed in ABA LEO 287 -- involving a court's mistaken understanding that a criminal defendant did not have a criminal record. One portion of that scenario involved the criminal defendant falsely answering the court's direct question about a past criminal record. ABA LEO 287 had concluded that the lawyer in that scenario could not disclose the client's intentionally false answer to the court's question.

ABA LEO 353 indicated that the ABA Model Rules now required a different answer.

> [I]n situation (2) ["the judge asks the defendant whether he has a criminal record and he falsely answers that he has none"], where the client has lied to the court about the client's criminal record, the conclusion of Opinion 287 that the lawyer is prohibited from disclosing the client's false statement to the court is contrary to the requirement of Model Rule 3.3. This rule imposes a duty on the lawyer, when the lawyer cannot persuade the client to rectify the perjury, to disclose the client's false statement to the tribunal for the reasons stated in the discussion of Rule 3.3 below.

Id. (emphasis added; footnote omitted).

ABA LEO 353 also addressed ABA Informal Opinion 1314 (3/25/75). Although that earlier informal legal ethics opinion dealt mostly with clients' intent to commit future fraud on the tribunal, it also discussed lawyers' duty if a client unexpectedly provided false testimony. ABA LEO 353 explained that Model Rule 3.3 changed the analysis.

> The Committee distinguished, in Informal Opinion 1314, the situation where the lawyer does not know in advance that the client intends to commit perjury. In that case, the Committee stated that when the client does commit perjury, and the lawyer later learns of it, the lawyer may not disclose the perjury to the tribunal because of the lawyer's primary duty to protect the client's confidential communications. The

> Committee believes that Model Rule 3.3 calls for a different course of action by the lawyer.

Id.

After its extensive 1987 ABA LEO 353 analysis, the ABA issued a number of other ethics opinions before revising ABA Model Rule 3.3.

ABA LEO 376 (8/6/93)

In 1993, the ABA addressed lawyers' reporting obligation upon learning of a client's litigation-related falsehoods outside the courtroom.

> The Committee has been asked to address the ethical obligations of a lawyer in a civil case who is informed by her client after the fact that the client lied in responding to interrogatories and deposition questions, and supplied a falsified document in response to a request for production of documents.

ABA LEO 376 (8/6/93) (emphasis added).

ABA LEO 376 articulated ABA Model Rule 3.3's disclosure obligation in fairly unambiguous terms.

> In circumstances where a lawyer has offered perjured testimony or falsified evidence in an adjudicative proceeding, the Model Rules, like the predecessor Model Code of Professional Responsibility (1969, amended 1980), adopt the view that remedial measures must be taken. . . . Most notably in this context, the duty of confidentiality mandated by Rule 1.6 is explicitly superseded by the duty of disclosure in Rule 3.3. See Rule 3.3(b). Thus, as was made clear in Formal Opinion No. 87-353, disclosure of a client's perjury is required by Rule 3.3 where a lawyer has offered material evidence to a tribunal and comes to know of its falsity, or when disclosure of a material fact is necessary to avoid assisting a criminal or fraudulent act by the client.

Id. (emphasis added; footnote omitted).

ABA LEO 376 noted the non-court setting, which implicated other rules.

> In the case at hand, there is no issue as to knowledge on the lawyer's part of the client's fraud; the client has made a direct admission to the lawyer after the fact. Similarly, there is no doubt that the perjury and other fraudulent acts of the client relate to a material fact, in that a necessary element of plaintiff's case is at issue. However, because the client's misrepresentations took place during pretrial discovery and none occurred in open court, the question arises whether the applicable rule of conduct is Rule 3.3 or Rule 4.1. . . . The issue is whether perjury or fraud in pretrial discovery should be regarded as a lack of candor toward the tribunal, governed by Rule 3.3, or untruthfulness toward the opposing party and counsel, as to which Rule 4.1 is the applicable provision. Unlike the duty of candor toward a "tribunal" in Rule 3.3, the duty of truthfulness toward "others" in Rule 4.1 does not expressly trump the duty to keep client confidences in Rule 1.6. If it is Rule 4.1 rather than Rule 3.3(a) that applies in this context, the prohibition on disclosure of client confidences in Rule 1.6 must be given full effect.

Id. (emphases added). This scenario made the analysis fairly easy, because the lawyer did not have to wrestle with the knowledge, materiality, or perjury/fraud standards.

ABA LEO 376 explained that the client's false discovery responses essentially amounted to fraud on the tribunal, because they could end up in court.

> It is clear that once the deposition is signed and filed and the motion for summary judgment submitted to the court, a fraud has been committed upon the tribunal which would trigger application of Rule 3.3(a). Indeed, we think that even before these documents are filed there is potential ongoing reliance upon their content which would be outcome-determinative, resulting in an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement. Support for this view is found in case law holding that the duty of a lawyer under Rule 3.3(a)(2) to disclose material facts to the tribunal implies a duty to make such disclosure to opposing counsel in pretrial settlement negotiations. . . . Further supporting the applicability of Rules 3.3(a)(2) and (4) to pretrial discovery situations is the fact that while paragraphs (a)(1) and (3) presuppose false or incomplete statements made to the tribunal, neither paragraph (a)(2) nor (a)(4) expresses

> any such condition precedent that the tribunal must have been aware of the crime, fraud, or false evidence. . . . Although the perjured deposition testimony and the altered mail log may not become evidence until they are offered in support of the motion for summary judgment or actually introduced at trial, their potential as evidence and their impact on the judicial process trigger the lawyer's duty to take reasonable remedial measures under Rule 3.3(a)(4), including disclosure if necessary, according to the complementary interpretation of paragraphs (a)(2) and (a)(4) in ABA Formal Opinion No. 87-353.

Id. (first emphasis added).

But much like ABA Model Rule 3.3(b) itself, ABA LEO 376 came in like a lion but went out like a lamb.

Acknowledging that "[a]t a minimum" the lawyer must withdraw from the representation, ABA LEO 376 again introduced some ambiguity about the lawyer's required response.

> It is important to note, however, that the Committee does not assert, nor should it be inferred from its analysis of Rule 3.3(a) in Opinion No. 87-353, that disclosure to the tribunal is the first and only appropriate remedial measure to be taken in situations arising under Rule 3.3(a)(4). As the Comment to Rule 3.3 makes clear, the duties of loyalty and confidentiality owed to her client require a lawyer to explore options short of outright disclosure in order to rectify the situation. Thus, the lawyer's first step should be to remonstrate with the client confidentially and urge him to rectify the situation. It may develop that, after consultation with the client, the lawyer will be in a position to accomplish rectification without divulging the client's wrongdoing or breaching the client's confidences, depending upon the rules of the jurisdiction and the nature of the false evidence. For example, incomplete or incorrect answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal. Although this approach would not appear to be feasible in the case at hand, it is nevertheless the type of

> reasonable remedial measure that should be explored initially by a lawyer when confronted by a situation in which she realizes that evidence she has offered or elicited in good faith is false.

Id. (emphases added).

After discussing what is called a "noisy withdrawal" option, ABA LEO 376 essentially dragged itself across the finish line, ultimately concluding that disclosure "may" be the only appropriate "remedial measure."

> It is possible that so-called "noisy withdrawal" procedures could be effective in the instant case, albeit in a way that is tantamount to disclosure. See ABA Formal Opinion No. 92-366 (August 8, 1992). Utilization of the withdrawal/ disaffirmance approach suggested by Opinion No. 92-366 is appealing as a remedial measure because it is less intrusive on the confidential relationship between lawyer and client than outright disclosure to the tribunal under Rule 3.3(a). It may also have the advantage of directly and expeditiously rectifying the fraud in a way that does not compromise the tribunal and prevent the case from proceeding. On the other hand, "noisy withdrawal" may not be an entirely effective means of dealing with the type of client fraud likely to occur in the pretrial stages of a case. For instance, withdrawal would not be sufficient to correct the fraud's impact on the case if the plaintiff decided to drop his or her lawsuit because of a perceived lack of proof prior to or notwithstanding the "noisy withdrawal." Also, a "noisy withdrawal" does not necessarily put either successor counsel or the opposing party on notice as to why the documents are being disaffirmed. Thus, notwithstanding withdrawal and disaffirmance, the fraud could continue to adversely affect the proceedings and ultimate disposition of the case. Direct disclosure under Rule 3.3, to the opposing party or if need be to the court, may prove to be the only reasonable remedial measure in the client fraud situations most likely to be encountered in pretrial proceedings.

Id. (emphases added).

As with the poor incoming ABA president's inability to give clear answers to ABA Model Rule 3.3's application in 1983, this 1993 ethics opinion had trouble coming to a conclusion.

ABA LEO 412 (9/9/98)

Five years later, the ABA returned to the issue. In ABA LEO 412 (9/9/98), the ABA dealt mostly with lawyers' obligation upon learning that they (rather than their client) had earlier made then-unknowingly false statements to the court.

The opinion also described the ethics rules applicable if the client rather than the lawyer had made false statements to the court.

- ABA LEO 412 (9/9/98) ("The Committee has been asked to address a lawyer's obligations under the Model Rules of Professional Conduct when the lawyer representing a client in civil litigation discovers that her client has violated a court order prohibiting the client from transferring or disposing of assets. In addition, we are asked whether there is a disclosure obligation by a lawyer who tries without success to convince her client to make disclosure to the tribunal and then withdraws or is discharged and is replaced by new counsel."; "A lawyer's duty to correct her own false statements to the court is, in this respect, no different from her obligation in civil cases to take reasonable remedial measures upon discovery of a client's perjury." (emphasis added; footnotes omitted); explaining the ethics rules that apply if the client rather than the lawyer has made false statements"; "If false representations of fact have been made by the client, but not by the lawyer, then Rule 3.3(a)(1) does not apply. In such a case, the lawyer's duty is governed by Rule 3.3(a)(2) and (4), which require a lawyer to reveal a fact to a tribunal when 'necessary to avoid assisting a criminal or fraudulent act by the client,' and to 'take reasonable remedial measures' upon discovery that the lawyer has offered material evidence that is false." (emphasis added); "When a lawyer learns that a client has violated an order prohibiting transfer of assets, the lawyer should determine whether the client has made or will be required to make representations in the litigation that, absent disclosure of the misconduct, are or will be false and material. Such representations could, for example, include periodic reports of transactions required to be made by the order itself, or discovery responses made by the client during the litigation, or testimony at a deposition, hearing, or trial."

Thus, as of 1998 the ABA still had not reached a definitive conclusion about lawyers' duties upon learning of clients' past fraud on a tribunal.

Restatement

In 2000, the American Law Institute adopted the Restatement (Third) of Law Governing Lawyers.

The main Restatement provision dealing with this scenario took the same ambiguous approach as the ABA Model Rules.

> If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

Restatement (Third) of Law Governing Lawyers § 120(2) (2000) (emphasis added).

The Restatement recognizes the historic context of the issue -- noting the profession's basic evolution from a non-disclosure duty to a disclosure possibility.

> Some earlier authority had required a lawyer to withdraw if a client threatened perjury or would not retract past perjury, but did not require the lawyer to disclose it.

Restatement (Third) of Law Governing Lawyers § 120 reporter's note cmt. h (2000).

That comment also describes the familiar context -- involving lawyers' dual duties to preserve client confidences and avoid tainting tribunals.

> Following the ABA's adoption of ABA Model Rule 3.4 in 1983, the majority of courts now hold that a lawyer is required to take corrective action, including disclosure if necessary.

Id.[19]

[19] The Restatement's reference to ABA Model Rule 3.4 may be a typo. ABA Model Rule 3.3 seems to be a more appropriate reference.

The Restatement begins with a discussion of the policy issues.

> A lawyer's discovery that testimony or other evidence is false may occur in circumstances suggesting complicity by the client in preparing or offering it, thus presenting the risk that remedial action by the lawyer can lead to criminal investigation or other adverse consequences for the client. At the very least, remedial action will deprive the client of whatever evidentiary advantage the false evidence would otherwise provide. It has therefore been asserted that remedial action by the lawyer is inconsistent with the requirements of loyalty and confidentiality . . . . However, preservation of the integrity of the forum is a superior interest, which would be disserved by a lawyer's knowing offer of false evidence. Moreover, a client has no right to the assistance of counsel in offering such evidence. As indicated in Subsection (2), taking remedial measures required to correct false evidence may necessitate the disclosure of confidential client information otherwise protected under Chapter 5.

Restatement (Third) of Law Governing Lawyers § 120 cmt. b (2000) (emphasis added).

The next section discusses the standard for lawyers' knowledge that triggers a possible disclosure duty.

> A lawyer's obligations under Subsection (2) depend on what the lawyer knows and, in the case of Subsection (3), on what the lawyer reasonably believes . . . . A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document . . . . A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphasis added).

The Restatement then distinguishes between "perjury" and "false testimony."[20]

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury" because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the criminal offense applies.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000).

The Restatement then turns to the obvious initial step lawyers must undertake in such scenarios -- trying to convince their client to correct any false evidence the client has presented.

> Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action.

Restatement (Third) of Law Governing Lawyers § 120 cmt. g (2000) (emphasis added).

The Restatement then turns to the heart of the matter -- what "remedial measures" a lawyer must or may take.

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[20] This issue implicates possible differences between ABA Canon 29's use of the term "perjury," ABA Canon 41's use of the phrase "fraud . . . upon the court," the ABA Model Code's use of the phrase "false . . . material evidence," and the ABA Model Rule's reference to "falsity" of "material evidence."

> A lawyer may be surprised by unexpected false evidence given by a witness or may come to know of its falsity only after it has been offered. If the lawyer's client or the witness refuses to correct the false testimony . . . , the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the finder of fact . . . . Alternatively, a lawyer could seek a recess and attempt to persuade the witness to correct the false evidence . . . . If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal . . . . If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps. To the extent necessary in taking reasonable remedial measures under Subsection (2), a lawyer may use or reveal otherwise confidential client information . . . . However, the lawyer must proceed so that, consistent with carrying out the measures (including, if necessary, disclosure to the opposing party or tribunal), the lawyer causes the client minimal adverse effects. The lawyer has discretion as to which measures to adopt, so long as they are reasonably calculated to correct the false evidence. If the lawyer makes disclosure to the opposing party or tribunal, thereafter the lawyer must leave further steps to the opposing party or tribunal. Whether testimony concerning client-lawyer communications with respect to the false evidence can be elicited is determined under § 82 (crime-fraud exception to attorney-client privilege). The lawyer's disclosure may give rise to a conflict between the lawyer and client requiring the lawyer to withdraw from the representation.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphasis added).

The 2000 Restatement provision represented a surprisingly modest approach. In other areas, the Restatement broke from the ABA Model Rules approach, and often criticized the ABA's standards.

In this important area, the Restatement meekly took the same path as the ABA Model Rules, indicating that lawyers must take "reasonably remedial measures" upon learning that their clients have presented false evidence -- mentioning the possibility that such measures might have to include disclosing the clients' past false evidence but not requiring that in every situation.

2002 ABA Model Rules Amendments

In 2002, the ABA revised ABA Model Rule 3.3. The main ABA Model Rule 3.3 provision was renumbered from (a)(4) to (a)(3).

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(a)(3) (emphasis added).

Unlike the 1983 version, this provision at least acknowledges that the "reasonable remedial measures" might include "disclosure to the tribunal." However, it still does not flatly require such disclosure -- as did the 1938 ABA Canons and the original 1969 ABA Model Code provision. The phrase "if necessary" continues to leave some doubt.

The 2002 changes also added an entirely new more general provision, which also contains an ambiguous disclosure obligation.

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added).

This new provision covered people other than clients, and conduct other than presenting false evidence.

The main ABA Model Rule 3.3 comment was renumbered and somewhat restated.

> Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

ABA Model Rule 3.3 cmt. [10] (emphasis added).

States' Approach

As in so many other scenarios involving confidentiality, states have taken differing positions on lawyers' disclosure duty upon learning of a client's past false evidence.

Historically, state bars and courts seemed to have followed the same trend as the ABA. The Restatement briefly notes this development.

> Some earlier authority had required a lawyer to withdraw if a client threatened perjury or would not retract past perjury, but did not require the lawyer to disclose it. . . . Following the ABA's adoption of ABA Model Rule 3.4 in 1983, the majority of courts now hold that a lawyer is required to take corrective action, including disclosure if necessary.

Restatement (Third) of Law Governing Lawyers § 120 reporter's note cmt. h (2000).

States had to scramble in the wake of the 1969 ABA Model Code's explicit articulation of lawyers' disclosure duty, the 1974 retreat (excepting "privileged communications" from the duty), and the 1975 further retreat involving ABA LEO 341's intellectually questionable expansion of the disclosure exception from "privileged communication" to include the quite different category of "secrets."

After the ABA's 1983 adoption of the ABA Model Rules, states had to scramble all over again. By this time, more states were issuing legal ethics opinions, so their reaction is easier to follow.

Nearly every state has followed the ABA's move away from confidentiality and toward disclosure. Most states adopted the ABA Model Rules formulation (or essentially the same approach) in the decade following the 1983 ABA Model Rules.

Some states took quite a bit longer to move in that direction. New York adopted new ethics rules on April Fools' Day 2009. A New York State legal ethics opinion issued about four months later addressed a client's fraud on a tribunal that occurred before the new rules came into effect. This made all the difference. Under the old New York

Code, a lawyer was not obligated to disclose clients' fraud on the tribunal. But under the new Rules the lawyer had such a duty.

- New York State LEO 831 (8/14/09) ("Where a lawyer learns that a client, before April 1, 2009 (the effective date of the new N.Y. Rules of Professional conduct), had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, which generally did not permit disclosure of confidences or secrets, and not by rule 3.3 of the new Rules of Professional Conduct, which may require disclosure of confidential information necessary to remedy the fraud. Where the fraud occurred before April 1, 2009, this conclusion applies whether the lawyer learns of the fraud before or after April 1, 2009."; "The inquirer represented a defendant accused of a misdemeanor. The inquirer arranged a plea bargain under which the defendant pleaded guilty to a violation of disorderly conduct with a conditional discharge. Under the terms of the sentence of conditional discharge, the defendant avoided incarceration or probation as long as she was not arrested within the next six months. In the course of the plea, the client represented to the court and the prosecutor that she (the client) had 'stayed out of trouble' since the misdemeanor arrest." (emphasis added); "A short time later, but after April 1, 2009, the client told the inquirer that in fact she had been arrested the week before the plea in a different county. The inquirer asks whether he must inform the prosecutor or the court about the client's prior arrest."; "New York adopted new Rules of Professional Conduct that became effective on April 1, 2009. Both the new Rules and the former Code of Professional Responsibility have provisions addressing a lawyer's obligations where a client engages in fraudulent conduct before a tribunal. Both provisions require a lawyer to take remedial measures, but the rules differ on two significant points: First, and most clearly, the provisions differ on the critical question of whether a lawyer must disclose protected confidential information if required to remedy the fraud. Second, the definition of 'fraudulent conduct' in the new rules differs from the interpretation we placed on the definition of 'fraud' in the old rules with respect to whether fraudulent conduct includes misleading or deceptive conduct short of actual fraud under the applicable law." (footnote omitted); "Under DR 7-102(B)(1) of the old Code, a lawyer who learned that a client had 'perpetrated a fraud upon a person or tribunal' was required to 'promptly call upon the client to rectify the same. If the client refuse[d] or [was] unable to do so,' the lawyer was required to 'reveal the fraud to the . . . tribunal, *except when the information is protected as a confidence or secret.*'" (emphasis added; emphasis in original in italics); "Rule 3.3(b) of the new Rules eliminates the exception for confidences and secrets (now called simply 'confidential information')." (emphasis added); "The lawyer would therefore have an obligation to disclose the information only if the information was not 'protected' under DR 4-101. Here, no exception to the

duty of confidentiality applies, and therefore the information remains 'protected' as a confidence or secret. While under DR 4-101(C)(3) (as under new Rule 1.6(b)(2)) a lawyer may disclose information necessary to prevent a future crime, the inquirer here learned of the client's misrepresentation after it occurred, when it was past wrongdoing, not a future crime." (footnote omitted)).

However, some states did not move in the ABA Model Rules direction.

- North Carolina LEO RPC 33 (1/15/88) (assessing the following question: "Attorney A represents Defendant D in a criminal proceeding. In a confidential communication with D, Attorney A discovers that D has been charged under an alias. If D's real identity were known, it would reveal a prior criminal record which could have an impact on sentencing and possibly result in other charges. In this particular case, it would be in the best interest of D to testify in his own behalf."; "Does Attorney A have an affirmative duty to disclose the alias? May he have D sworn under the alias? When the district attorney asks the defendant if he has a prior criminal record, must Attorney A withdraw if D denies any record? If asked by the judge to disclose D's prior record, which cannot be accomplished without revealing the alias, must Attorney A withdraw?"; "In the trial court . . . Attorney A also has a duty to the tribunal. He may not participate in the presentation of perjured testimony, Rule 7.2(a) (4), (5), (6) and (8), nor in the perpetration of a fraud upon the tribunal. Rule 7.2(b) (1). Obviously, trial court events may give rise to a conflict between this duty to deal honestly with the court, and the duty to deal confidentially with the client. Counsel may not sit idly by while a defendant testifies falsely. Rule 7.2(b) (1). And in response to a specific and direct question to counsel by the court, counsel may not misrepresent the defendant's criminal record but is under no ethical obligation to respond."; "Prior to trial, Attorney A must anticipate these possible trial events. He must request the Defendant to agree that he will testify truthfully about all matters, including his name and criminal record, if he testifies at all. If the Defendant refuses this request, Attorney A must terminate his representation. If he has formally entered the case, he must undertake to withdraw, prior to trial, in accord with the rules of the tribunal. See Rule 7.2 and comment."; "<u>If the Defendant agrees to these requests but, during the trial, testifies falsely with respect to a material matter, including his name and criminal record, Attorney A must call upon the Defendant to correct the false testimony. If the Defendant refuses, Attorney A must undertake to withdraw from the case in accord with the rules of the tribunal.</u> <u>See</u> Rule 7.2(b) (1) and comment." (emphasis added); concluding that a lawyer must withdraw from a case in which the client unexpectedly provides false testimony to a tribunal; not concluding that the lawyers must disclose the false testimony, but noting North Carolina's revised Rule 3.3 as providing additional guidance).

- Arizona LEO 92-2 (3/12/92) (analyzing a lawyer's duties upon discovering from his client's wife and then the client himself that he has given the authorities an incorrect name upon his arrest; addressing a situation as a "continuing crime"; "The rules for disclosure of a present and continuing crime, rather than a threatened future crime, are different. With the exception of certain frauds on the court listed in ER 3.3, discussed below, a lawyer may not ethically reveal the client's commission of a past crime. Where disclosure of a client's current and continuing crime would necessarily disclose the client's past crime, the rule of confidentiality applies. The Comment to ER 1.2 discusses an attorney's obligations in this situation: "'When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by ER 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.'" (emphasis added); "In short, a lawyer may not reveal a client's continuing crime if such a disclosure would also reveal a past crime by the client." (emphasis added); "Assuming that the client's past statement to the court of a false name was a crime, and that the client intends to continue the false statement, the client's course of conduct involves a past and continuing crime which the lawyer may not reveal under either ER 1.6(b) or (c)."; concluding as follows: "[T]he committee believes that the rules applicable to client perjury in a criminal setting should apply to this fact situation. Accordingly, the inquiring lawyer should advise the client that he cannot use a false name with the court. If the client insists on using a false name, the lawyer must move to withdraw citing irreconcilable differences, but not telling the court of the client's use of a fictitious name. If the motion to withdraw is denied, then counsel must proceed but cannot rely upon or argue the client's false statement in his or her further representation of the client." (emphasis added)).

Some of these lingering pro-confidentiality approaches eventually evaporated as states adopted rules following the ABA Model Rules approach. But even today, several states' black letter ethics rules continue to prohibit such disclosure.

- Massachusetts Rule 3.3(e) "In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. (1) If a lawyer discovers this intention before accepting the representation of the

client, the lawyer shall not accept the representation. (2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. (3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals." (emphasis added)).

- Massachusetts Rule 3.3 cmt. [10] ("Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. <u>If that fails, and except as provided for in Rule 3.3(e), the advocate must take further remedial action. Except as provided in Rule 3.3(e)</u>, if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, <u>the advocate must make such disclosure to the tribunal</u> as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing." (emphasis added)).

- North Dakota Rule 3.3(a)(3) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless the evidence was contained in testimony of the lawyer's client. If the evidence was contained in testimony of the lawyer's client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules. The lawyer may not use or argue the client's false testimony." (emphases added)).

- Tennessee Rule 3.3(g) ("A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by RPC 1.6." (emphasis added)).

- District of Columbia Rule 3.3(d) ("A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d). [Rule 1.6 permits disclosure in several limited circumstances involving: the possibility of bodily harm; litigation misconduct other than misstatements to the tribunal; and "substantial injury to the financial interests or property of another." D.C. Rule 1.6(c)(d)]" (emphasis added)).

- District of Columbia Rule 3.3 cmt. [8] ("Paragraph (d) provides that if a lawyer learns that a fraud has been perpetrated on the tribunal, the lawyer must take reasonable remedial measures. If the lawyer's client is implicated in the fraud, the lawyer should ordinarily first call upon the client to rectify the fraud. If the client is unwilling to do so, the lawyer should consider other remedial measures. The lawyer may not, however, disclose information otherwise protected by Rule 1.6, unless the client has used the lawyer's services to further a crime or fraud and disclosure is permitted by Rule 1.6(d). In other cases, the lawyer may learn of the client's intention to present false evidence before the client has had a chance to do so. In this situation, paragraphs (a)(4) and (b) forbid the lawyer to present the false evidence, except in rare instances where the witness is the accused in a criminal case, the lawyer is unsuccessful in dissuading the client from going forward, and the lawyer is unable to withdraw without causing serious harm to the client. In addition, Rule 1.6(c) may permit disclosure of client confidences and secrets when the lawyer learns of a prospective fraud on the tribunal involving, for example, bribery or intimidation of witnesses. The terms 'criminal case' and 'criminal

> defendant' as used in Rule 3.3 and its Comment include juvenile delinquency proceedings and the person who is the subject of such proceedings." (emphasis added)).

Current Status of Lawyers' Disclosure Obligations

Given the complex, confusing, and changing history of the ABA's approach to lawyers' disclosure obligation in this setting, it is worth describing the current ABA approach, as well as the pertinent parallel Restatement provisions and states' varying approaches.

Meaning of "Tribunal"

ABA Model Rule 3.3 is entitled "Candor Toward the Tribunal." That term appeared in the original 1983 ABA Model Rules, and still appears in all three subsections of ABA Model Rule 3.3(a), as well as current ABA Model Rule 3.3(b).

Current ABA Model Rule 3.3 cmt. [1] refers back to ABA Model Rule 1.0(m) for the definition of "tribunal."

> 'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

ABA Model Rule 1.0(m).

This definition parallels the 1965 ABA legal ethics opinion's standard.

- ABA LEO 314 (4/27/65) (explaining that lawyers who learn that their clients have provided false information to the IRS may withdraw, but may not disclose the client's deception, because the IRS is not a tribunal; "The Committee has received a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it."; "The Internal Revenue Service is neither a true tribunal, nor even a

> quasijudicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute." (emphasis added)).

Significantly, the ABA recognizes that the term "tribunal" includes depositions and other tribunal-related settings. This expansive definition extends the ethics rules' reach to misconduct during discovery. Because so many cases settle before they actually reach a courtroom, the broad definition makes sense.

Thus, ABA Model Rule 3.3 cmt. [1] indicates that the disclosure duty applies to depositions and similar "ancillary" proceedings.

> It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

ABA Model 3.3 cmt. [1] (emphasis added).

ABA legal ethics opinions issued in 1993 and 1998 confirmed this common sense concept.

- ABA LEO 376 (8/6/93) ("The Committee has been asked to address the ethical obligations of a lawyer in a civil case who is informed by her client after the fact that the client lied in responding to interrogatories and deposition questions, and supplied a falsified document in response to a request for production of documents." (emphasis added); "It is clear that once the deposition is signed and filed and the motion for summary judgment submitted to the court, a fraud has been committed upon the tribunal which would trigger application of Rule 3.3(a). Indeed, we think that even before these documents are filed there is potential ongoing reliance upon their content which would be outcome-determinative, resulting in an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement. Support for this view is found in case law holding that the duty of a lawyer under Rule 3.3(a)(2) to disclose material facts to the tribunal implies a duty to make such disclosure

to opposing counsel in pretrial settlement negotiations. . . . Further supporting the applicability of Rules 3.3(a)(2) and (4) to pretrial discovery situations is the fact that while paragraphs (a)(1) and (3) presuppose false or incomplete statements made to the tribunal, neither paragraph (a)(2) nor (a)(4) expresses any such condition precedent that the tribunal must have been aware of the crime, fraud, or false evidence. . . . Although the perjured deposition testimony and the altered mail log may not become evidence until they are offered in support of the motion for summary judgment or actually introduced at trial, their potential as evidence and their impact on the judicial process trigger the lawyer's duty to take reasonable remedial measures under Rule 3.3(a)(4), including disclosure if necessary, according to the complementary interpretation of paragraphs (a)(2) and (a)(4) in ABA Formal Opinion No. 87-353." (emphasis added)).

- ABA LEO 412 (9/9/98) ("The Committee has been asked to address a lawyer's obligations under the Model Rules of Professional Conduct when the lawyer representing a client in civil litigation discovers that her client has violated a court order prohibiting the client from transferring or disposing of assets. In addition, we are asked whether there is a disclosure obligation by a lawyer who tries without success to convince her client to make disclosure to the tribunal and then withdraws or is discharged and is replaced by new counsel." "The terms 'criminal or fraudulent act' in Rule 3.3(a)(2) encompass only crimes or frauds directed toward a matter pending before a court. . . . Discovery responses or other statements provided to the opposing party ordinarily fall within Rule 3.3. . . . A lawyer representing a client in litigation, however, ordinarily is not obligated -- or even permitted -- to advise the court of crimes or frauds not involving the litigation that the client may be in the process of committing during the course of the lawyer's representation of the client if disclosure would reveal information relating to the representation. See Rule 4.1(b)." (emphasis added)).

Bars and courts take the same approach.

- New York City LEO 2013-2 (2013) ("[T]he adjudicative process is not limited to proceedings before courts. Instead, Rule 1.0(w) defines a 'tribunal' as including not only courts, but also arbitral panels, and legislative, administrative and other bodies acting in an adjudicative capacity. Indeed, the adjudicative process includes proceedings before the tribunals listed in Rule 1.0(w) as well as ancillary proceedings conducted pursuant to the tribunal's adjudicative authority, such as depositions. Rule 3.3, cmt. [1]. The obligation to make disclosure set forth in Rule 3.3, therefore, applies across a broad spectrum of settings and should be parsed carefully.").

- In re Filosa, 976 F. Supp. 2d 460, 463, 470 (S.D.N.Y. 2013) (suspending for one year a lawyer who had not corrected his client's deposition testimony; explaining that the client had received and accepted two job offers after she

lost her job working for defendant company, but testified at her deposition (among other things) that it was stressful "'not knowing when the next job is going to come along'" (citation omitted); acknowledging that the plaintiff's lawyer eventually corrected the testimony; "Respondent's belated honesty in the face of an adversary who had already discovered the truth is hardly worthy of applause. If opposing counsel had not discovered Fryer's employment on their own, there is no telling how much longer Respondent would have continued to conceal the truth or whether the parties would have reached a settlement premised on the concealed information. In any event, the fact that Respondent may not have planned to perpetuate his deceit indefinitely does not lessen the seriousness of his misconduct.").

- Virginia LEO 1451 (3/13/92) (explaining that a lawyer has an ethical duty to disclose a client's knowingly false statement in a deposition, even if (1) the false testimony is irrelevant to the case's merits; (2) the client is willing to correct the testimony if the client testifies at trial; or (3) the case does not proceed to trial).

Application to Non-Adjudicatory Proceedings

Lawyers might easily miss the expansive reach of ABA Model Rule 3.3, whose title, black letter rule, and comments all refer to "tribunals." To fully understand ABA Model Rule 3.3's application, lawyers must also refer to ABA Model Rule 3.9.

As explained above, ABA Model Rule 3.3 is entitled "Candor Toward the Tribunal." Unfortunately, this is a confusing reference. ABA Model Rule 3.3(b) refers on its face to lawyers representing clients in "an adjudicative proceeding." Yet ABA Model Rule 3.9 provides an equally explicit application of such lawyers' duties to "a nonadjudicative proceeding." Thus, lawyers must check a different rule to discover that the reach of ABA Model Rule 3.3 extends far beyond the "tribunal" mentioned in Rule 3.3's title, black letter rule, and comments. This is discussed below.

Under ABA Model Rule 3.9, lawyers must comply with these disclosure obligations in non-adjudicatory proceedings, which do not take place in the ABA-defined "tribunals."

> A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

ABA Model Rule 3.9[21] (emphasis added). A comment confirms this application.

> In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

ABA Model Rule 3.9 cmt. [1] (emphasis added).

Bars apply the comment as written.

- Illinois LEO 13-05 (5/2013) (analyzing a lawyer's obligation when the lawyer discovers that the client had submitted false material evidence during an earlier administrative proceeding; concluding that the lawyer must try to persuade the client to correct the false evidence; concluding that it might be possible to undo the effect of the false evidence without disclosing that client's misconduct, but absent that remedy the lawyer must disclose the client's misconduct; "Lawyer represents an applicant for supplemental security income ('SSI') benefits before a Social Security Administration ('SSA') administrative law judge. The Client is contesting the denial of SSI benefits. The initial SSI application is in the form of a sworn affidavit, submitted by Client prior to retaining Lawyer. The application purports to state all the financial resources of Client. Lawyer discovers during the representation that Client failed to disclose significant assets, resources and income in the SSI application, which will likely have a significant effect on the disposition of the application. The false application is part of the administrative record upon which the administrative law judge will render a decision."; "Notwithstanding these Rule requirements concerning withdrawal, if the false material evidence is disclosed (and all ill effects remedied) and the client wishes the disclosing

[21] ABA Model Rule 3.3(d) falls outside this reference. That rule refers to ex parte proceedings, and requires lawyers to disclose even unfavorable facts to the tribunal in that setting. ABA Model Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

lawyer to continue the representation, that would not be prohibited under these Rules."; "The SSA is an administrative agency. Further, the proceeding at issue in this inquiry to determine the correctness of an initial benefit decision is adjudicative in that evidence will be presented; legal arguments made; and the rights of a party will be determined by a neutral official. Accordingly, the hearing at issue falls within the definition of a tribunal and therefore, the conduct of Lawyer must conform to the Rules of Professional Conduct." (emphasis added); "Notwithstanding the difficulties and consequences of this situation, when confronted with the knowledge of a client's presentation of false information to a tribunal, a lawyer's obligations are clear (this Opinion does not address a lawyer's obligations in a criminal proceeding)."; "Before fully answering the inquiry, the Committee reasonably assumes two underlying facts. First, Client's failure to disclose certain assets, resources and income in the initial SSI application was done intentionally for the express purpose of obtaining social security benefits, because if the nondisclosure of assets and income was inadvertent, then Client should not object to the filing of an amended application or other method. Second, the false information contained in the SSI application is material evidence is the SSA hearing. Not only is the SSI application the focus of the proceeding, but inasmuch as it is one of the documents comprising the record under review it will be available for consideration by the administration law judge as evidence."; "Varying factual scenarios will dictate which, if any, other remedial steps may be taken by the lawyer to correct the false information, however, disclosure to the tribunal may not always be required if other actions short of disclosure will undo the effects of the false evidence."; "The Committee accepts the Rantis [In re Rantis, No. 09 CH 65, Ill. Attorney Registration & Disciplinary Comm'n Review Bd. (Nov.14, 2011)] analysis that whether and when a lawyer is required to disclose a client fraud to the tribunal depends on 'when the effect of the false evidence cannot be undone through other measures.' Because the parties therein worked out an arrangement to avoid the effect of the client fraud and the matter was dismissed, it was found to be unnecessary that counsel formally disclose the fraud to the court."; "Of course, if the client refuses to withdraw or correct the false evidence and the lawyer's own efforts to undo the false evidence are impractical or unsuccessful, the lawyer 'must make such to the tribunal as is reasonably necessary to remedy the situation.' Rule 3.3, Comment [10]."; "If disclosure to the tribunal is made, a lawyer must be cautious to tailor the disclosure so as to disclose only so much information as is necessary to satisfy the purpose of disclosure (e.g. preventing a trier of fact from being misled)."; "Notably, the requirements of Rule 3.3 for candor to a tribunal are higher than the Rule 4.1 requirement of truthfulness to others as a lawyer is not permitted under Rule 4.1 to disclose a client fraud if the lawyer came to know of the falsity as a result of confidential information received from the client and as protected by Rule 1.6."; also analyzing the lawyer's possible withdrawal; "If the lawyer has unsuccessfully remonstrated with the client as outlined above, the lawyer

should ordinarily seek to withdraw from the representation at the time of his or her disclosure of the false material evidence to the tribunal."; "Applied to the inquiry before the Committee, Lawyer must attempt to get Client to correct the false information contained on the SSI application for benefits. This necessarily must be a frank discussion where Lawyer's ethical obligations are explained, including the need for Lawyer to disclose the false material evidence if Client fails to do so. If Client still refuses to rectify the fraud, Lawyer must seek to withdraw from representing Client. Finally, because the Lawyer's withdrawal by itself likely will have no effect on remedying the false evidence before the tribunal, Lawyer must take steps to correct the effects of the fraud. If nothing else can reasonably undo the effects of the fraud, the disclosure to the tribunal will be necessary as a last resort. This course of action, admittedly difficult in execution, is nevertheless justified and appropriate.").

- New Hampshire LEO 2008-09/3 (2008) (assessing the following situation: "An attorney represents a client who has suffered an injury to his left hand. He is, with the attorney's help, seeking damages. The client testified on day one of the trial, which was then continued to the next week, that there were no prior injuries to his hand. The attorney took him at his word. Now the attorney has unexpectedly received a medical report from a hospital that was thought to be merely background information when it was requested months ago. The report states that the client had been treated for a previous injury to that hand. The report makes it very clear that the client's testimony at the trial was false."; holding that the lawyer had a duty of disclosure; "May an attorney withdraw from the case without stating a reason for withdrawing? The problem with such a 'quiet withdrawal' is that maintaining client confidentiality may result in the lawyer engaging in wrongdoing where the client has engaged in a deceiving tribunal."; "Even if the matter can be settled, settlement may not end the duty to disclose under Rule 3.3 if the false statement was made in pleadings or to the tribunal. While a settlement may 'conclude' the dispute, a settlement does not necessarily cure the falsity, and hence would not be a reasonable remedial measure. In this regard, a distinction needs to be made between learning of the falsity before settlement and learning of the falsity after settlement. Prior to settling the matter, there is a duty to take remedial measures under Rule 3.3(a)(3). Learning of the falsity after a settlement may not require disclosure, because Rule 3.3(d) provides that the duty 'continue[s] to the conclusion of the proceeding,' but not thereafter."; explaining that the duty applies in nonadjudicative proceedings; "The Rule 3.3 duty extends even to non-adjudicative proceedings under the New Hampshire Rules. As Rule 3.9 states, the duty of candor under Rule 3.3(a), (b) and (d) [New Hampshire Rule 3.3(d) parallels ABA Model Rule 3.3(c) -- indicating that the disclosure duty "continues to the conclusion of the proceeding"] applies to the representation of clients before' . . . a legislative body or administrative agency in a non-adjudicative proceeding . . .' Thus

> lobbying efforts and rulemaking proceedings come with the rule's reach." (emphasis added); ultimately concluding that "[a]n attorney who learns that the client has testified falsely about his prior hand injury should try to convince the client to explain the discrepancy, admit error, or otherwise correct the apparent falsehood. If the client is not willing to do so, the attorney is under an ethical duty to disclose the falsity to the tribunal. Remedial measures should be taken promptly, as [an] Idaho attorney [in a cited case] who waited until the next day to disclose the falsity learned to his detriment.").

Materiality Requirement

The ABA Model Rules address materiality issues in the ABA Model Rule 3.3 provisions dealing with lawyers' statements to tribunals and with presentation of evidence.[22]

On its face, ABA Model Rule 3.3(a)(3) seems to address both material and immaterial evidence.

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added).

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[22] Under ABA Model Rule 3.3(a), "a lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Until 2002, this rule prohibited lawyers from knowingly making "a false statement of material fact" to the tribunal. In that year, the ABA amended the rule so it now prohibits lawyers from making any "false statement of fact" (even non-material statements) to tribunals. At the same time, the ABA added the second half of the rule, which requires lawyers to correct false statements of fact they previously made -- but only if these were material.

Thus, the first prohibition applies to any evidence the lawyer "knows to be false" -- not just material evidence. However, the remedial measure requirement applies only to "material evidence."

States take this approach.

- New York City LEO 2013-2 (2013) ("Rule 3.3 represents a significant change from the predecessor rule in the Code of Professional Responsibility, which provided that the lawyer was required to 'reveal the fraud to the . . . tribunal, except when the information is protected as a confidence or secret.' Before April 1, 2009, when New York adopted the Model Rules format and amended a number of its rules, a lawyer's obligation to make disclosure to the tribunal was subordinate to the lawyer's duty of confidentiality to the client. Since April 1, 2009, when the courts promulgated Rule 3.3(c), under certain narrow circumstances the lawyer's duty to protect the integrity of the adjudicative process trumps the lawyer's duties of confidentiality and loyalty to the client. Indeed, Rule 1.1(c)(2) acknowledges that a lawyer has a duty not to harm the client 'except as permitted or required by these Rules,' and Rule 1.6(b)(6) expressly allows a lawyer to reveal confidential information "when permitted or required under these Rules or to comply with other law or court order.'"; "Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result. If the false evidence is material, it makes no difference if the falsity was intentional or inadvertent -- in either instance, the lawyer who discovers the falsity has a duty to act under the Rule." (emphasis added)).

- New York State LEO 837 (3/16/10) ("Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also 'material.' While inquiring counsel has not specifically addressed the question of materiality, for purposes of this opinion we assume that the testimony and the documentary evidence at issue were 'material.' See, e.g., N.Y. County 732 (2004) at p. 5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on 'materially inaccurate' information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.").

- Michigan LEO RI-272 (6/19/96) (analyzing the following situation: "A lawyer represents the personal representative of an estate in a medical malpractice action. During a deposition, the personal representative was asked and could not remember whether an exhumation autopsy had been conducted. When

questioned about that answer by the lawyer shortly after the deposition, the personal representative then remembered that the autopsy had been ordered, but the personal representative did not recall during the deposition having authorized it because it had been 'quite a long time in the past.'"; "The lawyer has concluded that the results of the autopsy do not assist the plaintiff in the case, and the plaintiff does not intend to call the pathologist to testify in the matter. The lawyer is convinced that the personal representative was not intentionally untruthful but in fact did not remember. The lawyer asks whether the lawyer is required to disclose that an exhumation autopsy had been authorized and had occurred."; finding that the lawyer did not have to track the immaterial testimony; "The above authorities, then, provide the basic ethical framework in which inquiries such as presented here are analyzed and addressed. However, the facts presented do not disclose fraudulent or illegal conduct by the personal representative, nor that the information was material to the legal matter. It is only by drawing poorly-grounded inferences from the personal representative's testimony that one could conclude that fraudulent, or even inaccurate, testimony was given." (emphasis added); "Here, the personal representative was asked whether an exhumation autopsy had occurred. The personal representative could not recall, and so stated. That testimony was truthful. It was only after the personal representative was later taken aside by the lawyer and reminded of the activities surrounding the exhumation that the personal representative recalled that such activity had been authorized."; "Therefore, the inquirer has no ethical obligation to correct the testimony or to make disclosures to the opposing party.").

- Virginia LEO 1650 (9/8/95) (analyzing a scenario in which the plaintiff and defendant settled a case based at least in part on the plaintiff's expert's deposition testimony, after which lawyers "for both sides learn[ed] that the expert lied the about professional qualifications that formed the basis of his expert opinion."; reiterating that false deposition testimony is fraud on a tribunal; noting, however, not every misrepresentation made by a witness in a deposition is a "fraud upon the tribunal" -- disclosure is required only "to prevent a judgment from being corrupted" by the "unlawful conduct."; concluding that if the false testimony about the plaintiff's expert's qualifications is "material to the opinion given by such expert" and therefore "corrupts the opinion," the fraud must be revealed to the tribunal "regardless of whether the case proceeds to trial or is settled.").

Required Level of Knowledge

ABA Model Rule 3.3(a)(3) triggers lawyers' disclosure duty only if lawyers "comes to know" of clients' past false testimony.

ABA Model Rule 1.0(f) defines that term

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). ABA Model Rule 3.3 cmt. [8] reinforces this concept.

> The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8] (emphases added).

ABA LEO 353 reminded lawyers that their disclosure duty arose only in very narrow circumstances.

> The lawyer's obligation to disclose client perjury to the tribunal, discussed in this opinion, is strictly limited by Rule 3.3 to the situation where the lawyer knows that the client has committed perjury, ordinarily based on admissions the client has made to the lawyer. The lawyer's suspicions are not enough.

ABA LEO 353 (4/20/87) (emphasis added; footnote omitted)).

ABA LEO 353 warned lawyers not to refrain from asking their client about the facts, so that the lawyers never "know" whether clients have (or will) testify falsely.

> The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never 'know' that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4-3.2(a) and (b) are also applicable.

Id.

The 2000 Restatement follows the same basic approach.

> A lawyer's obligations under Subsection (2) depend on what the lawyer knows and, in the case of Subsection (3), on what the lawyer reasonably believes . . . . A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document . . . . A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphases added).

Following the ABA and this Restatement approach, states require more than suspicion.

- North Carolina LEO 99-15 (7/19/00) (holding that a lawyer learning that his former client had submitted false information to a bankruptcy court had the discretion to disclose the former client's fraud if the client used the lawyer's services -- even if the client had not retained the lawyer to represent him in the bankruptcy; "Rule 1.6(d)(5) permits a lawyer to reveal confidential information of a client to the extent that the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act 'in the commission of which the lawyer's services were used.' Mere suspicion that Client is committing a fraud on the court is not sufficient to trigger this exception to the duty of confidentiality. However, if Attorney A knows that Client is committing a fraud on the court and that his services were used to perpetrate the fraud, he may reveal confidential information of his former client as necessary to rectify the fraud." (emphasis added); "If Attorney A knows that the bankruptcy petition is fraudulent and he decides to take action to rectify the fraud, Attorney should reveal confidential information of Client only to the extent necessary."; "The first step is a letter to his former client requesting that Client take action to rectify the fraud. If this is unsuccessful, disclosure to Client's current lawyer is permitted under Rule 1.6(d)(5). Attorney A should inform Attorney B that he will notify the bankruptcy administrator if no action is taken to rectify the fraud or he does not receive a response from Attorney B. If Attorney B fails to respond or fails to alleviate Attorney A's concerns, Attorney A may notify the bankruptcy administrator.").

Some states take a different approach. For instance, Virginia still follows the "clearly establishing" standard from the old ABA Model Code (discussed above).

> A lawyer shall promptly reveal . . . information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud.

Virginia Rule 1.6(c)(2)[23] (emphases added). Thus, in Virginia a lawyer faces a disclosure obligation only if the client confesses to have committed fraud on a tribunal.

> Disciplinary Rule 4-101(D)(2) mandates that a lawyer must reveal information which "clearly establishes" that his client has, during the course of the representation, perpetrated a fraud related to the subject matter of the representation upon the tribunal. The rule defines and limits the meaning of "clearly establishes" to when, and only when, "the client acknowledges to the attorney that he has perpetrated a fraud." Disciplinary Rule 4-101(C)(3) provides that a lawyer may reveal information which "clearly establishes" that his client has, in the course of his representation, perpetrated a fraud related to the subject matter of the representation on a third party. The Committee interprets the meaning of "clearly establishes" in this Disciplinary Rule as the same as defined in DR:4-101(D)(2), as to be only when "the client acknowledges to the attorney that he has perpetrated a fraud." To subscribe to a less stringent determination would create the anomalous situation where the attorney would be allowed to tell the third party of the fraud but, in the same situation, the attorney would be proscribed from revealing the same to the court. (See Doe v. Federal Grievance Committee, 847 F.2d 57, 62 (2d Cir. 1988)).

[23] Virginia Rule 1.6(b)(3) deals with clients' past fraud on other third parties. Virginia Rule 1.6(b)(3) ("To the extent a lawyer reasonably believes necessary, the lawyer may reveal . . . such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.").

Virginia LEO 1347 (6/28/90)[24] (emphasis added).

> [A]bsent the client/corporate officer acknowledging that a fraud has been perpetrated upon a tribunal by himself or other officers, it would be improper for the attorney to reveal a client's confidences or secrets. . . . If a corporate officer has acknowledged that the insurance claim was fraudulent, it would be permissible for the attorney to reveal the fraud to the insurance company's attorneys. . . . It is the opinion of the Committee that the arrest, conviction, or acquittal of these people (or for that matter the Corporation itself) would not be relevant to the attorney's ethical duty because, as stated above, the only way to "clearly establish" the fraud is by the acknowledgment of the client.

Id. (emphases added).

Most states do not go this far. Instead, they require more than suspicion, but less than a client confession. ABA Model Rule 3.3 cmt. [8] explains that lawyers' knowledge of clients' past perjury may be "inferred from circumstances," and warns that lawyers "cannot ignore an obvious falsehood." ABA LEO 353 (4/20/87) explained that lawyers' knowledge is "ordinarily" based on client admissions, which does not limit the knowledge to those circumstances.

Prohibition on Settling a Case Before Disclosing Clients' Past False Evidence

Not surprisingly, the ABA and state legal ethics opinions have confirmed that lawyers knowing of clients' past false evidence may not settle a case without taking whatever "remedial measures" the pertinent bar or court requires.

[24] Virginia LEO 1347 (6/28/90) (analyzing a situation in which a lawyer represented a corporation in settling a claim with an insurance company after the corporation's offices are burglarized; noting that the lawyer later learned that corporate officers may have staged the burglary; explaining that a lawyer is permitted to reveal to a third party information which "clearly establishes" this the client has committed fraud; also explaining that a lawyer must reveal to a court information which "clearly establishes" that the client has committed fraud on the tribunal; concluding that the only information that "clearly establishes" the client's fraud is the client's acknowledgment to the lawyer that the client has committed a fraud; even the arrest or conviction of the client "would not be relevant to the attorney's ethical duty" because the "only way" to "clearly establish" the fraud is by the "acknowledgment of the client.").

- New York County LEO 741 (3/1/10) ("Once the lawyer is aware of material false deposition testimony, the lawyer may not sit by idly while the false evidence is preserved, perpetuated or used by other persons involved in the litigation process. Thus, if a settlement is based even in part upon reliance on false deposition testimony, the lawyer may not ethically proceed with a settlement. The falsity must be corrected or revealed prior to settlement." (emphasis added)).

- ABA LEO 412 (9/9/98) ("The Committee has been asked to address a lawyer's obligations under the Model Rules of Professional Conduct when the lawyer representing a client in civil litigation discovers that her client has violated a court order prohibiting the client from transferring or disposing of assets. In addition, we are asked whether there is a disclosure obligation by a lawyer who tries without success to convince her client to make disclosure to the tribunal and then withdraws or is discharged and is replaced by new counsel."; discussing when the proceeding is concluded; "The Committee does not here consider the question whether a proceeding is 'concluded' for purposes of Rule 3.3(b) when a final judgment has a continuing effect, as in the case of an injunction, and the judgment may have been influenced by false statements to the court. Settlement of litigation without informing the court or opposing counsel of a prior, material false statement made during the litigation may violate the lawyer's duty of candor to the court." (emphasis added)).

- Virginia LEO 1477 (8/24/92) (analyzing the obligation of a lawyer who learned that a client's answers to interrogatories were incorrect, and requiring updating under court rules; noting that the client wanted to settle the case before amending the answers, because the amendment could adversely affect the settlement value; explaining that the lawyer may not attempt to settle the case before amending the answers, because they were signed under oath and the lawyer now knew that they were inaccurate -- because such a settlement would be "fraudulently induced," whether the lawyer "verbally reaffirm[ed] the incorrect answers or simply remain[ed] silent as to their inaccuracy during the negotiations process.").

Disclosure Duty's Duration

The ABA Canons of Professional Ethics did not directly deal with the duration of lawyers' duty to disclose clients' past fraud on tribunals.

The 1969 ABA Model Code is similarly silent on the lawyers' disclosure duty.

Current ABA Model Rule 3.3(c) explains the disclosure duty's duration.

> The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

ABA Model Rule 3.3(c) (emphasis added).

A comment provides guidance.

> A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

ABA Model Rule 3.3 cmt. [13] (emphasis added).

This seems simple enough. But in several legal ethics opinions, the ABA introduced enormous uncertainty.

ABA LEO 353 confirmed that ABA Model Rule 3.3's disclosure duty lasted until a proceeding's "final judgment."

> [U]nder Rule 3.3(b), the duty to disclose continues only "to the conclusion of the proceeding . . . ." From the Comment to Rule 3.3, it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client's unlawful conduct. Therefore, on the facts considered by Formal Opinion 287, where the lawyer learns of the perjury after the conclusion of the proceedings -- three months after the entry of the divorce decree -- the mandatory disclosure requirement of Rule 3.3 does not apply and Rule 1.6, therefore, precludes disclosure.

ABA LEO 353 (4/20/87) (emphasis added; footnotes omitted). However, in a footnote ABA LEO 353 introduced doubt of this timing issue.

> The Committee assumes that there were no further proceedings and that this was a final decree. This is not to say, however, that the judgment could not be set aside by the court if the court subsequently learns of the fraudulent representations of the client.

Id. (emphasis added).

Although contained in a footnote, this concept could be critically important. If ABA Model Rule 3.3's intent is to avoid corrupting the judicial process while the corruption can be remedied, acknowledging that a court could revisit a final judgment completely changes the equation. If a court could reopen a final judgment upon learning of clients' fraud, one would think that lawyers' disclosure obligation would parallel that timing. Thus, one could reasonably conclude that lawyers' ABA Model Rule 3.3 disclosure obligation could extend beyond the final judgment -- as long as the court could remedy the fraud.

In a later legal ethics opinion focusing primarily on lawyers' rather than clients' misstatements to the court, the ABA also discussed the disclosure duty's duration -- and again introduced some uncertainty.

- ABA LEO 412 (9/9/98) ("The Committee has been asked to address a lawyer's obligations under the Model Rules of Professional Conduct when the lawyer representing a client in civil litigation discovers that her client has violated a court order prohibiting the client from transferring or disposing of assets. In addition, we are asked whether there is a disclosure obligation by a lawyer who tries without success to convince her client to make disclosure to the tribunal and then withdraws or is discharged and is replaced by new counsel."; discussing when the proceeding is concluded; "The Committee does not here consider the question whether a proceeding is 'concluded' for purposes of Rule 3.3(b) when a final judgment has a continuing effect, as in the case of an injunction, and the judgment may have been influenced by false statements to the court. Settlement of litigation without informing the court or opposing counsel of a prior, material false statement made during the litigation may violate the lawyer's duty of candor to the court." (emphasis added)).

The 2000 Restatement ends the disclosure obligation when the time for appeal has ended -- without explicitly adding the uncertainty in the ABA legal ethics opinions.

> Responsibilities of a lawyer under this Section extend to the end of the proceeding in which the question of false evidence arises. Thus, a lawyer representing a client on appeal from a verdict in a trial continues to carry responsibilities with respect to false evidence offered at trial, particularly evidence discovered to be false after trial . . . . If a lawyer is discharged by a client or withdraws, whether or not for reasons associated with the false evidence, the lawyer's obligations under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphasis added).

Although the ethics rules and legal ethics opinions focus on the scenario of a case proceeding to trial, possibly appealed, etc., most cases settle. To the extent that the settlement results in a final judgment, the black letter rule ends lawyers' possible disclosure duty as of that date.

Surprisingly few legal ethics opinions address this type of final judgment, which of course cannot be appealed -- and therefore immediately ends lawyers' disclosure duty. A 2008 New Hampshire legal ethics opinion properly interpreted the black letter rule's effect in this scenario.

- New Hampshire LEO 2008-09/3 (2008) (assessing the following situation: "An attorney represents a client who has suffered an injury to his left hand. He is, with the attorney's help, seeking damages. The client testified on day one of the trial, which was then continued to the next week, that there were no prior injuries to his hand. The attorney took him at his word. Now the attorney has unexpectedly received a medical report from a hospital that was thought to be merely background information when it was requested months ago. The report states that the client had been treated for a previous injury to that hand. The report makes it very clear that the client's testimony at the trial was false."; holding that the lawyer had a duty of disclosure; "May an attorney

withdraw from the case without stating a reason for withdrawing? The problem with such a 'quiet withdrawal' is that maintaining client confidentiality may result in the lawyer engaging in wrongdoing where the client has engaged in a deceiving tribunal."; "Even if the matter can be settled, settlement may not end the duty to disclose under Rule 3.3 if the false statement was made in pleadings or to the tribunal. While a settlement may 'conclude' the dispute, a settlement does not necessarily cure the falsity, and hence would not be a reasonable remedial measure. In this regard, a distinction needs to be made between learning of the falsity before settlement and learning of the falsity after settlement. Prior to settling the matter, there is a duty to take remedial measures under Rule 3.3(a)(3). Learning of the falsity after a settlement may not require disclosure, because Rule 3.3(d) provides that the duty 'continue[s] to the conclusion of the proceeding,' but not thereafter." (emphasis added); explaining that the duty applies in nonadjudicative proceedings; "The Rule 3.3 duty extends even to non-adjudicative proceedings under the New Hampshire Rules. As Rule 3.9 states, the duty of candor under Rule 3.3(a), (b) and (d) applies to the representation of clients before' . . . a legislative body or administrative agency in a non-adjudicative proceeding . . .' Thus lobbying efforts and rulemaking proceedings come with the rule's reach."; ultimately concluding that "[a]n attorney who learns that the client has testified falsely about his prior hand injury should try to convince the client to explain the discrepancy, admit error, or otherwise correct the apparent falsehood. If the client is not willing to do so, the attorney is under an ethical duty to disclose the falsity to the tribunal. Remedial measures should be taken promptly, as [an] Idaho attorney [in a cited case] who waited until the next day to disclose the falsity learned to his detriment.").

Most states have adopted black letter ABA Model Rule 3.3(d)'s approach to lawyers' disclosure duty's duration, ending any disclosure duty at "the conclusion of the proceeding." ABA Model Rule 3.3(c).

- Grievance Adm'r v. McCargo, ADB Case No. 09-50-GA, at 6, 76 n.31 (Mich. Attorney Discipline Bd. Mar. 1, 2010) (finding that a lawyer for disgraced former Detroit Mayor Kwame Kilpatrick violated ethics rules while representing the Mayor in a case brought by a former city employee claiming that they had been wrongfully fired in violation of the Whistle-blowers' Protection Act after reporting "the Mayor's dalliances."; concluding that McCargo was not guilty of violating a number of ethics rules, but violated other rules; "We also reject McCargo's argument that MRPC 3.3 no longer applied because the proceedings had concluded. We hold that, at a minimum, a proceeding is not concluded for purposes of MRPC 3.3 until entry of a final judgment. In this case, that did not occur until December 2007, long

> after the events discussed here occurred. Other authorities suggest that the rule applies for an even longer period. See Hazard and Hodes, The Law of Lawyering, Section 29.23 ('The 'conclusion' of a proceeding for purposes of Rule 3.3(c) should be the point where the time to appeal has normally expired, or the point of affirmance if there has been an appeal.')" (emphasis added)).

Other states have explicitly rejected black letter ABA Model Rule 3.3(d)'s approach -- taking one of four paths, one of which ends lawyers' disclosure duty earlier than the ABA Model Rules, and three of which extend the duty further than the ABA Model Rules.

First, a District of Columbia rule explains that lawyers' possible duty to disclose clients' past fraud on tribunals ends when the lawyer withdraws.

> A practical time limit on the obligation to take reasonable remedial measures concerning criminal and fraudulent conducted [sic] related to the proceeding is needed. The conclusion of the proceeding is an appropriate and reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. If the lawyer withdraws before the conclusion of the proceeding, the lawyer's obligation ends at the time of withdrawal.

District of Columbia Rule 3.3 cmt. [12] (emphasis added). This approach harkens back to the old ABA approach, allowing lawyers to withdraw upon learning of their clients' fraud on a tribunal -- but not requiring disclosure.

Second, a Texas rule takes the opposite approach -- implicitly extending lawyers' disclosure duty past a proceeding's conclusion. However, the Texas rule ends lawyers' duty when remedial measures are "no longer reasonably possible."

> The duties stated in paragraph (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Texas Rule 3.03(c) (emphasis added). This represents an ambiguous standard that could be nearly impossible to apply.

Third, some states' Rule 3.3 explicitly extends the disclosure duty past a proceeding's conclusion.[25]

> Extent of Lawyer's Duties. The duties stated in this rule continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

Florida Rule 4-3.3(d) (emphasis added).

Fourth, some states do not explicitly extend the disclosure obligation, but deliberately decline to adopt ABA Model Rule 3.3(d)'s approach. For instance, Virginia's Rule 3.3 and Wisconsin's Rule SCR 20:3.3 lack any provision describing when lawyers' duty to take "reasonable remedial measures" ends. This theoretically leaves no endpoint for lawyers' disclosure duty.

The most recent state to have taken this approach is New York, which adopted its new ethics rules on April Fools' Day 2009.

The New York City Bar dealt with this issue nearly a decade earlier, in a report dealing with this issue. A 1993 New York City Bar Report criticized the ABA Model Rules' termination of the disclosure duty when the proceedings end.

> This [ABA Model Rule] provision is baffling in its continuation of the duty to disclose only until the conclusion of the proceeding. If after the proceeding a lawyer discovers that client fraud tainted the entire proceeding he or she must keep silent. Clearly, the crime or fraud exception to the attorney-client privilege would permit a court to require the lawyer to testify about the fraud after the proceeding had

[25] Until Illinois changed its rules on January 1, 2010, Illinois Rule 3.3(b) similarly indicated that lawyers' "reasonable remedial measures" duties are "continuing duties. . . ." The new Illinois Rules follow the ABA Model Rules approach.

> ended. Thus, there seems to be no justification for Model Rule 3.3's limitation.

Report on the Debate Over Whether There Should Be An Exception To Confidentiality For Rectifying A Crime or Fraud: Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., 20 Fordham Urb. L.J. 857, 866 (1993) (footnote omitted)).[26]

Interestingly, a 2010 New York legal ethics opinion explained that the New York Bar recommended adoption of the ABA Model Rule duration approach -- but that the New York Court of Appeals (that state's highest court) rejected the Bar's recommendation.

- New York State LEO 837 (3/16/10) ("Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a 'fraud' to have been perpetrated. Rule 3.3(b) likewise applies only in the case of 'criminal or fraudulent' conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered. . . . The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that '[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding . . . .' The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) 'establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation.' See Proposed Rules of Professional Conduct,

[26] This analysis does not make much sense. A 2015 opinion correctly labeled as "absurd" the argument that lawyers' confidentiality duty disappears in the face of the possible applicability of a crime-fraud exception to the evidentiary attorney-client privilege. Hays v. Page Perry, LLC, Civ. A. No. 1:13-CV-3925-TWT, 2015 U.S. Dist. LEXIS 32381, at *18-19 (N.D. Ga. Mar. 17, 2015) (holding that a law firm representing an investment services company had no duty to report a constituent's fraud; "The Plaintiff then argues that there are no confidentiality issues due to the crime-fraud exception to the attorney-client privilege. This is absurd. The Plaintiff claims that, because the Defendants' services allegedly facilitated DeHaan's fraudulent activity, the information acquired by the Defendants was not confidential. The Plaintiff conflates attorney-client confidentiality with the attorney-client evidentiary privilege. The attorney-client privilege allows a party to prevent the discovery of certain pieces of evidence during a judicial proceeding. If an exception is established -- e.g., the crime-fraud exception -- then the privilege becomes inapplicable. Obviously, neither this privilege nor its exceptions are relevant here. That certain confidential information may be discoverable does not mean that attorneys may volunteer such information outside of a judicial proceeding, much less be required to do so under the threat of civil penalties. They could be disbarred for disclosing confidential information. For these reasons, the Plaintiff's malpractice claim based upon the Defendants' failure to report DeHaan's and Lighthouse's violations was properly dismissed." (emphases added; footnotes omitted)).

> pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. Cf., N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. See N.Y. State 831, n. 4 (2009)." (emphases added)).

In 2013, both a New York State and a New York City legal ethics opinion addressed this issue, describing the New York rules' history and addressing other states' approach.

- New York City LEO 2013-2 (2013) ("When a lawyer discovers after the close of a proceeding that material evidence offered by the lawyer, the lawyer's client or witness called by the lawyer during the underlying civil or criminal proceeding was false, the lawyer must comply with Rule 3.3(a)(3). If it is still possible to amend, modify or vacate the prior judgment, then compliance with Rule 3.3(a)(3) requires disclosure of the false evidence to the tribunal, to opposing counsel, or to the opposing party if opposing counsel is no longer practicing law. If it is still possible to reopen the proceeding based on this disclosure, then the lawyer must disclose to the tribunal to which the evidence was presented that the specified evidence was false. If it is no longer possible to reopen the proceeding but another tribunal could amend, modify or vacate the prior judgment, then the lawyer must disclose the falsity to the opposing counsel, or the opposing party if opposing counsel no longer represents the opposing party and there is no successor counsel." (emphasis added); "Rule 3.3 is silent on when the obligation to take remedial action ends. ABA Model Rule 3.3(c) states that the obligation to take remedial action required by Rule 3.3(a)(3) only continues 'to the conclusion of the proceeding,' but that phrase is absent from New York's formulation. Although the rules of professional conduct for lawyers that have been adopted in most states include the ABA endpoint language in their version of Rule 3.3, a few (Florida, Illinois and Texas) explicitly extend the obligation beyond the conclusion of a proceeding. Only Virginia and Wisconsin have, like New York, adopted versions of Rule 3.3 that are silent on whether the obligation survives beyond the proceeding." (emphases added; footnote omitted); "Rule 3.3(a)(3) thus does not impose a duty of disclosure unless at the time of disclosure: (1) it is still possible to make disclosure of the new evidence

either to the tribunal to which the false evidence was presented, or to a tribunal that did or could review the decisions of the tribunal to which the false evidence was submitted, and (2) the tribunal is still in a position to consider the new evidence and provide a basis for reopening the matter and/or amending, modifying or vacating the prior judgment. . . . [T]he obligations of a lawyer under Rule 3.3 end only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on the new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence." (emphasis added; footnote omitted); "Where the original tribunal is not empowered to consider the new evidence and modify, amend or vacate the prior judgment, but a different tribunal can consider the new evidence and modify, amend or vacate the prior judgment, the attorney may disclose the false evidence to the opposing counsel in the original proceeding, or if opposing counsel no longer represents the opposing party and there is no successor counsel, to the opposing party, and this disclosure will constitute a reasonable remedial measure.").

- New York LEO 980 (9/4/13) ("Although the State Bar proposed that the duty continue only to the conclusion of the proceeding, the courts did not adopt that proposal. N.Y. State 837 ¶16 (2010). Thus it appears that the obligation to disclose 'may continue even after the conclusion of the proceeding in which the false material was used.' We nevertheless opined that the endpoint of the obligation 'cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3.' Id. (citations omitted); accord N.Y. City 2013-2 (opining that 'for a measure to be remedial, it must have a reasonable prospect of protecting the integrity of the adjudicative process,' and discussing how application of that standard requires consideration of law and court procedures applicable to correction of the false evidence in question)." (emphases added)).

Thus, lawyers trying to analyze the duration of any ABA Model Rule 3.3 disclosure obligation are left without much dispositive guidance. Although ABA Model Rule 3.3(d) seems to provide a definite answer, the two post-ABA Model Rule legal ethics opinions explained the possibility that courts can reopen proceedings and remedy any fraud or other false evidence. Thus, even states that have adopted the ABA Model Rule 3.3 formulation presumably carry such uncertainty into their ethics rules.

And several other states have either explicitly described the disclosure duty's duration as extending beyond a proceeding's conclusion, or deliberately deleted ABA Model Rule 3.3(d) -- thus leaving a void that obviously creates uncertainty.

And substantive law adds to the uncertainty. For instance, neither the ABA nor state bars have addressed other ways that "concluded" proceedings can be reopened. Under Fed. R. Civ. P. 60(b)(3), courts may

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.

Fed. R. Civ. P. 60(b)(3). Under Fed. R. Civ. P. 60(c)(1), a litigant must seek such relief "no more than a year after the entry of a judgment or order or the date of the proceeding."

And even then, Fed. R. Civ. P. 60(d) in the provision mentioned above

> does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or (3) set aside a judgment for fraud on the court.

Fed. R. Civ. P. 60(d)(1), (3). Thus, the Federal Rules of Civil Procedure recognize that fraud on the tribunal can justify overturning a judgment at any time following a proceeding's conclusion.

A 2015 New Hampshire Supreme Court decision addressed the effect of a lawyer's perjurious statements to arbitrators in support of his fee petition -- vacating the arbitration award and ordering the lawyer to disgorge $837,000 in fees. The court rejected the lawyer's claim that a three-year statute of limitations barred the court's remedy.

- Conant v. O'Meara, 117 A.3d 692, 699, 700, 702, 703 (N.H. 2015) ("New Hampshire common law has similarly recognized that '[f]raud will vitiate a judgment, and a court of equity may declare it a nullity.' . . . We have also observed that such relief may be granted notwithstanding a long passage of time since the challenged judgment was rendered"; "This type of fraud is typically called 'fraud on the court' and, in federal courts, may be brought as an independent action permitted under the savings clause in Federal Rule of Civil Procedure 60(d)(3). Fed. R. Civ. P. 60(d)(3). It has been described as 'only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.'" (citation omitted); "The treatment of perjured testimony in our cases is less clear. Perjury by a witness may constitute grounds for a new trial under the statute providing that a new trial may be granted when, due to accident, mistake or misfortune, justice has not been done. . . . A petition under that statute, however, must be brought within three years of the tainted judgment. . . . We have not explicitly addressed whether, or under what circumstances, a judgment may be set aside or a new trial granted, on grounds of perjury, long after the original judgment was rendered. In cases where perjury has been used to vitiate a judgment, the action, however it was brought, would seem to have been, under any measure, timely." (emphasis added); "We need not now decide all conditions under which a judgment or award may be set aside on an untimely request, whether by motion or independent action. We hold only that fraud on the court, as recognized in Hazel-Atlas [Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944)] and found by the trial court in this case -- in particular, perjury by an officer of the court -- constitutes sufficient grounds under New Hampshire law to set aside a judgment or award."; "We conclude that because O'Meara committed perjury before the arbitrators, as an officer of the court, the trial court permissibly vacated the arbitrator's award under the fraud-on-the-court doctrine. We also conclude that the court sustainably exercised its discretion in ordering O'Meara to disgorge the $837,000 awarded by the arbitrators. In perjuring himself before the arbitration panel in an attempt to secure his own fee, O'Meara placed his own interests above those owed to his clients."; "We fail to see how fraud on a tribunal can justify avoiding the time-bar of a claim not before that tribunal.").

This type of successful attack reinforces the possibility that there really is no finality to proceedings tainted by perjury. This raises questions about the ethics rules' majority view, which ends lawyers' disclosure obligation upon learning of clients' fraud on the tribunal "when a final judgment in the proceeding has been affirmed on appeal or

the time for review has passed." ABA Model Rule 3.3 cmt. [13]. In essence, some courts' acknowledgement that judgments remain vulnerable forever means that "the time for review" never really ends.

And various common law theories such as constructive fraud claims can allow challenges to supposedly final judgments years after they have been entered.

Presumably bars' failure to discuss these possibilities results from a concern about endless litigation triggered by lawyers' after-discovered evidence that their clients had committed fraud during the earlier proceeding.

Remedial Steps

Current ABA Model Rule 3.3 requires lawyers who "come[] to know" of clients' past false evidence to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." ABA Model Rule 3.3(a)(3).

Comment [10] describes what steps that might include -- ultimately concluding that disclosure is a last resort.

> Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must

> make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

ABA Model Rule 3.3 cmt. [10] (emphases added).

Thus, lawyers in this situation must first try to convince their clients to correct any false evidence. This type of discussion could include trying to talk the client into correcting his or her own false evidence, or allowing the lawyer to correct another witness's false evidence.

In 2010, the New York County Bar discussed this initial step.

- New York County LEO 741 (3/1/10) ("Remonstrating with a client who has offered false testimony can be accomplished in various ways. The attorney should explore whether the client may be mistake or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct. If the client is acting intentionally, stronger remonstration may be required, including a reference to the attorney's duty under the Rules to disclose false testimony or fraudulent testimony to the court.").

If a lawyer succeeds in convincing clients to correct their false testimony, the lawyer as a practical matter has remedied the taint.

- Waste Mgmt. of Wash., Inc. v. Kattler, 776 F.3d 336, 341-42 (5th Cir. 2015) (reversing a trial court's contempt citation against a lawyer who "unknowingly repeated" a client's factually incorrect statements to the court; "WM defends this ground for contempt by arguing that, even if Moore 'unknowingly repeated Kattler's representation to the district court,' he still had a duty to correct those statements after he determined that Kattler did in fact possess the SanDisk drive, and his continued silence at that point made him complicit in the deception. In support of this contention, WM cites In re Rosenthal [No. H-04-186, 2008 U.S. Dist. LEXIS 122017, 2008 WL 983702 (S.D. Tex. Mar. 28, 2008)], an unpublished district court decision in which a lawyer was sanctioned for failing to disclose immediately that his client had deleted relevant, subpoenaed emails. But this court reversed Rosenthal in Ibarra v. Baker [338 F. App'x 457 (5th Cir. 2009)] because the lawyer, upon

> discovering that his client had deleted the responsive e-mails, took immediate steps to recover the lost information and informed opposing counsel of the conduct after the extended Thanksgiving weekend. Here, Moore contacted a professional responsibility expert the day he learned of Kattler's deception. He took steps to withdraw from representing Kattler within three days. Within a week, Kattler had declared, in a sworn statement, that he now remembered owning at least one SanDisk thumb-drive device. Although this case differs from Ibarra because Moore played a somewhat less proactive role in alerting the court to the deceptive conduct, he did take immediate steps to distance himself from Kattler, and the court and opposing counsel did learn of Kattler's refreshed recollection within one week. Accordingly, we conclude that here, as in Ibarra, Moore's conduct 'did not amount to assisting a fraudulent act.'" (citation and footnotes omitted)).

If lawyers' efforts to discussion with their clients prove fruitless, lawyers must take some further step. Some legal ethics opinions have suggested that theoretically something short of disclosing clients' past fraud on a tribunal might constitute a sufficient remedial measure.

- Philadelphia LEO 2013-5 (6/2013) (starting the analysis by warning that "prior to taking any action, the inquirer [lawyer] must advise the full range of possible solutions and actions as well as the consequences of each and should refer the clients to a criminal attorney so that they can understand the impact in that arena of the decisions that they eventually make."; holding that the lawyer may continue representing the clients if they allow the lawyer to rectify the false statement to the court in the complaint; also concluding that the lawyer must withdraw if the clients refuse to allow such correction; noting that "[m]erely withdrawing the case without prejudice allows the clients to move forward with their claim again, and does nothing to correct the fraud committed upon the court. However, withdrawing the claim with prejudice in fact ends any claims that the clients are able to make against the defendant and thus permanently concludes any matters before the court on a third party liability claim, thus effectively rectifying the clients' misrepresentation to the court." (emphasis added)).

- New York State LEO 837 (3/16/10) ("In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding -- he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a

criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. See People v. Andrades, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); Benedict v. Henderson, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony 'without intrusion of direct questions,' because counsel thereby met his 'obligation . . . not to assist in any way presenting false evidence')." (emphasis added)).

- New York LEO 980 (9/4/13) ("The Rules of Professional Conduct became effective, replacing the former Code of Professional Responsibility, on April 1, 2009. On that day, a lawyer's duty in appearing before a tribunal materially changed. The relevant provision of the Code had required that a lawyer who learned that the lawyer's client had clearly perpetrated a fraud upon a tribunal 'shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected . . . tribunal, except when the information is protected as a confidence or secret.' DR 7-102(B)(1) (emphasis added). . . . In contrast, one of the new rules that took effect on April 1, 2009, sweeps more broadly. The duty to take remedial steps is triggered when 'a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity.' Rule 3.3(a)(3). The duty is also triggered whenever the lawyer knows of 'fraudulent conduct related to the proceeding.' In either case, 'the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.' Rule 3.3(a)(3), (b). There is no longer any exception for confidences or secrets. See Rule 3.3(c) (duty applies 'even if compliance requires disclosure of information otherwise protected by Rule 1.6'); N.Y. State 837 ¶¶ 6-7 (2010)." (footnote omitted); "[I]f the false information was material and was imparted to the tribunal on or after April 1, 2009, then the lawyer had a duty to take reasonable remedial measures, and if measures short of disclosure were insufficient, then the lawyer would have a duty of disclosure to the tribunal." (emphasis added)).

- Maine Bar Counsel Informal Advisory Ethics Note (2/10/12) (analyzing the following question: "Attorney represents a criminal defendant charged with domestic violence assault. The client failed to appear at a recent hearing. On the hearing date and shortly before it was scheduled to begin, client called Attorney and told her that he was in Connecticut and could not get transportation back to Maine. At the hearing, Attorney informed the Court of that factual reason for client's absence. The judge chose to disbelieve client's excuse, concluded it was a failure to appear and issued a bench warrant

without bail. Client has recently confidentially informed Attorney that he had lied to her and that -- as the Court surmised -- he was actually in Maine during that hearing. Does Attorney have to disclose to the police his client's current whereabouts, and what does she now have to tell the Court?"; holding that the lawyer did not have a duty to disclose the client's whereabouts; "Attorney cannot tell the police anything unless the Court orders her to do so. Her source of the client's current location is confidential information under M. R. Prof. Conduct 1.6. However, under these facts, Rule 1.6 is specifically 'superseded' by Attorney's requirement to be completely truthful with the Court. See Rule 3.3(c). Therefore, under Rule 3.3(a) Attorney must call on her client to correct the earlier misrepresentation given to the tribunal. If client refuses to do so, then Attorney must reveal client's deceit to the court. See MRPC 3.3(a)(1),(3);(c)." (emphasis added)).

- Grievance Administrator v. McCargo, ADB Case No. 09-50-GA, at 6, 77-78 (Mich. Attorney Discipline Bd. Mar. 1, 2010) (finding that a lawyer for disgraced former Detroit Mayor Kwame Kilpatrick violated ethics rules while representing the Mayor in a case brought by a former city employee claiming that they had been wrongfully fired in violation of the Whistle-blowers' Protection Act after reporting "the Mayor's dalliances."; concluding that McCargo was not guilty of violating a number of ethics rules, but violated other rules; "Given our conclusion, the next question we address is whether McCargo took appropriate remedial action once he knew about the false testimony. We hold that he did not do so. MRPC 3.3(a)(4) provides that when a lawyer has knowledge that a client gave false testimony, a lawyer has certain duties to take remedial measures as an officer of the court that trump the lawyer's duties as an advocate. As Professor Dubin noted, MRPC 3.3 recognizes that as an officer of the court, a lawyer cannot maintain confidentiality if by doing so he becomes an instrument of a perpetration of a fraud on a court." (emphasis added); "We conclude that McCargo violated MRPC 3.3(a)(4) with respect to the false testimony concerning the reasons for Brown's and Nelthrope's removals by not making disclosure to the court, and letting the court decide if further action was required. By doing nothing when he had knowledge of the false testimony, McCargo failed to comply with his obligations under MRPC 3.3(a)(4) and usurped what should have been Judge Callahan's decision as to whether further action should be taken in light of the false testimony. In this instance, the fact that confidential information about Kilpatrick was involved was explicitly trumped by McCargo's duty to take appropriate remedial action." (emphasis added)).

Withdrawal Obligation

As explained above, the ABA formerly indicated that lawyers' withdrawal upon learning of clients' past fraud on the tribunal satisfied lawyers' ethics obligation.

However, the ABA and nearly all states[27] now require other remedial measures, including as a last (but typical) resort disclosure of the clients' past fraud.

If lawyers comply with their ethical duties and take remedial measures in these circumstances, lawyers may have to make another determination. Do those steps so rupture the lawyer-client relationship that the lawyer must necessarily withdraw from the representation? One might think that lawyers must always withdraw if they have essentially ratted out their client.

But surprisingly, an ABA Model Rule comment indicates otherwise.

> Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

ABA Model Rule 3.3 cmt. [15] (emphasis added). This is a somewhat surprising conclusion. Perhaps the comment essentially represents wishful thinking. Lawyers'

[27] As explained elsewhere, at least one jurisdiction's rules indicate that lawyers' disclosure duty ends if the lawyer withdraws from the representation -- thus making withdrawal an appropriate remedy. District of Columbia Rule 3.3 cmt. [12] ("A practical time limit on the obligation to take reasonable remedial measures concerning criminal and fraudulent conducted [sic] related to the proceeding is needed. The conclusion of the proceeding is an appropriate and reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. If the lawyer withdraws before the conclusion of the proceeding, the lawyer's obligation ends at the time of withdrawal." (emphasis added)).

and especially courts' job would be much easier if lawyers continue to represent clients even after disclosing clients' or some other witnesses' false evidence.

Interestingly, at least one state's legal ethics opinion indicated that a lawyer in this context cannot withdraw, because that would tip off the court that there was some issue.

- Virginia LEO 1731 (6/29/99) (analyzing the ethical ethics obligations of a lawyer representing a client facing a sentencing hearing in three weeks after the client's guilty plea to a drug violation; explaining that the client just advised the lawyer that she had been arrested for DWI, but had used her girlfriend's driver's license and therefore been arrested under her girlfriend's name; acknowledging that Virginia ethics rules allow lawyers to disclose "clearly established" client fraud on third parties, but only if the fraud relates to the representation's subject matter; "The committee believes that this rule does not apply, however, because the subject matter of the attorney's representation of the client (sentencing hearing on criminal drug charge) and the fraud committed by the client (misrepresentation of identity to police officer during arrest for DWI) are unrelated. Therefore, the attorney may not reveal the client's fraud unless the client consents."; explaining that the lawyer could not represent the client and the girlfriend because of the inherent conflicts; also explaining that the lawyer should advise the client of the risks she faces by not appearing in court on the DWI charge, but must abide by the client's decision not to appear in court; also explaining that the lawyer may not make any false statements to the sentencing judge, but may likewise not reveal the client's DWI arrest or use of her girlfriend's driver's license, absent some question from the court; "If the attorney is asked directly by the court whether the client has a prior criminal record [if the client is found guilty of the DWI-related criminal offenses before the sentencing hearing], the committee believes that the attorney must be truthful in his response and not mislead the court."; concluding that the lawyer could not withdraw from the representation, because that would prejudice the client, likely prompting the court's request for an explanation; "The committee is of the opinion that withdrawal cannot be effectuated without prejudice to the client. Therefore, in the committee's opinion, withdrawal is not an option available to the attorney to resolve the dilemma presented in the preceding paragraph. However, the committee believes that the attorney has an obligation to explain to the client how the representation might be limited at the sentencing hearing, so as to avoid the risk of disclosing the client's criminal activity. The attorney would be required to withdraw, however, if the client were convicted of the criminal charges before the sentencing hearing, had misrepresented to the court that she had

no prior convictions, and the attorney was unable to convince the client to rectify the fraud on the court." (emphases added)).

Effect of Lawyers' Termination if the Lawyer Knows of Clients' Fraud on Tribunals

As explained above, lawyers must or at least should try to convince clients to disclose their past fraud on tribunals that occurred on the lawyer's watch.

Perhaps as a result of such a conversation, or for some other reason, clients who have committed such fraud might fire the lawyer.

The ABA Model Rule describing the endpoint of lawyers' disclosure obligation does not mention this possibility. ABA Model Rule 3.3 cmt. [13]. Thus, presumably even terminated lawyers' disclosure duty ends only with the proceeding's conclusion.

At least one legal ethics opinion takes this approach.

- Philadelphia LEO 2013-5 (6/2013) (analyzing the duty of a lawyer representing a husband and wife injured in an automobile accident; explaining that the husband and wife repeatedly represented to the insurance carrier that the wife had been driving, but that shortly after the lawyer filed a complaint in court the husband admitted to the lawyer that both clients had lied about who was driving; concluding that the false statements were material, and amounted to insurance fraud; also explaining the lawyer's duties if the clients fire him or her; "Should the clients fire the inquirer and choose to go to new counsel, the inquirer clearly should make disclosure to the new attorney of the clients' untruth. However, in the Committee's view this does not necessarily meet the inquirer's obligations under Rule 3.3b. If the complaint is not amended by the new attorney, the inquirer is required under the Rule to report the lie to the court, and as previously stated to the insurance carrier as well." (emphasis added); "[H]ad the inquirer not been involved in the transmission of completed PIP forms to the carrier, that disclosure to the PIP carrier would not be required. However, as a practical matter since the defendant's and the clients' carrier is the same, disclosure to the third party liability division by amending the complaint would obviously suffice as disclosure to the PIP division. However, withdrawal of the matter with prejudice while addressing the inquirer's obligation under Rule 3.3b would not suffice to cure the problem of the fraud with the PIP carrier, which would still require disclosure that the husband and not the wife was driving."; explaining that the lawyer would have to advise the insurance carrier of the fraud against it even if the client withdrew their complaint with prejudice, and even if the

> lawyer had not played a role in transmitting the false statements to the insurance carrier).

Advising Successor Counsel

If lawyers withdraw from the representation voluntarily, involuntarily, or because they cannot continue a normal attorney-client relationship, another issue arises -- must or may the withdrawing lawyer advise replacement counsel of the clients' past fraud.

The Restatement indicates that such disclosure might constitute an appropriate "remedial measure."

> Responsibilities of a lawyer under this Section extend to the end of the proceeding in which the question of false evidence arises. Thus, a lawyer representing a client on appeal from a verdict in a trial continues to carry responsibilities with respect to false evidence offered at trial, particularly evidence discovered to be false after trial . . . . If a lawyer is discharged by a client or withdraws, whether or not for reasons associated with the false evidence, the lawyer's obligations under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphasis added).

In contrast, one legal ethics opinion indicated that lawyers in this situation must also advise the court.

- Philadelphia LEO 2013-5 (6/2013) (analyzing the duty of a lawyer representing a husband and wife injured in an automobile accident; explaining that the husband and wife repeatedly represented to the insurance carrier that the wife had been driving, but that shortly after the lawyer filed a complaint in court the husband admitted to the lawyer that both clients had lied about who was driving; concluding that the false statements were material, and amounted to insurance fraud; also explaining the lawyer's duties if the clients fire him or her; "Should the clients fire the inquirer and choose to go to new counsel, the inquirer clearly should make disclosure to the new attorney of the clients' untruth. However, in the Committee's view this does not necessarily meet the inquirer's obligations under Rule 3.3b. If the complaint is not amended by the new attorney, the inquirer is required under the Rule to

report the lie to the court, and as previously stated to the insurance carrier as well." (emphasis added); "[H]ad the inquirer not been involved in the transmission of completed PIP forms to the carrier, that disclosure to the PIP carrier would not be required. However, as a practical matter since the defendant's and the clients' carrier is the same, disclosure to the third party liability division by amending the complaint would obviously suffice as disclosure to the PIP division. However, withdrawal of the matter with prejudice while addressing the inquirer's obligation under Rule 3.3b would not suffice to cure the problem of the fraud with the PIP carrier, which would still require disclosure that the husband and not the wife was driving."; explaining that the lawyer would have to advise the insurance carrier of the fraud against it even if the client withdrew their complaint with prejudice, and even if the lawyer had not played a role in transmitting the false statements to the insurance carrier).

Clients' Post-Representation Fraud on Tribunals

Lawyers might learn after the representation ends that the client presented false testimony while being represented by successor counsel. For instance, a lawyer might learn while watching a television news show that a former client has testified directly contrary to what the client had explained to the lawyer during the representation.

The ABA and several state legal ethics opinions have explained that lawyers in that situation could not disclose former clients' confidences.

- ABA LEO 268 (6/21/45) (explaining that a prospective client confessed to a lawyer that he had not met the residency requirement for obtaining a divorce, and ended up retaining someone else to represent him in the divorce; discussing the lawyer's duty upon learning that while represented by successor counsel the former client had filed for a divorce using the false residency allegation; "While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences. It is not infrequently the case that a lawyer who has been retained by a client accused of crime, having been told by the client facts which make it certain that the client is guilty, declines to represent the defendant, insomuch as a successful defense cannot be hoped for without suborning perjury under such circumstances. In such case, the lawyer is bound by the Canon not to disclose the information received from the client in confidence, though he ascertains that the client, having subsequently retained

another lawyer, has, in his defense, stated the facts to be otherwise." (emphases added)).

States generally take the same approach.

- Virginia LEO 1777 (6/13/03) (analyzing the obligation of a bankruptcy lawyer who finished a representation and closed the file shortly after the discharge order, but who later learned that his former client had inherited real estate that must be reported to the bankruptcy court because it was received within a specified "window" of time after the discharge order had a duty not to report the inheritance to the court; explaining that the "clearly established" standard for fraud that must be reported to a court requires the client to acknowledge the fraud; noting that the client here claimed that the failure to report within the required window of time was a mistake, and that the client did not understand that he had an obligation to report the inheritance until he talked to his former lawyer, after the "window" period had lapsed; explaining that "regardless of what hunch or assumption this attorney may have or wish to make, the attorney does not have information clearly establishing client fraud on the court," and therefore may not reveal it to the court, because lawyers may not reveal "mistakes made by former clients after termination of the attorney-client relationship." (emphasis added)).

- Virginia LEO 1643 (9/8/95) (analyzing a situation in which a lawyer represented a client in a divorce; explaining that the representation ended, the former client filed for bankruptcy; noting that the former client listed the lawyer's bill as a debt, but failed to list assets that were included in the publicly filed divorce property settlement agreement; explaining that the existence of these assets could still be a secret "despite the fact that others share the same information or the information is a matter of public record."; concluding that the lawyer may therefore only reveal the fraud on the bankruptcy court if the lawyer's duty of confidentiality was outweighed by some other duty; also concluding that the lawyer had no such other duty here, because the fraud (1) did not occur during the course of the attorney-client relationship; and (2) did not relate to the subject matter of the representation; further noting that the lawyer may not reveal the confidences "to establish the reasonableness of his fees" because the client did not dispute the fees; explaining that the lawyer therefore may not reveal the fraud on the bankruptcy court: "The protection of client confidences and secrets is so fundamental to the attorney-client relationship that any exceptions to the bedrock principle must be strictly limited.").

- Los Angeles LEO 452 (11/21/88) (holding that a lawyer whose client had declared bankruptcy without paying the lawyer could seek recovery in the bankruptcy setting, but with limits to the type of disclosure; emphasizing California's duty of confidentiality; "A failure by the former client to disclose all of the assets known to the attorney in the bankruptcy case may constitute

> bankruptcy fraud by the former client. Competing with the obligation to protect client confidences and secrets is an attorney's obligation to rectify any fraud or deception which has been imposed upon the court or a party. . . . However this exception applies only to fraud committed during the course of the attorney's representation of the client. . . . Because any such nondisclosure would come after the termination of the attorney-client relationship, the attorney may not base any disclosure of the former client's business relations on this exception to section 6068(e)." (emphases added)).

Two ethics opinions have concluded that lawyers finding themselves in that situation had the discretion -- but not a duty -- to disclose their former client's false testimony even though it occurred on a successor lawyer's watch.

- Philadelphia LEO 2014-7 (10/14) (finding that a lawyer who filed a claim for fees after his client declared bankruptcy had discretion to disclose the bankrupt former client's failure to disclose in bankruptcy filings overseas property of which the lawyer is aware; "The inquirer represented A over the last six years in various litigations, primarily defense of mortgage foreclosure actions and/or confession of judgment actions and other collection actions by creditors. Last year, while still a client, A advised the inquirer that he had property in a foreign country that he was trying to sell, and that the sale price was $300,000. Apparently he had had at least one buyer at that price, but the deal fell through."; "The relationship between A and the inquirer ended, with A having an unpaid bill due the inquirer. A has since filed for bankruptcy, and the inquirer filed a Proof of Claim for his unpaid legal services as a creditor in that bankruptcy. None of the parties against whom the inquirer represented A during the course of their attorney-client relationship are creditors or claimants in the bankruptcy. In reviewing the bankruptcy filings, the inquirer has seen that the property in the foreign country was not listed as an asset. He contacted A's bankruptcy counsel who advised that the inquirer needed to inform the Trustee of the existence of this property immediately. In addition, the inquirer consulted with an ethics attorney who advised that the inquirer 'had the right, if not an obligation, to disclose this information to the Trustee in order to prevent any fraud upon the Court and/or creditors.'"; "After much consideration, the Committee believes that the exceptions to Confidentiality as contained in Rules 1.6c2 and 4 relate to the issue at hand and provide the inquirer with the discretion to make the disclosures. Rule 1.6c2 applies to the situation at hand because, here, failure to disclose the asset to the Bankruptcy Court and Trustee is a federal crime that will result in substantial injury to the financial interests of another. There is no question that the client's failure to disclose is resulting in the shielding of assets." (emphasis added; footnote omitted); "The same analysis applies to the exception as found in Rule 1.6c4. Comment 15 makes it clear that the purpose of the

exception is to allow an attorney to respond to any type of fee dispute brought by the client against the lawyer, or to allow the lawyer in a proceeding to establish his right to a fee. The disclosure relates to the fee and possible assets that are available to protect and pay that fee. The disclosure, if made, will possibly increase the amount of money available to pay all creditors, and therefore benefits all of the creditors including the inquirer."; "Turning next to Rule 3.3, the inquirer is not technically before the court in representing his former client in the bankruptcy proceeding. Here, because the inquirer is not providing any representation to the client in that context, the Committee as a whole felt that disclosure in this context was discretionary." (emphasis added)).

- North Carolina LEO 99-15 (7/19/00) (holding that a lawyer learning that his former client had submitted false information to a bankruptcy court had the discretion to disclose the former client's fraud if the client used the lawyer's services -- even if the client had not retained the lawyer to represent him in the bankruptcy; "Rule 1.6(d)(3) permits Attorney A to reveal Client's confidences if required to do so by law. A number of bankruptcy statutes require disclosure of debtor's assets and liabilities and other financial information. 18 U.S.C. §152, a federal criminal statute, imposes criminal penalties on 'a person who knowingly and fraudulently conceals . . . any property belonging to the estate of a debtor. . . . Rule 1.6(d)(3) merely determines whether a lawyer is permitted to disclose confidential information, not whether the lawyer is compelled to do so by law. Whether a lawyer has a duty to disclose confidential information under the circumstances described above is a matter to be determined under 18 U.S.C. §152 and other relevant law. The determination of that legal issue is beyond the scope of this opinion."; "Rule 1.6(d)(5) permits a lawyer to reveal confidential information of a client to the extent that the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act 'in the commission of which the lawyer's services were used.' Mere suspicion that Client is committing a fraud on the court is not sufficient to trigger this exception to the duty of confidentiality. However, if Attorney A knows that Client is committing a fraud on the court and that his services were used to perpetrate the fraud, he may reveal confidential information of his former client as necessary to rectify the fraud. "; "If Attorney A knows that the bankruptcy petition is fraudulent and he decides to take action to rectify the fraud, Attorney should reveal confidential information of Client only to the extent necessary." (emphasis added); "The first step is a letter to his former client requesting that Client take action to rectify the fraud. If this is unsuccessful, disclosure to Client's current lawyer is permitted under Rule 1.6(d)(5). Attorney A should inform Attorney B that he will notify the bankruptcy administrator if no action is taken to rectify the fraud or he does not receive a response from Attorney B. If Attorney B fails to respond or fails to alleviate Attorney A's concerns, Attorney A may notify the bankruptcy administrator." (emphasis added)).

In 2009, the District of Columbia dealt with an interesting issue. A lawyer withdrew from representing a client for whom the lawyer had prepared draft pleadings and an affidavit -- that the lawyer later learned contained false statements. The now-former client demanded copies of those documents, and the District of Columbia explained that the lawyer could refuse to turn them over.

- District of Columbia LEO 350 (10/09) (holding that a lawyer did not have to provide the client draft pleadings that the lawyer learned were based on the clients' false statements; presenting the scenario: "After drafting a brief and affidavit which included various material factual representations asserted by the client, a lawyer discovered that those representations were false and, refusing to file such fraudulent documents with the court, the lawyer withdrew from the representation. The former client now demands that the lawyer surrender these documents, but the lawyer has reason to believe, though not actual knowledge, that the former client intends to file the brief and affidavit in going forward with the case. The client did not owe the lawyer any outstanding legal fees at the time the lawyer terminated the representation."; "We conclude that a lawyer who knows that the former client's representations are false and has good reason to believe that the former client (whether through another lawyer or pro se) intends to file the brief and affidavit containing such misrepresentations would violate Rule 3.3 by surrendering such documents to the former client."; "Rather than decline to produce the entire document to the former client, the lawyer may**,** where practicable and effective, opt to redact all factual misrepresentations of which he knows -- and all legal analysis and discussion which rely upon or incorporate such misrepresentations -- and surrender only such redacted affidavit and brief. An effective redaction is where the lawyer excises sufficient material, including context where necessary, such that the client cannot simply re-insert the fraudulent facts or misrepresentations and file the brief essentially unchanged from its original fraudulent form."; "Even where a lawyer acts with utmost diligence to either withhold the entire document or surrender only a carefully redacted version to the client, there nonetheless remains the potential for the former client to use the lawyer's past services to perpetrate a fraud upon the tribunal. For this reason, the lawyer should also transmit a letter to the former client demanding that the former client immediately destroy or return all prior drafts of documents containing or making use of the misrepresentations and directing the client not to file the brief and affidavit, or an earlier draft thereof." (emphasis added); "In the event that the former client attempts to perpetrate a fraud upon the tribunal by filing the fraudulently obtained documents or by forwarding the documents to successor counsel for use on the client's behalf, *and* if substantial injury to

> another's financial interests or property are reasonably certain to result from the former client's fraud, then Rule 1.6(d) permits the original lawyer to make disclosure of the fraud to successor counsel or the tribunal**,** regardless of client consent." (emphasis added)).

This is an interesting conclusion. District of Columbia LEO 350 allowed but did not require the lawyer to disclose the former client's post-representation fraud (using the former lawyer's draft pleadings). But the legal ethics opinion did not focus solely on the former client's fraud on the tribunal. In fact, the lawyer had no discretion to disclose the former client's fraud unless it would cause "substantial injury" to someone's financial interest or property. This approach seems contrary to the general principle reflected in ethics rules, legal ethics opinions, and case law -- requiring more disclosure in the context of clients' fraud on tribunals compared to clients' fraud on others.

President Clinton's Lewinsky Testimony

Issues involving a client's past fraud on a tribunal arose after President Clinton testified about his relationship with Monica Lewinsky.

Although the public has focused on President Clinton's "meaning of the word 'is'" testimony (discussed below), and the possible ambiguity of the term "sexual relations," the key to President Clinton's possible past perjury involved his repeated sworn testimony that he did not recall even being alone with Monica Lewinsky.

To set the stage, it is worth noting that criminal defendants have been convicted of perjury for testifying under oath that they did not recall something that a jury found that they clearly must have recalled.

Ironically (given Hillary Clinton's role in assisting Congress' investigation of President Nixon), President Nixon's aide H.R. Haldeman suggested that witnesses called to testify about the Watergate burglary could falsely claim lack of memory.

> HALDEMAN: Okay, but you, but you, you do have rules of evidence. You can refuse to talk.
>
> DEAN: You can take the Fifth Amendment.
>
> PRESIDENT: That's right. That's right.
>
> HALDEMAN: You can say you forgot, too, can't you?
>
> DEAN: Sure.
>
> PRESIDENT: That's right.
>
> DEAN: But you can't . . . you're . . very high risk in perjury situation.
>
> PRESIDENT: That's right. Just be damned sure you say I don't . . .
>
> HALDEMAN: Yeah . . .
>
> PRESIDENT: remember; I can't recall, I can't give any honest, an answer to that that I can recall. But that's it.
>
> HALDEMAN: You have the same perjury thing on the Hill, don't you?
>
> DEAN: That's right.

Transcript of a Recording of a Meeting Among the President, John Dean, and H.R. Haldeman in the Oval Office, Mar. 12, 1973, from 10:12 to 11:55 a.m. (emphases added).

This strategy did not work out well. Nixon aide John Ehrlichman and Attorney General John Mitchell were convicted of perjury based on testimony that they did not recall events.

- U.S. v. Haldeman, 559 F.2d 31, 59(D.C. Cir. 1976) ("In early May Ehrlichman told the grand jury that he had no recollection of Dean's having told him of Liddy's involvement in the break-in during the first weeks after the burglary. He also testified that he had spoken generally with Kalmbach about Kalmbach's fund-raising efforts, but he denied all recollection of any mention of the purposes the money was to serve, and he claimed no memory of telling Kalmbach to keep the efforts secret. . . . For this testimony he was charged in Counts 11 and 12 with making false material declarations, 18 U.S.C. § 1623 (1970), and the jury found him guilty of both offenses. Mitchell too, although he had not been privy to most of the April meetings where scenarios were devised, advanced the cover-up through his testimony before the grand jury and the Senate Committee in the spring and summer of 1973. On April 20 he denied before the grand jury any recollection of having been told of Liddy's confession to LaRue and Mardian. . . . Before the Senate Committee in July he claimed not to have heard of Gemstone as of June 19, 1972, and he denied that there was any mention of destroying documents at the meeting he held that evening with Magruder, Mardian, Dean, and LaRue. . . . These statements founded Counts 5 and 6 of the indictment, charging false declarations, 18 U.S.C. § 1623 (1970), and perjury, id. § 1621, respectively. Mitchell was convicted under each." (emphases added)).

More recently, another Washington insider -- "Scooter" Libby -- was convicted of perjury on that basis.

- Carol D. Leonnig and Amy Goldstein, Libby Found Guilty in Central Intelligence Agency Leak Case, Wash. Post, Mar. 7, 2007 ("A federal jury convicted I. Lewis 'Scotter' Libby yesterday of lying about his role in the leak of an undercover Central Intelligence Agency (CIA) officer's identity, culminating a four-year legal saga that transfixed official Washington and revealed the inner workings of the White House and the media."; "After 10 days of deliberations, the 11 jurors found Vice President Cheney's former chief of staff guilty of four felony counts of making false statements to the Federal Bureau of Investigation (FBI), lying to a grand jury and obstructing a probe into the leak of Valerie Plame's identity. The jury acquitted him of one count of lying to the FBI about his conversation with a Time magazine reporter. Libby is the highest-ranking White House official to be convicted of a felony since the Iran-contra scandal nearly two decades ago."; "One juror, Denis Collins, said he and fellow jurors had little doubt after reviewing the evidence that Libby could not have forgotten how he learned Plame's identity -- the core of the defense's argument." (emphasis added); "'It just seemed very unlikely he would have forgotten that. There were just so many things,' said Collins, a writer who worked as a Washington Post reporter in the 1980s. 'That he could remember that fact on a Tuesday and forget it on a Thursday . . . didn't make sense.'"; "Libby, 56, was the only person charged in

an unprecedented leak investigation that led to the questioning of Cheney and President Bush, though neither testified at the trial. Fitzgerald set out in December 2003 to answer a central question: Did anyone in the administration intentionally and illegally disclose Plame's classified status during the late spring and early summer of that year? At that time, several top officials were speaking to reporters, trying to rebut potent accusations from Plame's husband that the administration had twisted intelligence to justify war in Iraq."; "Libby was not charged with the leak but with lying repeatedly to the FBI and a grand jury about how he learned about Plame's identity, and what he told reporters about her that spring and summer." (emphasis added); "Libby has said that he forgot he learned about Plame from Cheney in June 2003, and that he believed he heard of her for the first time a month later from NBC's Tim Russert. He said he then shared the information with other reporters." (emphasis added)).

- Joel Seidman, Libby Set To Invoke Memory Defense In Central Intelligence Agency Case, NBC News, July 31, 2006 ("Attorneys for I. Lewis 'Scooter' Libby, in a court filing Monday, are seeking to admit the expert testimony of a memory specialist on behalf of Libby, the former chief of staff for Vice President Cheney, who faces charges of perjury and obstruction of justice for his role in the CIA leak scandal."; "Libby's lawyers contend that issues of memory -- including how it works and why it fails -- will be crucial to the jury's determination of Libby's guilt or innocence."; "Libby's attorneys are seeking to admit the statements of Dr. Robert A. Bjork, the chairman of the Department of Psychology at the University of California, Los Angeles."; "According to the filing, Libby will argue that, in many cases, it is the government witnesses who have misremembered the facts, and that any errors Libby made in describing the events were the result of 'confusion or faulty memory, not any intent to misrepresent the truth.'" (emphasis added); "The legal journal reached back in scandal history to find that, 'during the Watergate scandal, President Richard Nixon advised aides to say 'I don't remember' when they testified before the Senate Watergate Committee. Subsequently, John Mitchell, Nixon's attorney general; H.R. Haldeman, his chief of staff; and John Ehrlichman, a policy adviser, all were convicted of perjury.'" (emphasis added); "Judge Reggie Walton has said previously in court that he was somewhat skeptical of memory experts as trial witnesses."; "Libby was charged in October with lying to the Federal Bureau of Investigation and a federal grand jury about how he learned and when he subsequently told three reporters about Plame. He faces five counts of perjury, false statements and obstruction of justice.").

This issue played a role in the events surrounding President Clinton's false testimony about his relationship with Monica Lewinski.

On January 17, 1998, Plaintiff Paula Jones' lawyer James Fisher deposed President Clinton. Well-known D.C. lawyer Robert Bennett represented President Clinton at the deposition.

Judge Susan Wright, the Eastern District of Arkansas Judge handling Paula Jones' sexual harassment action against President Clinton personally attended the deposition. Judge Wright had been born in Arkansas, and attended Randolph-Macon Women's College in Virginia. She had studied under President Clinton at the University of Arkansas School of Law. She reportedly challenged Professor Clinton in one telling episode. Professor Clinton apparently had lost all of the class members' examinations, and offered every student a "B+." Then-student Susan Wright negotiated with Clinton's then-fiancée Hillary Rodham, and successfully obtained an "A" in that course. Lois Romano, The Judge's In-House Counsel, Wash. Post, Feb. 09, 1998, at A1. After teaching at several law schools, Judge Wright joined the federal bench in 1990.

In front of Judge Wright, President Clinton answered several questions at his deposition.

> (Q) Mr. President, before the break, we were talking about Monica Lewinsky. At any time were you and Monica Lewinsky alone together in the Oval Office?
>
> (A) I don't recall, but as I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. I typically worked some on the weekends. Sometimes they'd bring me things on the weekends. She -- it seems to me she brought things to me once or twice on the weekends. In that case, whatever time she would be in there, drop it off, exchange a few words and go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do

some work on one of the days of the weekends in the afternoon.

(Q) So I understand, your testimony is that it was possible, then, that you were alone with her, but you have no specific recollection of that ever happening?

(A) Yes, that's correct. It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there. That's possible.

. . .

(Mr. Bennett): Your Honor, excuse me, Mr. President, I need some guidance from the Court at this point. I'm going to object to the innuendo. I'm afraid, as I say, that this will leak. I don't question the predicates here. I question the good faith of counsel, the innuendo in the question. Counsel is fully aware that Ms. Jane Doe 6 has filed, has an affidavit which they are in possession of saying that there is absolutely no sex of any kind in any manner, shape or form, with President Clinton, and yet listening to the innuendo in the questions.

. . .

(A) Now, to go back to your question, my recollection is that, that at some point during the government shutdown, when Ms. Lewinsky was still an intern but was working the chief staff's office because all the employees had to go home, that she was back there with a pizza that she brought to me and to others. I do not believe she was there alone, however. I don't think she was. And my recollection is that on a couple of occasions after that she was there but my secretary Betty Currie was there with her. She and Betty are friends. That's my, that's my recollection. And I have no other recollection of that.

. . .

(Q) At any time have you and Monica Lewinsky ever been alone together in any room in the White House?

(A) I think I testified to that earlier. I think that there is a, it is -- I have no specific recollection, but it seems to me that she was on duty on a couple of occasions working for the legislative affairs office and brought me some things to sign, something on the weekend. That's -- I have a general memory of that.

(Q) Do you remember anything that was said in any of those meetings?

(A) No. You know, we just have conversation, I don't remember.

. . .

(Q) Did you have an extramarital sexual affair with Monica Lewinsky?

(A) No.

(Q) If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?

(A) It's certainly not the truth. It would not be the truth.

(Q) I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit I, as modified by the Court.

(Mr. Bennett): I object because I don't know that he can remember.

(Judge Wright): Well, it's real short. He can -- I will permit the question and you may show the witness definition number one.

(A) I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

Transcript of January 17, 1998, deposition in the Paula Jones case of President William Clinton, http://law2.umkc.edu/faculty/projects/ftrials/clinton/clintontestimony.html (emphases added).

Among other things, President Clinton also endorsed Monica Lewinski's affidavit, which was introduced and then characterized by President Clinton's lawyer Robert Bennett.

Mr. Bennett referred to Ms. Lewinski's affidavit early in the deposition, objecting to questions about President Clinton having been alone with Ms. Lewinski in the Oval Office or in a nearby hallway.

> Your Honor, excuse me, Mr. President, I need some guidance from the Court at this point. I'm going to object to the innuendo. I'm afraid, as I say, that this will leak. I don't question the predicates here. I question the good faith of counsel, the innuendo in the question. Counsel is fully aware that Ms. Jane Doe 6 has filed, has an affidavit which they are in possession of saying that there is absolutely no sex of any kind in any manner, shape or form, with President Clinton, and yet listening to the innuendo in the questions --

Id. After Judge Wright directed Mr. Bennett "not to comment on other evidence" or "arguably coach[] the witness at this juncture," Mr. Bennett advised Judge Wright that President Clinton was familiar with Ms. Lewinski's affidavit. Mr. Bennett then stated that "when [Ms. Jones' lawyer] asks questions like this where he is sitting on an affidavit from the witness, he should at least have a good faith proffer." Id. Judge Wright agreed that Ms. Jones' lawyer "needs to have a good faith basis for asking the question," and stated that she assumed he did. Id.

Near the end of the deposition, Mr. Bennett began his cross-examination by referring to and reading from Ms. Lewinski's affidavit.

> I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship.

Affidavit of Monica S. Lewinsky, signed Jan. 7, 1998.

President Clinton endorsed the affidavit's accuracy.

> (Mr. Bennett): In paragraph eight of her affidavit, she says this, "I have never had a sexual relationship with the president, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for reflecting a sexual relationship."
>
> Is that a true and accurate statement as far as you know it?
>
> (Mr. President): That is absolutely true.

Transcript of January 17, 1998, deposition of President William Clinton.

Nine days later, President Clinton spoke on national television to deny having had a sexual relationship with Monica Lewinsky.

> I did not have sexual relations with that woman, Ms. Lewinsky.

Peter Baker and John F. Harris, Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal 'Prying,' Wash. Post, Aug. 18, 1998, at A1.

On August 17, 1998 -- exactly seven months after his deposition -- President Clinton testified before a grand jury. In that testimony, President Clinton finally acknowledged an inappropriate relationship with Ms. Lewinsky.

The Deputy Independent Counsel asked President Clinton why he had not corrected a statement the President's lawyer Robert Bennett had made in front of Federal District Court Judge Wright at the earlier deposition in the Paula Jones case. During that deposition, Robert Bennett had stated to Judge Wright that Ms. Lewinsky

had filed an affidavit "saying that there is absolutely no sex of any kind in any manner, shape or form, with President Clinton"[28] (emphasis added).

When the Deputy Independent Counsel later asked President Clinton to confirm that Robert Bennett's statement was incorrect, President Clinton answered as follows:

> It depends on what the meaning of the word "is" is. If the -- if he -- if "is" means is and never has been, that is not -- that is one thing. If it means that there is none, that was a completely true statement.

Videotaped Testimony of William Jefferson Clinton, Tr. 58, Aug. 17, 1998 (Office of the Independent Counsel).

The Deputy Independent Counsel then posed a question that put President Clinton's answer in perspective.

> I just want to make sure I understand, Mr. President. Do you mean today that because you were not engaging in sexual activity with Ms. Lewinsky during the deposition that the statement that Mr. Bennett made might be literally true?

Id. at 60. President Clinton explained that his improper relationship with Ms. Lewinsky had ended several months earlier, so that "the present tense encompass[ed] many months." Id. at 61.

On March 6, 2002, the Independent Counsel's final report described these incidents.

> As part of the pretrial discovery process, Jones attempted to show that President Clinton had engaged in a pattern of similar sexually oriented conduct with subordinate government employees. Jones's attorneys served President Clinton with written interrogatories, one of which stated: Please state the name, address, and telephone number of each and every [federal employee] with whom you had

[28] Videotaped Testimony of William Jefferson Clinton, Tr. 57, Aug. 17, 1998 (Office of the Independent Counsel).

> sexual relations when you [were] . . . President of the United States. . . . On December 23, 1997, pursuant to Judge Wright's Discovery Order,68 President Clinton, under penalty of perjury, answered 'None.' . . . The Independent Counsel's criminal investigation began on January 16, 1998. Seven months later, on August 17, 1998, President Clinton testified from the Map Room of the White House via live video transmitted to federal Grand Jury 97–2 empaneled in the District of Columbia. At his grand jury appearance, President Clinton was asked, 'Mr. President, were you physically intimate with Monica Lewinsky?' He then asked for and received permission to read the following prepared statement: 'When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong.' . . . President Clinton further testified regarding the nature of his relationship with Monica Lewinsky: Q. [W]hether or not Mr. Bennett knew of your relationship with Lewinsky, the statement that there was 'no sex of any kind in any manner, shape or form, with President Clinton,' was an utterly false statement. Is that correct? A. It depends on what the meaning of the word 'is' is. . . . I mean that at the time of the deposition, it had been -- that was well beyond any point of improper contact between me and Ms. Lewinsky. So that anyone generally speaking in the present tense, saying there is not an improper relationship, would be telling the truth if that person said there was not, in the present tense; the present tense encompassing many months. (emphasis added; footnotes omitted)).

Final Report of the Indep. Counsel, In re Madison Guar. Sav. & Loan Ass'n, at 26-27, 27, 35, 39 (Mar. 6, 2002).

Although President Clinton's "meaning of the word 'is'" testimony has received far more attention, the more important grand jury testimony involved President Clinton's specific recollection of his interactions with Monica Lewinski -- contrary to his earlier sworn testimony a few feet from Judge Wright that he did not recall ever being alone with her.

An excerpt from Judge Wright's later decision holding President Clinton in contempt detailed this grand jury testimony and its inconsistency with President Clinton's earlier testimony.

- Jones v. Clinton, 367 F Supp. 2d 1118, 1128-29, 1129, (E.D. Ark. 1999) (noting that in his August 17, 1998, appearance before the Grand Jury "the President directly contradicted his deposition testimony by acknowledging that he had indeed been alone with Ms. Lewinsky on a number of occasions during which they engaged in 'inappropriate intimate contact.'. . . He stated he also was alone with her 'from time to time' when there was no 'improper contact' occurring. . . . The President began his testimony by reading a statement which reads in part as follows: 'When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong." (emphases added); reciting some of Clinton's testimony before the Grand Jury: "'Q. Let me ask you, Mr. President, you indicate in your statement that you were alone with Ms. Lewinsky. Is that right? A. Yes, sir. Q. How many times were you alone with Ms. Lewinsky? A. Let me begin with the correct answer. I don't know for sure. But if you would like me to give an educated guess, I will do that, but I do not know for sure. And I will tell you what I think, based on what I remember. But I can't be held to a specific time, because I don't have records of all of it. . . . I have a specific recollection of two times. I don't remember when they were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone.'" (emphases added); "In addition, the President recalled a specific meeting on December 28, 1997, less than three weeks prior to his January 17th deposition, at which he and Ms. Lewinsky were alone together." (emphasis added)).

That evening, President Clinton admitted on national television to an inappropriate relationship with Monica Lewinsky.

> This afternoon in this room, from this chair, I testified before the Office of Independent Counsel and the grand jury. I answered their questions truthfully, including questions about my private life, questions no American citizen would ever want to answer. Still, I must take complete responsibility for all my actions, both public and private. And that is why I am speaking to you tonight. As you know, in a deposition in January, I was asked questions about my relationship with Monica Lewinsky. While my answers were legally accurate, I did not volunteer information. Indeed, I did have a relationship with Miss Lewinsky that was not

> appropriate. In fact, it was wrong. It constituted a critical lapse in judgment and a personal failure on my part for which I am solely and completely responsible. But I told the grand jury today and I say to you now that at no time did I ask anyone to lie, to hide or destroy evidence or to take any other unlawful action. I know that my public comments and my silence about this matter gave a false impression. I misled people, including even my wife. I deeply regret that.

http://www.cnn.com/ALLPOLITICS/1998/08/17/speech/transcript.html (emphasis added).

On September 20, President Clinton's lawyer Robert Bennett sent a letter to Judge Wright, advising the court that it should not rely on Monica Lewinsky's affidavit, or on his comment about her affidavit at President Clinton's deposition.

> Dear Judge Wright,
>
> As you are aware, Ms. Monica Lewinsky submitted an affidavit dated January 7, 1998 in the above captioned case in support of her motion to quash the subpoena for her testimony. This affidavit was made in part of the record of President Clinton's deposition on January 17, 1998.
>
> It has recently been made public in the Starr Report that Ms. Lewinsky testified before a federal grand jury in August 1998 that portions of her affidavit were misleading and not true. Therefore, pursuant to our professional responsibility, we wanted to advise you that the Court should not rely on Ms. Lewinsky's affidavit or remarks of counsel characterizing that affidavit.

September 30, 1998, letter from Robert Bennett to Judge Susan Wright.

A few weeks later, the Washington Post commented on Bennett's letter.

- Peter Baker, Lewinsky Affidavit False, Bennett Admits, Washingtonpost.com, Oct. 9, 1998 ("President Clinton's attorney has told the judge who oversaw the Paula Jones lawsuit to disregard the affidavit he submitted from Monica S. Lewinsky denying a sexual relationship despite Clinton's January testimony that it was 'absolutely true.'"; Robert S. Bennett, who has represented Clinton throughout the Jones case, introduced the Lewinsky affidavit during the president's Jan. 17 deposition in an effort to cut off questioning about her.

> During the proceeding, Bennett told U.S. District Judge Susan Webber Wright that Lewinsky's statement meant 'there was absolutely no sex of any kind in any manner, shape or form,' and asked Clinton to verify that."; "'That's absolutely true,' Clinton responded."; "But Lewinsky testified before independent counsel Kenneth W. Starr's grand jury that the affidavit she signed Jan. 7 was false and that she performed oral sex on Clinton in the White House on 10 occasions. Starr accused Clinton of perjury and obstruction of justice for attesting to the affidavit's accuracy and allowing it to be introduced as evidence."; "In a new letter to Wright, Bennett in effect admitted that the Clinton team submitted a false statement, citing Lewinsky's August testimony 'that portions of her affidavit were misleading and not true.'"; "'Therefore, pursuant to our professional responsibility, we wanted to advise you that the Court should not rely on Ms. Lewinsky's affidavit or remarks of counsel characterizing that affidavit,' Bennett wrote in the Sept. 30 letter, which was filed under seal and made public yesterday."; "Sources have said that Clinton lied to Bennett and other attorneys about his relationship with Lewinsky and that they did not know her affidavit was untrue at the time. <u>As an officer of the court, Bennett is obligated by legal ethics to correct the record once a falsehood becomes known.</u> Jones's lawyers have cited the letter in trying to persuade the 8th U.S. Circuit Court of Appeals to reverse Wright and reinstate the case that she dismissed in April." (emphasis added))

Mr. Bennett's letter provides a fascinating insight into jurisdictions' differing rules. As a Washington, D.C., lawyer, Bennett was undoubtedly familiar with the unique D.C. ethics rules governing clients' past fraud on tribunals. D.C. is one of the few jurisdictions which does not require disclosure of past client fraud on tribunals unless D.C. Rule 1.6 permits the disclosure.

- District of Columbia Rule 3.3(d) ("A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, <u>including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).</u> [Rule 1.6 permits disclosure in several limited circumstances involving: the possibility of bodily harm; litigation misconduct other than misstatements to the tribunal; and "substantial injury to the financial interests or property of another" D.C. Rule 1.6(c)(d)]" (emphasis added)).

- District of Columbia Rule 3.3 cmt. [8] ("Paragraph (d) provides that if a lawyer learns that a fraud has been perpetrated on the tribunal, the lawyer must take reasonable remedial measures. If the lawyer's client is implicated in the fraud, the lawyer should ordinarily first call upon the client to rectify the fraud.

> If the client is unwilling to do so, the lawyer should consider other remedial measures. The lawyer may not, however, disclose information otherwise protected by Rule 1.6, unless the client has used the lawyer's services to further a crime or fraud and disclosure is permitted by Rule 1.6(d). In other cases, the lawyer may learn of the client's intention to present false evidence before the client has had a chance to do so. In this situation, paragraphs (a)(4) and (b) forbid the lawyer to present the false evidence, except in rare instances where the witness is the accused in a criminal case, the lawyer is unsuccessful in dissuading the client from going forward, and the lawyer is unable to withdraw without causing serious harm to the client. In addition, Rule 1.6(c) may permit disclosure of client confidences and secrets when the lawyer learns of a prospective fraud on the tribunal involving, for example, bribery or intimidation of witnesses. The terms 'criminal case' and 'criminal defendant' as used in Rule 3.3 and its Comment include juvenile delinquency proceedings and the person who is the subject of such proceedings." (emphasis added)).

One might think that this unique D.C. Rule accounts for Bennett's withdrawing Ms. Lewinski's affidavit and his "remarks . . . characterizing that affidavit."

However, the D.C. ethics rules did not apply to Bennett's obligations upon learning that his client had testified falsely. Because President Clinton's deposition was taken in an Eastern District of Arkansas case, the Arkansas ethics rules governed Bennett's duties.

> In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows: . . . For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise

District of Columbia Rule 8.5(b)(1) (emphasis added).

Under the ABA Model Rules, Bennett would clearly have been obligated to report President Clinton's false testimony. After all, if Bennett found it necessary to withdraw Ms. Lewinski's affidavit and his own characterization of it, presumably President Clinton's endorsement of the affidavit's accuracy would have triggered the same

disclosure obligation. The same would be true of President Clinton's repeated statement under oath that he had no recollection of being alone with Ms. Lewinski, which he repeatedly contradicted just seven months later -- although perhaps Mr. Bennett concluded that his client's accurate grand jury testimony about his recollection of being alone with Ms. Lewinski acted as a correction of his false deposition testimony.

On April 12, 1999, Judge Wright held President Clinton in contempt for testifying falsely in her presence at his January 17, 1998 civil deposition.

- Jones v. Clinton, 36 F. Supp. 2d 1118, 1121, 1127, 1128, 1129, 1129-30, 1130 & n.15, 1132, 1134 (E.D. Ark. 1999) (holding President Clinton in contempt for providing false statements during deposition, which was conducted in the presence of Federal Judge Susan Wright; describing President Clinton's January 17, 19988 deposition testimony before Judge Wright; "[T]he President testified in response to questioning from plaintiff's counsel and his own attorney that he had no recollection of having ever been alone with Ms. Lewinsky and he denied that he had engaged in an 'extramarital sexual affair,' in 'sexual relations,' or in a 'sexual relationship' with Ms. Lewinsky. . . . An affidavit submitted by Ms. Lewinsky in support of her motion to quash a subpoena for her testimony and made a part of the record of the President's deposition likewise denied that she and the President had engaged in a sexual relationship. When asked by Mr. Bennett whether Ms. Lewinsky's affidavit denying a sexual relationship with the President was a 'true and accurate statement,' the President answered, 'That is absolutely true.' Pres. Depo. At 204." (emphasis added); noting the court granted President Clinton summary judgment in Jones' case on April 1, 1998, but that on August 17, 1998, President Clinton testified before a Grand Jury in a way that contradicted his deposition testimony; also noting that on September 9, 1998, the Independent counsel submitted his findings to the House of Representatives, which commenced impeachment proceedings resulting in two Articles of Impeachment, one of which alleged President Clinton's perjury in his August 17 testimony before the Grand Jury, and the other one alleging obstruction of justice; also noting that an out-of-court settlement with Jones on November 13, 1998, and that on February 12, 1999, the Senate acquitted President Clinton of both Articles of Impeachment; "[T]he record demonstrates by clear and convincing evidence that the President responded to plaintiffs questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process. The

President acknowledged as much in his public admission that he 'misled people' because among other things, the questions posed to him 'were being asked in a politically inspired lawsuit, which has since been dismissed.' Although there are a number of aspects of the President's conduct in this case that might be characterized as contemptuous, the Court addresses at this time only those matters which no reasonable person would seriously dispute were in violation of this Court's discovery Orders and which do not require a hearing, namely the President's sworn statements concerning whether he and Ms. Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." (emphasis added); reciting some of Clinton's answers at his January 17, 1998, deposition; "Q. Do you ever recall walking with Monica Lewinsky down the hallway from the Oval Office to your private kitchen there in the White House? A. . . . My recollection is that, that at some point during the government shutdown, when Ms. Lewinsky was still an intern but was working the chief staffs office because all the employees had to go home, that she was back there with a pizza that she brought to me and to others. I do not believe she was there alone, however. And my recollection is that on a couple of occasions after that she was there but my secretary, Betty Currie, was there with her. She and Betty are friends. That's my, that's my recollection. And I have no other recollections of that." (emphasis added); "Q. At any time were you and Monica Lewinsky along in the hallway between the Oval office and this kitchen area? A. I don't believe so, unless we were walking back to the back dining room with the pizza. I just, I don't remember. I don't believe we were alone in the hallway, no."; "Q. At any time have you and Monica Lewinsky ever been alone together in any room in the White House? A. I think I testified to that earlier. I think that there is a, it is -- I have no specific recollection, but it seems to me that she was on duty on a couple of occasions working for the legislative affairs office and brought me some things to sign, something on the weekend. That's -- I have a general memory of that." (emphasis added); noting that in his August 17, 1998, appearance before the Grand Jury "the President directly contradicted his deposition testimony by acknowledging that he had indeed been alone with Ms. Lewinsky on a number of occasions during which they engaged in 'inappropriate intimate contact.'. . . He stated he also was alone with her 'from time to time' when there was no 'improper contact' occurring. . . . The President began his testimony by reading a statement which reads in part as follows: 'When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong.'" (emphasis added); reciting some of Clinton's testimony before the Grand Jury; "Q. Let me ask you, Mr. President, you indicate in your statement that you were alone with Ms. Lewinsky. Is that right? A. Yes, sir. Q. How many times were you alone with Ms. Lewinsky? A. Let me begin with the correct answer. I don't know for sure. But if you would like me to give an educated guess, I will do that, but I do not know for sure. And I will tell you what I think,

based on what I remember. But I can't be held to a specific time, because I don't have records of all of it."; "'I have a specific recollection of two times. I don't remember when they were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone.'" (emphasis added); "In addition, the President recalled a specific meeting on December 28, 1997, less than three weeks prior to his January 17th deposition, at which he and Ms. Lewinsky were alone together." (emphasis added); reciting some of Clinton's January 17, 1998, deposition testimony about "sexual relations"; "'Q. I think I used the term 'sexual affair.' And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court? . . . A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.'"; also reciting Clinton's response to his lawyer Robert Bennett's question: "'Q. In paragraph eight of her affidavit, she [Lewinsky] says this, 'I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship.' Is that a true and accurate statement as far as you know it? A. That is absolutely true.'" (emphasis added); "It is difficult to construe the President's sworn statements in this civil lawsuit concerning his relationship with Ms. Lewinsky as anything other than a willful refusal to obey this Court's discovery Orders. Given the President's admission that he was misleading with regard to the questions being posed to him and the clarity with which his falsehoods are revealed by the record,' there is no need to engage in an extended analysis of the President's sworn statements in this lawsuit. Simply put, the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false, notwithstanding tortured definitions and interpretations of the term 'sexual relations.'" (emphasis added; footnote omitted); "'[T]he President's attorney later notified this Court pursuant to his professional responsibility that portions of Ms. Lewinsky's affidavit were reported to be 'misleading and not true' and that this Court should not rely on Ms. Lewinsky's affidavit or remarks of counsel characterizing that affidavit. See Letter of September 30, 1998. The President's testimony at his deposition that Ms. Lewinsky's denial of her affidavit of a 'sexual relationship' between them was 'absolutely true' likewise was 'misleading and not true."; requiring Clinton to pay all reasonable expenses caused by his misconduct; also requiring Clinton to reimburse the Court for Judge Wright's travel to Washington for the August 17, 1998, deposition; "'[T]he President shall reimburse this Court its expenses in traveling to Washington, D.C. at his request to preside over his tainted deposition. The Court therefore will direct that the President deposit into the registry of this Court the sum of $1,202.00, the total expenses incurred by this Court in traveling to Washington, D.C.'";

also sanctioning Clinton by reporting the incident to the Arkansas Bar; "'In addition, the Court will refer this matter to the Arkansas Supreme Court's Committee on Professional Conduct for review and any disciplinary action it deems appropriate for the President's possible violation of the Model Rules of Professional Conduct. Relevant to this case, Rule 8.4 of the Model Rules provides that it is professional misconduct for a lawyer to, among other things, 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation,' or to 'engage in conduct that is prejudicial to the administration of justice.'"; "The Court takes no pleasure whatsoever in holding this Nation's President in contempt of court and is acutely aware, as was the Supreme Court, that the President 'occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties.'. . . [T]here simply is no escaping the fact that the President deliberately violated this Court's discovery Orders and thereby undermined the integrity of the judicial system. Sanctions must be imposed, not only to redress the President's misconduct, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. Accordingly, the Court adjudges the President to be in civil contempt of court pursuant to Fed. R. Civ. P. 37(b)(2) for his willful failure to obey this Court's discovery Orders.").

In the meantime, the Arkansas Bar reluctantly dealt with President Clinton's law license.

The Arkansas Supreme Court ultimately had to issue a writ of mandamus compelling the Arkansas Bar to deal with an ethics complaint filed against President Clinton.

- Hogue v. Neal, 12 S.W.3d 186, 188, 188-89 (Ark. 2000) (issuing a writ of mandamus compelling the Arkansas Bar to deal with ethics complaints against President Clinton; noting that the original complaint was filed on September 23, 1998, and that Federal District Judge Wright referred the matter to the Arkansas Bar on April 13, 1999, but that the Bar had taken no action since then; "From the facts as we know them, Hogue filed his complaint on September 15, 1998, and Neal, as Executive Director, was then required to furnish Mr. Clinton with a copy of that complaint. Service should have been performed under Section 5E, as we discussed above. Also, as already discussed, Neal was mandated to provide the attorney's response to the complaint within ten days from receiving it. Hogue asserts that no docket control number has been assigned his complaint, nor has he received any information from Neal or the Committee about any action taken regarding his

> allegations. Neal and the Committee offer no explanation except to indicate that confidentiality controls the information at this stage of the proceedings and that their duties are discretionary and not ministerial in nature. While what Neal and the Committee argue is a correct statement of our procedures in Section 2, 3, and 4, Neal and the Committee have mandatory duties that they must initiate under other procedures discussed above, in order to afford Hogue an opportunity to respond to Mr. Clinton's response, if he files one. Certainly, the same can be said of the complaint and referral from Judge Wright." (emphases added); "If Neal and the Committee have failed to initiate the procedures required to initiate and process Hogue's and Judge Wright's complaints, then we order they take such action forthwith. . . . If Neal and the Committee have initiated such action already, Hogue and Judge Wright can expect to receive that notice and information called for under this court's procedures as discussed above. Once the court's rules and procedures are complied with and the parties are permitted to join issues, the Committee can then properly consider the allegations and arguments on their merits." (emphasis added)).

On President Clinton's last day in office, he reached an Agreed Order of Discipline with the Arkansas Bar. The Agreed Order described its background.

> On April 1, 1998, Judge Wright granted summary judgment to Mr. Clinton, but she subsequently found him in Civil contempt in a 32-page Memorandum Opinion and Order (the "Order") issued on April 12, 1999, ruling that he had "deliberately violated this Court's discovery orders and thereby undermined the integrity of the judicial system." Order, at 31. Judge Wright found that Mr. Clinton had "responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process . . . [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." Order, at 16 (footnote omitted). Judge Wright offered Mr. Clinton a hearing, which he declined by a letter from his counsel, dated May 7, 1999. Mr. Clinton was subsequently ordered to pay, and did pay, over $90,000, pursuant to the Court's contempt findings. Judge Wright also referred the matter to the Committee "for review and any action it deems appropriate." Order, at 32.
>
> Mr. Clinton's actions which are the subject of this Agreed Order have subjected him to a great deal of criticism. Twice elected President of the United States, he became only the second President ever impeached and tried by the Senate,

> where he was acquitted. After Ms. Jones took an appeal of the dismissal of her case, Mr. Clinton settled with her for $850,000, a sum greater than her initial ad damnum in her complaint. As already indicated, Mr. Clinton was held in civil contempt and fined over $90,000.

Neal v. Clinton, No. CIV 2000-5877, 2001 WL 34355768, at *1 (Ark. Cir. Ct. Jan. 19, 2001) (emphasis added).

The Agreed Order acknowledged President Clinton's false testimony's effect.

> Mr. Clinton's conduct, as described in the Order, caused the court and counsel for the parties to expend unnecessary time, effort, and resources. It set a poor example for other litigants, and this damaging effect was magnified by the fact that at the time of his deposition testimony, Mr. Clinton was serving as President of the United States.

Id. at *2.

The Agreed Order also described the disbarment effort's legal context.

> On May 22, 2000, after receiving complaints from Judge Wright and the Southeastern Legal Foundation, the Committee voted to initiate disbarment proceedings from Mr. Clinton. On June 30, 2000, counsel for the Committee filed a complaint seeking disbarment in Pulaski County Circuit Court, Neal v. Clinton, Civ. No. 2000-5677. Mr. Clinton filed an answer on August 29, 2000, and the case is in the early stages of discovery.

Id. In the Agreed Order, President Clinton acknowledged his misconduct.

> In this Agreed Order Mr. Clinton admits and acknowledges, and the Court, therefore, finds that: A. That he knowingly gave evasive and misleading answers, in violation of Judge Wright's discovery orders, concerning his relationship with Ms. Lewinsky, in an attempt to conceal from plaintiff Jones' lawyers the true facts about his improper relationship with Ms. Lewinsky, which had ended almost a year earlier. B. That by knowingly giving evasive and misleading answers, in violation of Judge Wright's discovery orders, he engaged in conduct that is prejudicial to the administration of justice in that his discovery responses interfered with the conduct of the Jones case by causing the court and counsel for the

> parties to expend unnecessary time, effort, and resources, setting a poor example for other litigants, and causing the court to issue a thirty-two page Order civilly sanctioning Mr. Clinton.

Id. (emphases added).

The court found a Rule 8.4(d) violation, and suspended President Clinton's law license.

> Upon consideration of the proposed Agreed Order, the entire record before the Court, the advice of counsel, and the Arkansas Model Rules of Professional Conduct (the "Model Rules"), the Court finds: . . . That Mr. Clinton's conduct, heretofore set forth, in the Jones case violated Model Rule 8.4(d), when he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky, in violation of Judge Wright's discovery orders. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." WHEREFORE, it is the decision and order of this Court that William Jefferson Clinton, Arkansas Bar ID #73019, be, and hereby is, SUSPENDED for FIVE YEARS for his conduct in this matter, and the payment of the fine in the amount of $25,000. The suspension shall become effective as of the date of January 19, 2001.

Id. at 2-3.

The Arkansas Supreme Court issued a notice on February 21, 2001, announcing President Clinton's five year suspension.

> Attorney William Jefferson Clinton, an attorney residing in the State of New York, Bar ID #73019 has been suspended from the practice of law within the jurisdiction of this State for violation of Model Rule 8.4(d) of the Arkansas Model Rules of Professional Conduct. The Agreed Order of Discipline filed of record with the Pulaski County Circuit Court reflects that Mr. Clinton admitted to giving knowingly evasive and misleading discovery responses concerning his relationship with Monica Lewinsky, in violation of Judge Susan Weber Wright's discovery orders in the case of Jones v. Clinton, No. LR-C-94-290 (E.D. Ark.). The Agreed Order of Discipline

> also reflects that William Jefferson Clinton's Arkansas Attorney's License has been suspended for a period of five (5) years effective January 19, 2001.

In re William Jefferson Clinton, Notice of Suspension of Attorney's Privilege to Practice Law, Ark. Supreme Court Comm. on Prof'l Conduct (Feb. 21, 2001).

On October 1, 2001, the United States Supreme Court unanimously issued a Show Cause Order inviting former President Clinton to show why he should not be disbarred from the Supreme Court's Bar.

> Bill Clinton, of New York, New York, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

In re Discipline of Bill Clinton, 534 U.S. 806 (2001). Clinton apparently did not respond to this order.

Interestingly, President Clinton's fellow Yale Law School-educated lawyer seemed unrepentant. A 2001 Georgetown Journal of Legal Ethics article quoted President Clinton's lawyer David Kendall explaining President Clinton's deposition answering technique.

> "[H]e answered the questions narrowly, but truthfully. There was no perjury there. Was he trying to mislead the Paula Jones lawyers, absolutely." He added: "You ought not if asked your name to give your name and address. The trick is to try to answer questions and any lawyer will tell you this."

E. Cliff Martin and T. Karena Dees, The Truth about Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct, 15 Geo. J. Legal Ethics 777, 780 (2002) (emphasis added).

Current Developments

Some large firms have dealt with past client fraud on a tribunal in several newsworthy incidents.

- Jan Wolfe, A $25 Million Win, And Then An Unpleasant Surprise, Am. Lawyer, July 2014, at 16 ("A courtroom victory turned sour for Akin Gump Strauss Hauer & Feld in May after the firm discovered that its client's case was apparently based on deceit. But in its haste to flee the case, did Akin Gump reveal too much about its former client's alleged malfeasance?"; "Akin Gump told a judge on May 21 that its client, a software developer called LBDS Holding Company, fabricated evidence to win a $25 million jury verdict earlier this year in the Eastern District of Texas. In a withdrawal motion, Akin Gump's Sanford Warren Jr. wrote, 'Akin Gump now knows that it offered false evidence and testimony in the record in this litigation.' He told U.S. District Judge Leonard Davis that LBDS' CEO admitted to the firm posttrial that its damages theory was built on a phony contract and fake emails, and that LBDS is under investigation by federal prosecutors and the U.S. Federal Bureau of Investigation."; "Akin Gump's efforts to distance itself from the alleged fraud didn't sit well with its client, however. In a pro se motion filed on May 27, LBDS CEO Davis wrote that he won't oppose the firm's decision to withdraw from representing the company, but said that he 'does object to the inclusion of statements alleged to have been made by the company's representatives in Akin Gump's motion to withdraw, as the disclosure to those statements violates [LBDS'] attorney-client privilege.' Davis indicated that LBDS would file a longer brief outlining its objections, and asked for an extension so that he could consult with a new legal team."; "In its withdrawal motion, Akin Gump said it was bound by ethical rules to 'take remedial measures, including disclosing LBDS' deception to the court.'").

- Adam Klasfeld, Ecuadoreans Blast Patton Boggs Deal as 'Rotten,' Courthouse News Serv., May 22, 2014 ("Patton Boggs 'unceremoniously abandoned' its Ecuadorean clients through a $15 million settlement with Chevron, 'trashing' the environmental suit against the oil giant as fraudulent, the clients fumed."; "'There is no way to sugarcoat it: Patton Boggs has put its own interests above those of the people it was supposed to represent, switched sides in the middle of a hotly contested legal dispute, unceremoniously abandoned the clients without so much as notifying them, and publicly expressed regret at having taken on their representation in the first place,' the motion to intervene filed late Wednesday states. 'And it has even agreed to cooperate with Chevron in discovery, so that Chevron may use what it finds against the firm's former clients.'"; "New York attorney Steven Donziger signed the 12-page document on behalf of Ecuadorean rainforest residents Hugo Camacho Naranjo and Javier Piaguaje, who

claimed in a statement they want to make the settlement 'conform to ethical rules' rather than block it."; "'No court should place its imprimatur on such a rotten deal,' the motion states.").

- Sean McLernon, Not So Fast, Patton Boggs: Ethics Issues Threaten $15M Deal, Law360, ("Law360, New York (May 08, 2014, 6:56 PM ET) -- Patton Boggs LLP's $15 million settlement with Chevron Corp. over its role in defending a discredited $9.5 billion Amazon pollution judgment may have trouble surviving a court challenge from the case's Ecuadorean plaintiffs, as experts say the firm's unusual decision to betray its clients could be deemed unethical. With Patton Boggs having trouble finding a merger partner while the Chevron litigation was pending, the firm buckled to pressure from the oil giant Wednesday. In addition to forking over $15 million to resolve claims that the firm hid evidence, Patton Boggs issued a statement regretting it had agreed to defend the Ecuadorean plaintiffs in the first place. Those former Patton Boggs clients are understandably livid. They have pledged to pursue all available options to nullify the firm's deal with Chevron, claiming the settlement was a 'betrayal' and that Patton Boggs agreed to a deal that is 'unethical on its face.' As part of the settlement, Patton Boggs resolved its claims with Chevron and released a statement expressing remorse that it took part in the case. Patton Boggs told Law360 that it has completed all of the matters in which it was engaged and has not violated any ethical duty. 'We know of no basis for your report that the clients are claiming that our firm is violating our ethical duty not to withdraw from a case,' the firm said. Patton Boggs may have abandoned its client's interests through the settlement, according to University of Maryland Carey School of Law Professor Robert Percival. 'You can't just decide after you lose in a district court that you are going to join the other side,' Percival said.").

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE YOUR FORMER CLIENT'S FRAUD ON THE TRIBUNAL, UNLESS YOUR CLIENT CONSENTS (PROBABLY)**. B 10/15