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Recent Developments: Professional Responsibility—Ethical Duty of Counsel Who Believes Client's Witnesses Will Commit Perjury. State v. Mahoney, 16 Md. App. 193, 294 A.2d 471 (1972)

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RECENT DEVELOPMENTS

PROFESSIONAL RESPONSIBILITY—ETHICAL DUTY OF COUNSEL WHO BELIEVES CLIENT'S WITNESSES WILL COMMIT PERJURY. *STATE V. MAHONEY*, 16 Md. App. 193, 294 A.2d 471 (1972).

John Edward Mahoney was convicted of robbery with a deadly weapon; the conviction was upheld on appeal.[1] Subsequently, a petition for post-conviction relief was filed in which the defendant alleged, *inter alia*, that his trial counsel was incompetent for failing to call several alibi witnesses who allegedly would have testified that he was home at the time the robbery was committed.

During the post-conviction hearing, at which time the defendant and trial counsel testified, it was revealed that counsel's principal reason for not calling these witnesses was his belief that they would commit perjury.[2] The post-conviction judge concluded that trial counsel had been incompetent, and ordered a new trial.[3] The State of Maryland filed an appeal maintaining that: 1) Mahoney's trial counsel acted properly in not calling the alleged alibi witnesses because the failure or neglect of trial counsel in not calling witnesses, even if material, is a matter of trial tactics; 2) if such trial tactics are later proved improvident, there is still not a denial of effective representation; 3) there was no showing that this particular fact situation was tantamount to a denial of effective assistance under the Maryland test for

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1. State v. Mahoney, 16 Md. App. 193, 294 A.2d 471 (1972).
2. Illuminating for purposes of the issue under discussion is the verbal exchange between post-conviction judge and John Bell, trial counsel. *Id.* at 198-200, 294 A.2d at 473, 474:
   [Bell]: ... [T]his presented a difficult situation for the defense attorney or any defense attorney but I think it is abundantly clear that while a defense attorney is an instrumentality by which the defendant's case is presented to the jury and to the Court, the defense attorney cannot take the facts of a case and change them substantially, nor can a defense attorney in any way participate in a fraud upon the Court or lend himself to any perjury or subornation of perjury from the defendant or any other witnesses... and not to bring any fabrication or lies or any other false, spurious, counterfeit facts before the Court or before the jury.
   [Judge]: Are you the judge? Are you supposed to make that judgment as to whether or not their testimony would be perjured?
   Isn't the jury the judge? Isn't the jury entitled to hear the testimony of the defendant's witnesses and then reach its own judgment as to who is telling the truth and who isn't?
   [Bell]: I would take the position that I am not going to put on any witnesses, including the defendant, who I think is going to give perjured testimony.
3. The trial court felt the decision by Mahoney's trial counsel not to call the witnesses was more than a tactical judgment and thus concluded that "Bell's failure to accede to Mahoney's wish 'to have alibi witnesses testify for him* * * deprived * * * [him] of due process'; [and] that if Bell 'didn't like the way his client was insisting that the case be tried, he should have withdrawn his appearance ....'" *Id.* at 200, 294 A.2d at 474.

determining competency of trial counsel;[4] and, 4) the so-called alibi witnesses would not have assisted Mahoney in his defense, as their testimony would not have established his whereabouts at the time the crime was committed.

Mahoney contended that his trial counsel was obligated to present all evidence available to his defense which was of probative value, unless he *knew* that such evidence was perjured, and that whether such witnesses were to be believed was a matter solely for the jury.[5] Defendant's legal conclusion was that he had been denied due process under the sixth and fourteenth amendments.

The Maryland Court of Special Appeals approached the controversy through the formulation of two issues:

> (1) Whether, in the circumstances of this case, Mahoney's Fourteenth Amendment rights to the effective assistance of counsel and to due process of law were denied him by reason of counsel's refusal to call the so-called alibi witnesses to testify on his behalf at the trial.
> (2) Whether, in the circumstances of this case, viewed in light of the provisions of Maryland Rule BK45 directing that [the] post-conviction hearing judge 'make such order on the petition as justice may require', counsel's refusal to call the alibi witnesses justifies the granting of a new trial.[6]

The Court of Special Appeals held that trial counsel's refusal to call the alibi witnesses, even if an improper exercise of judgment, was not so prejudicial as to deny the defendant effective assistance of counsel or due process of law: the defendant's contentions thus did not warrant granting a new trial. In reaching its decision, the court noted that no showing was made as to what the testimony of the alibi witnesses (other than the defendant's mother and sister-in-law) would have been, that none of the other alleged alibi witnesses were produced at the post-conviction hearing, and that the proposed testimony of the mother and sister-in-law would fail to show that the defendant was home at the time the crime was committed.[7]

While no fundamental disagreement exists with either the reasoning used or the conclusion reached by the *Mahoney* court on the overriding issue of effective assistance, a more comprehensive treatment would not have been unwarranted. An examination of authorities in a variety of jurisdictions provides no scarcity of commentary on the subject. A preliminary requirement in affording a client effective assistance of counsel is the obligation of the attorney to investigate all sources of

4. The Maryland test for determining competency of trial counsel is whether, under all the circumstances of the particular case, counsel was so incompetent that the accused was not afforded genuine and effective legal representation. Green v. Warden, 3 Md. App. 266, 269, 238 A.2d 920, 922 (1967).
5. 16 Md. App. at 201, 294 A.2d at 475.
6. *Id.* at 202, 294 A.2d at 475.
7. *Id.* at 207, 294 A.2d at 478.

inquiry suggested by the accused. This is a determinative factor in whether counsel has acted properly in failing or refusing to call a witness suggested by his client.[8] By general consensus, failure on the part of counsel (or investigators for counsel) to pursue suggested lines of examination, will result in a denial of effective assistance.[9] Once this mandatory pre-trial investigation procedure has been faithfully executed, the judicial trend is to give counsel great latitude in the calling of witnesses. Generally, the decision is regarded as a judgment of strategy or trial tactics left almost exclusively to counsel.[10] Even improvident strategies or poor tactics do not necessarily amount to deficient advocacy.[11] It has also been stated that the failure to call alleged alibi witnesses, where counsel believes their testimony not to be helpful, is considered a part of proper trial tactics.[12] Clearly then, the failure to call a non-material witness is not a denial of effective assistance. One court has stated that to sustain a claim of inadequate representation by reason of failure to call a witness, it must be established that the alleged defense witness was material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him.[13] This court therefore implies that within "proper judgment" even a material witness can be withheld, the courts on review defining "proper judgment." However, other authority, expanding the latitude of "proper judgment" and thus limiting the courts on review, states that whatever the reason involved, failure to put on the stand material witnesses is merely an error of judgment which does not constitute denial of effective assistance.[14]

Though the above analysis clearly supports *Mahoney's* result, what should be criticized is the court's failure to have dealt, if only by way of dicta, with the underlying sensitive and confusing ethical dilemma

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8. *In re* Branch, 70 Cal. 2d 200, 210, 449 P.2d 174, 181, 74 Cal. Rptr. 238, 245 (1969); Evans v. Warden, 240 Md. 333, 335-36, 214 A.2d 145, 146 (1965).
9. Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972); United States v. Chaney, 446 F.2d 571, 577 (3d Cir. 1971); People v. Perry, 271 Cal. 2d 84, 111, 76 Cal. Rptr. 725, 743 (1969).
10. Johns v. Warden, 240 Md. 209, 211, 212, 213 A.2d 467, 470 (1965); Shelton v. State, 3 Md. App. 394, 401, 239 A.2d 610, 615 (1968). Mere tactical errors generally will not invoke a finding of incompetency. Gullion v. Warden, 3 Md. App. 263, 266, 239 A.2d. 140, 142 (1968); Hall v. Warden, 224 Md. 662, 665-66, 168 A.2d 373, 375 (1961). Furthermore, where a party is represented by counsel, he is not entitled as a matter of right to examine witnesses or otherwise participate in the conduct of his trial. Strosnider v. Warden, 245 Md. 692, 695-96, 226 A.2d 545, 548 (1967).
11. Tompa v. Virginia, 331 F.2d 552, 554 (4th Cir. 1964); Ingram v. Cox, 321 F. Supp. 90, 92-93 (W.D. Va. 1970); Bray v. Peyton, 290 F. Supp. 593, 594-95 (W.D. Va. 1969); Terrell v. United States, 294 A.2d 860 (D.C. App. 1972); Bell v. United States, 260 A.2d 690 (D.C. App. 1970).
12. United States v. Dorn, 169 F. Supp. 144 (D.D.C. 1959); State v. Crepeault, 127 Vt. 465, 496, 252 A.2d 534, 537 (1969).
13. People v. Hill, 70 Cal. 2d 678, 690-91, 452 P.2d 329, 335, 76 Cal. Rptr. 225, 231 (1969).
14. Tompa v. Virginia, 331 F.2d 552, 554 (4th Cir. 1964); Bolden v. United States, 266 F.2d 460 (D.C. Cir. 1959); Churder v. United States, 294 F. Supp. 207, 209 (E.D. Mo. 1968); Crowder v. United States, 294 F. Supp. 291, 294 (E.D. Mich. 1967); Hoffler v. Peyton, 207 Va. 302, 311, 149 S.E.2d 893, 899 (1966).

posed: namely, what is the role of an attorney when, in light of all the facts at his disposal, he reasonably believes, but does not know for a certainty, that material or non-material witnesses for his client will perjure themselves? Although, admittedly, the facts of *Mahoney* lend themselves to a strict analysis on the basis of effective assistance of counsel, the lurking ethical considerations which the court did not discuss were in fact the motivating forces of the appeal. Moreover, the ethical problems manifested are representative of the ongoing struggle and attendant confusion in defining the balance between active zealous representation on the one hand and faithful duty as an officer of the court on the other. The case at hand provides an appropriate focus on the existing problems and guidelines for an attorney facing a similar ethical problem.

The Code of Professional Responsibility of the American Bar Association is recognized by the bench and bar throughout the United States as setting forth proper standards of professional conduct.[15] Regrettably, however, the Code adds more uncertainty than it does guidance to this issue.[16] The original Canon V of the American Bar Association's Canons of Professional Ethics stated that, "A lawyer in undertaking the defense of one accused of crime is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."[17] Likewise, the current Canon VII of the Code of Professional Responsibility provides that a lawyer should represent a client zealously within the bounds of the law. However, Ethical Consideration 7-26 states:

> The law and disciplinary rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in the introduction of such 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.[18]

The Code and interpretative cases appear to define "knowing" or "should know" in the sense of absolute certainty. If, in a particular fact

15. The Maryland Rules of Procedure now provide that the Code of Professional Responsibility of the American Bar Association (as set forth in Appendix F of the Rules) is adopted as part of state statutory law. MD. R. CIV. P. 1230.
16. Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 AM. CRIM. L. Q. 28 (1966).
17. ABA CANONS OF PROFESSIONAL ETHICS No. 5 (1908). The Canons of Professional Ethics, adopted in 1908, were added to and amended numerous times until the adoption of the Current Code of Professional Responsibility and Canons of Judicial Ethics. The Code was adopted by the House of Delegates of the American Bar Association on August 12, 1969 to become effective for American Bar Association members on January 1, 1970.
18. ABA CODE OF PROFESSIONAL RESPONSIBILITY, No. 7, EC 7-26.

situation, this quantum of conviction has been reached, the attorney's conduct is clearly defined. Thus, the courts have held an attorney responsible under the prohibition of EC 7-26 in the following situations: 1) the witness informs counsel of his intent to commit perjury;[19] 2) the client tells counsel of his intent to commit perjury;[20] 3) the client or witness commits perjury while on the witness stand;[21] 4) there was reasonable cause to believe the court was being defrauded.[22]

Absent, however, is specific direction from the Code in stating proper conduct where reasonable belief but not total certainty exists. It would appear therefore, that the job of defining the parameters of EC 7-26, vis-à-vis the issue here, is left to the individual attorney or to the courts on a case-by-case analysis. Conceivably, any particular court could include or delete "reasonable belief" from the mandates of EC 7-26. This potentially shifting standard may well be a perplexing dilemma to an ethically-minded attorney fearing possible later repercussions, while at the same time providing an invitation to carelessness for others who fear not the dangerous edge.

Moreover, the problems raised by these vague strata of uncertainty go beyond the self-protective interests of the attorney involved. Important considerations of the role of counsel in relation to the client and the court are also raised. A fundamental belief has existed among the bar that the proper role for counsel is zealous defense in spite of personal feelings as to guilt or innocence of the client: to do otherwise, it is thought, would be "donning the robe of judge and claiming membership on the jury."[23] On the other end of the spectrum, the Code and bar demand the utmost obligation as an officer of the court. This is the classic conflict in the dual role of the advocate. Clearly, the conflict is resolved in a "knowing" situation under EC 7-26: the duty to represent zealously by using every possible defense under the law is preempted by a higher obligation to protect the court from fraud. But the disturbing question is whether the same order of priorities is justified under circumstances of reasonable belief. If so, the mandates of EC 7-26 would, in the present situation, protect the attorney from a charge of inadequate representation if he decides to withhold testimonial or real evidence. If not, the attorney potentially faces condemnation from bench and bar for overreaching his role as counsel and thus denying the client effective assistance.

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19. Ingle v. Fitzharris, 283 F. Supp. 205, 207 (N.D. Cal. 1968).
20. State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970).
21. *In re* Hoover, 46 Ariz. 24, 46 P.2d 647 (1935); *In re* Palmieri, 176 App. Div. 58, 162 N.Y.S. 799 (1916); *In re* King, 7 Utah 2d 258, 322 P.2d 1095 (1958).
22. *In re* Huie, 285 Ala. 185, 188-91, 230 So. 2d 514, 517-19 (1970); *In re* Griffith, 283 Ala. 527. 534, 219 So. 2d 357, 359 (1969). In both of these cases disbarment was warranted where counsel obtained divorces either knowing or having reasonable cause to believe that the parties were not bona-fide residents of the state.
23. Gallegos v. Turner, 256 F. Supp. 670, 677 n.6 (D. Utah 1966).

Although much legal scholarship has been generated in closely related areas, the specific ethical problem presented in *Mahoney* remains a singularly gray area in legal ethics, with most discussion centering around the situation where the client informs counsel of his intent to commit perjury. Those writers who constitute the more liberal divisions of the bar on ethical principles believe that their first loyalty is to the client.[24] Members of the bar who constitute the more conservative side on ethics consider themselves first of all officers of the court, and tend to adopt a literal interpretation of the canons.[25] While there is a consensus among both of these groups that the attorney should first try to dissuade the perjuriously-inclined client, opinion differs if this proves unsuccessful. A key spokesman of the "left wing," Monroe H. Freedman, argued that a lawyer is obligated to exploit every means to secure his client's acquittal, and that a declaration by the defendant that he would perjure himself should not alter that obligation. Freedman claimed that either withdrawal from the case or informing the court of the defendant's intended perjury would only shift the ethical burden to another lawyer or judge. Moreover, Freedman believed that under the protections and obligations of confidentiality, the attorney would have no alternative but to put the perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either judge or jury. Freedman would thus treat the client as innocent until the court finds him guilty, even when the client has admitted his guilt to the lawyer.[26]

Approaching the problem from the "right wing" was Mr. Chief Justice Warren Burger, then a judge on the U.S. Court of Appeals, who maintained that the canons are clear in their prohibition against the knowing use of perjured testimony.[27] In dealing with a client who

24. Speaking for this group, Charles P. Curtis of the Boston Bar wrote:

> His [the lawyer's] loyalty runs to his client. He has no other master. Not the Court? you ask.... No, in a paradoxical way. The lawyer's official duty, required of him indeed by the court, is to devote himself to the client. The court comes second by the court's, that is the law's, own command.

Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

25. The attitude of this group seems to be that the final goal of justice cannot be attained by stooping to condone or collaborate in those practices which are endemic to the injustices above which men of the law aspire to rise.

Championing this view has been Lloyd P. Stryker who wrote:

> The standards of conduct that lawyers must obey are as high, and are as generally followed, as the most exalted rules that govern any men on earth. All advocates are bound by these standards, and they must obey them. They may and should fight hard for their clients, but they must fight fairly. They may and should say all that honestly and honorably can be said for them. They may say it with fervor and all the persuasion in their power; but in saying it they may not deceive, they must not lie.

L. STRYKER, THE ART OF ADVOCACY 283 (1954).

26. Reichstein, *The Criminal Law Practitioner's Dilemma: What should the lawyer do when his client intends to testify falsely?* 61 J. CRIM. L.C. & P.S. 1, 2 (1970), citing Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471, 1475–76, 1477–78, 1482 (1966).

27. The Chief Justice stated: "The proposition that perjury may ever be knowingly used is as

informs counsel of his intent to commit perjury, Chief Justice Burger does not state that a lawyer must inform the court of the intended perjury, but he does place severe restrictions on the attorney's subsequent conduct. In stating that the lawyer may not facilitate the perjury in any way, he has set forth explicit guidelines.[28]

The written material that has addressed itself more closely to the specific issue of reasonable belief reflects this same conflict among the legal community as to the dual client-court obligation. One writer in the early part of the century expounded the belief that it is the jury's role to determine the veracity of witnesses. While agreeing that counsel is precluded from the introduction of evidence *known* to be false, the matter of determining the veracity of witnesses was said to be otherwise out of his hands.[29]

A more contemporary viewpoint consistent with this approach directs attention to the exact problem of conscience. This commentator notes that attorneys, although attempting to be objective, cannot help but form moral judgments as to the guilt or innocence of clients. Realizing this, he urges that counsel should resist to the utmost the tendency of this mental and emotional formulation to influence their handling of the case.[30] Responding to the claim among the bar that the

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pernicious as the idea that counterfeit documents can be fabricated and knowingly offered to the Court as genuine. This is so utterly absurd that one wonders why the subject need even be discussed among persons trained in the law." Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L. Q. 11, 12 (1966). *See also*, Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM CRIM. L. Q. 23 (1966); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1495 (1966); and Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64, MICH. L. REV. 1488 (1966).

28. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L. Q. 11, 13 (1966), says:

> In those circumstances, if the lawyer's immediate withdrawal from the case is either not feasible, or if the Judge refuses to permit withdrawal, the lawyer's course is clear: He may not engage in direct examination of his client to facilitate the known perjury. He should confine himself to asking the witness to identify himself and to make a statement, but he cannot participate in the fraud by conventional direct examination.

See also Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L. J., 1048, 1053 (1967): Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 594-95 (1961).

29. Battle, *The Defense of a Client Whose Guilt is Known*, 4 N.Y.L. REV. 74, 75 (1926). The author states:

> [I]t frequently happens that testimony is offered which the counsel may suspect to be untrue, but which he does not know to be false. In such event it is his duty . . . to present this testimony and leave it to the jury to determine its truth or falsity. The counsel has no right as such to pass upon the veracity of witnesses. If a witness makes statements and is prepared to testify to them under oath, counsel is not justified in withholding such testimony because he may suspect it is not true. . . . But if the witness tells him the testimony is true, then it is his duty to submit that testimony to the jury.

30. Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. R. 65 (1965):

> Belief in a client's cause should not be so overwhelming that the lawyer's enthu-

jury, and not counsel, should pass on the veracity of a client's story, a past president of the American Bar Association has taken the opposing stance, assuming a strong court-oriented position.[31] He believed it is the duty of counsel to know whether his client is guilty in a criminal case, and that he should govern his advice and conduct of the case accordingly.[32]

While the ambiguities of the code of ethics and the disharmony among legal scholars pose more questions than answers to the problem, fortunately, some direction has been emanating from the courts. Although there are no authorities directly holding that "reasonable belief" of perjury falls within the prohibition against the knowing use of perjured evidence, a number of cases have directed their analysis toward that principle.

One classification of case authority has protected defense counsel's efforts at preventing the introduction of potentially perjured evidence. In a recent California decision, petitioner claimed denial of effective assistance for counsel's failure to investigate allegedly exculpatory defense witnesses. The court found no denial of effective assistance where the information given to the attorney regarding the proposed witnesses was given under such circumstances that counsel reasonably believed the testimony would be perjured.[33] Another California court concluded that counsel's failure to call witnesses on behalf of his client was justified on two grounds, one of which was that after weighing all of the facts, the attorney may well have believed the proposed testimony of the witnesses to be false. Supporting this position, the court noted that an attorney owes no duty on behalf of his client to offer testimony which is untrue.[34] Cases have also held counsel's

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siasm creates witnesses ... or should [his] disbelief... discourage possible witnesses from testifying for a defendant.

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...Disbelief and defeatism deny the defendant the right to effective counsel. *Id.* at 72-73.

31. Buckner, *The Trial of Cases*, 15 A.B.A.J. 271 (1929) states:

> The client is not entitled to have a lawyer who will permit a witness or client to testify to something which the lawyer himself does not believe to be true....
>
> ...I think that if the lawyer thinks that his client or witness is not telling the truth he should not be a party to what he believes to be perjury.

Id. at 273.

32. "The lawyer should form an opinion as to his guilt or innocence in order that he may probe more intelligently into the truth or falsity of the testimony which the client or his friends propose to give in court and thus prevent the introduction by himself of false testimony." *Id.* at 273.

33. *In re* Branch, 70 Cal. 2d 200, 202, 211-13, 449 P.2d 174, 182-83, 74 Cal. Rptr. 238, 240, 246-47 (1969). Here, information was given to counsel just prior to sentencing. Under these circumstances, "reasonable belief" was sufficient to abort the otherwise mandatory requirement to investigate all crucial defenses of fact that may be available. While stating the general maxims of EC 7-26, the court appears to have expanded in this situation the concept of "knowing."

34. People v. Lucas, 1 Cal. App. 3d 637, 642-44, 81 Cal. Rptr. 840, 844 (1969). The second and primary ground justifying the decision not to call the witnesses was that counsel

disbelief in the veracity of alleged exculpatory witnesses, following an investigation, was sufficient ground for deciding not to call them at trial.[35] Finally, one recent decision has recognized a measure of responsibility to the court where the attorney reasonably suspects that the client's representations are false.[36]

Another classification of authority, addressing itself to the government's obligation in the presentation of evidence, has recognized a level of responsibility below absolute knowledge of perjured testimony: the United States District Court for Maryland has twice spoken to this point. In one case, counsel for petitioner argued that in order to obtain relief, petitioner need not show that the prosecuting officer had actual knowledge that the testimony was perjured; it was sufficient that the officer should have known. The court recognized the more severe requirement, but decided it was not necessary to pass on that legal point.[37] In the other case, the District Court held that petitioner's allegations that the prosecuting attorney should have known that certain testimony was perjured raised factual issues and legal questions concerning the state's responsibility for the accuracy of what the witness said.[38] Other jurisdictions have also recognized this principle,[39] and even civil cases have carved a niche of responsibility where

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may have determined legally it made little difference what the witnesses would have testified to. Somewhat parallel to *Mahoney*, the court raised the ethical considerations, but ultimately decided the case according to proper trial tactics.

35. United States *ex rel.* Green v. Rundle, 305 F. Supp. 523 (E.D. Pa. 1969). The decision not to call alibi witnesses was not considered ineffective assistance of counsel where one of the reasons for the decision was an investigator's report to counsel that he did not believe the witnesses.

    See also In re Atchley, 48 Cal. 2d 408, 415-18, 310 P.2d 15, 20-21, *cert. denied*, 335 U. S. 899 (1957). Here, both the attorney and sheriff had investigated the witnesses, the attorney concluding they were not, as claimed, present when the crime took place. The court concluded that counsel's failures to call the two allegedly exculpatory witnesses because he felt they would perjure themselves, was not a denial of effective assistance of counsel. It is interesting that the lower court judge in this case made essentially the same recommendation to counsel as the post-conviction judge did in *Mahoney*.

    > The referee believed the testimony of the public defender but concluded that... [he] should have presented a defense which... [he] believed was false and let petitioner gamble on the chances that the jury might impose a death sentence or a life sentence for murder, or might convict petitioner of a lesser offense than murder, or might acquit petitioner.

    Id. at 417-18, 310 P.2d at 21.

36. State v. Zwillman, 112 N.J. Super. 6, 16, 270 A.2d 284, 289 (1970). The New Jersey court, in agreeing that an attorney must seek for his client his maximum entitlement under the law and not to act as judge or jury, also noted: "It is not an attorney's responsibility to decide the truth or falsity of a client's representations unless he has actual knowledge or unless from facts within his personal knowledge or professional experience he should know or reasonably suspect that the client's representations are false." *Id.*

37. The district court noted that "even if the less severe burden applies, this petitioner has not proved any such injury as would bring the rule into play." Smith v. Warden, 254 F. Supp. 805, 806 (D. Md. 1966).

38. McCloskey v. Boslow, 349 F.2d 119, 120-21 (4th Cir. 1965).

39. Wild v. Oklahoma, 187 F.2d 409 (10th Cir. 1951). Here the court recognized the principle by stating: "In the case before us there is no suggestion that the prosecuting officers

an attorney has reasonable cause to believe that a fraud was perpetrated on the court.[40] Although the above authority does not directly advocate that "reasonable belief" of perjury be put squarely within the prohibitions against the knowing use of perjured testimony, it represents at least a foundation for the proposition.

Against the above conflicts and scattering of existing guidelines, *Mahoney's* significance becomes apparent not merely because it exposes the vague area under consideration: factually, this case is a classic example of the problem. The attorney, after making the required investigation of those available witnesses suggested by his client, and evaluating all surrounding facts, concluded that it was the apparent intention of the relatives to establish some type of false alibi. He therefore decided that he could not in good conscience present any witnesses whom he considered were intent on proffering perjured testimony. This decision was not reached arbitrarily—several factors were taken into consideration independent of counsel's investigation of the witnesses themselves:

> (1) at the trial, a juvenile accomplice of the defendant testified in detail that he, together with John Mahoney and brother Will Mahoney, committed the robbery;
> (2) a second witness testified that shortly after the robbery, the defendant came to his home and admitted the robbery—subsequently offering money to the witness to supply him with an alibi;
> (3) a third witness, Mahoney's uncle, told the jury that the defendant admitted to him he had committed the robbery;
> (4) both John and Will Mahoney made full confessions to the police shortly after their arrest; and
> (5) an admission was made to counsel by defendant's brother, Will Mahoney, that the defendant had committed the crime.[41]

Consequently, the defendant offered no evidence in his defense, and the jury found him guilty of armed robbery.

Counsel's conduct is open to two interpretations which, in themselves, mirror the general dilemma. On the one hand, *Mahoney* is a case of an attorney motivated by the highest ethical ideals in protecting

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knew or had reason to believe that any of the testimony offered at the trial of the petitioner was false or perjured." *Id.* at 410.

Another case, citing *Wild*, declared that a due process violation had occurred because the District Attorney should have known of a plea-bargain agreement. The court noted that even if the District Attorney did not know of the agreement, he had every reason to believe a deal had been made and should have made further inquiry. DeLuzio v. People, 494 P.2d 589, 592 (Colo. 1972).

40. Where attorneys obtained divorces when they had reasonable cause to believe that one or both of the parties was not a bona fide resident of the governing state, disbarment was held warranted. *In re* Huie, 285 Ala. 185, 188-91, 230 So. 2d 514, 517-19 (1970); *In re* Griffith, 283 Ala. 527, 534, 219 So. 2d 357, 363 (1969).

41. 16 Md. App. at 195, 196, 294 A.2d at 472.

the court from even the possibility of fraud, while on the other, either an attorney diluting his client's case by usurping the jury's role in determining the veracity of potential witnesses, or an attorney whose services were rendered ineffective because of his own conviction of his client's guilt. Arguably, the five factors pointing to the client's guilt played a more significant role in counsel's belief of perjury than the independent investigation of the witnesses themselves. Assuming this belief of perjury was more client-oriented than witness-oriented, an argument can be advanced that counsel was rendered ineffective once convinced of his client's guilt. To state the proposition another way, because counsel believed in his client's guilt, a fortiori, the witnesses must be lying.[42] The Maryland court was not, by virtue of the facts of the case, forced to elect one of these positions. Because *Mahoney* dealt with non-material witnesses, a convenient escape valve was provided. The court resolved the case squarely within the sphere of proper trial tactics, thus achieving a polite sidestepping of the ethical consideration involved.

Left in limbo at this point is how the court would resolve a similar situation where the witnesses are critical to the defense. It is notable that authority exists for the proposition that even a material witness can be withheld, whatever the reason, once the required pre-trial investigation is made.[43] If the Maryland courts followed this line of

42. Although factually distinguishable from *Mahoney*, Johns v. Smyth, 176 F. Supp. 949, 953 (E.D. Va. 1959); and State v. Merchant, 10 Md. App. 545, 563, 271 A.2d 752, 761 (1970), provide the underlying theory of this argument. In *Johns* the attorney represented an indigent state prisoner convicted of murder. Counsel failed to submit instructions covering manslaughter and failed to argue the case to the jury, even though the evidence provided by the prosecution suggested some provocation for the act. In exploring the reasons for the attorney's failure to pursue these tactics, the court stated: "[Y]ou could not conscientiously argue to the jury that he [the defendant] should be acquitted?" The attorney responded: "I definitely could not." Johns v. Smyth, *supra* at 953. The court held that the failure of counsel for a defendant "to argue the case before the jury, while ordinarily only a trial tactic not subject to review, enters the field of incompetency of counsel when the reason... [given for such failure to argue]... is the attorney's conscience." *Id.* Thus, the defendant was denied due process because he was not provided with effective assistance of counsel. The court in stating its reasons said:

> When the defendant was interviewed by his court-appointed attorney, the attorney stated that he had reason to doubt the accuracy of the defendant's statement. It was at this time that the attorney's conscience actuated his future conduct which continued throughout the trial. If this was the evidence presented by the prosecution, the defendant was entitled to the faithful and devoted services of his attorney uninhibited by the dictating conscience.

Id., citing *Johns*, *Merchant* stated:

> [P]etitioner's counsel in prejudging their client's guilt failed as a consequence to pursue the defense of consent or to make an investigation into the reputation of the prosecutrix and... their belief in the improbability if not impossibility of a white housewife consenting to intercourse with a negro laborer... is the equivalent of the attorney's "conscience" in *Johns* and thus removes... counsel's conduct of the defense from the realm of trial tactics and places it in the category of ineffective representation.

State v. Merchant, *supra* at 563, 271 A.2d at 761.

43. In Bolden v. United States, 266 F.2d 460 (D.C. Cir. 1959), the court stated with regard to the failure of counsel to call an alleged alibi witness: "Whatever the reason for it, the

reasoning, even a material-witness situation with parallel ethical problems could again be resolved according to proper trial tactics disregarding any ethical considerations. Thus, the "trial tactics" principle, if followed, would safeguard an attorney who decided for ethical reasons to withhold a material witness. The question remains, however, whether on review, the Maryland courts (unlike the above authorities) would delve into counsel's reasons for failing to introduce a material defense witness. If so, it would remain uncertain whether the court would be satisfied if the sole reason for the attorney's decision was an ethical consideration of the type under discussion. In addition, because Maryland has neither approved nor disapproved a "reasonable belief" standard, an attorney faced with a decision either to proffer or to withhold evidence which he reasonably believes will be perjured would only be guessing whether his conduct will receive acceptance or condemnation. The ethical struggles raised in *Mahoney* are a prelude to these unresolved problems.

CONCLUSION

The often antagonistic roles of zealous advocate and dutiful officer present significant tensions for the criminal defense lawyer. Even if it is true, as has been suggested,[44] that most attorneys today agree that the ultimate responsibility of counsel is to the court, the difficulty would lie in determining at what point the superior loyalty to the bench should come into play to the potential compromise of the client's interests. The resolution of this ethical dilemma recommended by the post-conviction judge, that counsel withdraw from the case, merely postpones the inevitable, for each succeeding individual will be faced with the same difficulty.[45] It is suggested that counsel's motives in *Mahoney* were admirable and exemplify the highest principles in the practice of law; however, whether one applauds or criticizes counsel's actions, whether one agrees or disagrees with a "reasonable belief" measure of responsibility, and whether one perceives a subtle expansion of EC 7-26 emanating from the courts, one fact is apparent: the need for judicial guidance. If the courts reserve to themselves the right to be

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decision was for the judgment of counsel and should not now be the basis for a charge of inefficiency. Thus, there is no merit to this position of petitioner's claim." *Id.* at 461.

In addition, with regard to the failure to call witnesses, one court has said: "the failure to produce and put on the stand material witnesses is merely an error of judgment which does not constitute lack of effective representation of counsel." Hoffler v. Peyton, 207 Va. 302, 311, 149 S.E.2d 893, 899 (1966). *See also* cases cited note 14 *supra.*

44. Stovall, *Aspects of the Advocate's Dual Responsibility*, 22 ALA. LAW. 66, 68 (1961).
45. Brief for appellant at 7, State v. Mahoney, 16 Md. App. 193, 294 A.2d 471 (1972). *See also* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1476 (1966).

the final arbiters of professional conduct for members of the bar in Maryland, then it is the courts who must *actively* seek to aid lawyers in defining proper ethical conduct where the code or case law has been vague or silent. Failure to do so leaves at best no guidelines for those concerned practitioners faced with a similar ethical situation, and, at worst, a temptation for others to exceed proper bounds of professional conduct. *State v. Mahoney* represented an opportunity lost for such guidance.

Richard S. Miller

CRIMINAL LAW—SEARCH AND SEIZURE—AUTOMOBILE SEARCH ON POLICE LOT HELD VALID DUE TO EXIGENT CIRCUMSTANCES. *SKINNER V. STATE*, 16 Md. App. 116, 293 A.2d 828 (1972).

In *Skinner v. State*,[1] the Court of Special Appeals of Maryland upheld a conviction for receipt of stolen goods and possession of heroin and controlled paraphernalia.[2] The defendant was discovered in an attempt to cash a stolen check at a bank, and thereafter fled to a waiting car. A description of the defendant and the car was reported to the police, who relayed it to a patrol unit, which in turn stopped the defendant's car in an apartment parking lot.

After locking his car, the suspect was taken to the police station, and his car was towed to headquarters where officers secured a warrant authorizing its search. In dealing with the constitutionality of the search of the car in the police garage, the *Skinner* court stated:

> The search is constitutionally unassailable. With scrupulous regard for their suspect's 4th Amendment protections, the [police] did more than they were required to do. Their effort, in terms of its constitutionality, is like Portia's quality of mercy, "twice blest."
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> . . . . [A]t the moment when [one of the officers] saw the [defendant's] automobile pull onto the parking lot . . . he . . . had probable cause to believe that the automobile contained fruits, instrumentalities and evidence of crime. We are further satisfied that the exigency of the situation would have justified an immediate warrantless search of the automobile there upon that parking lot.[3]

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1. 16 Md. App. 116, 293 A.2d 828 (1972).
2. This note will not deal with the exception to a search warrant due to a bona fide inventory search. A jury verdict of statutory common nuisance, also not dealt with in this note, was reversed. Skinner v. State, 16 Md. App. 116, 293 A.2d 828 (1972).
3. 16 Md. App. at 118-19, 293 A.2d at 830-31 (1972).