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COMMENTS

PROPOSED CLIENT PERJURY: A CRIMINAL DEFENSE ATTORNEY'S ALTERNATIVES

Approval of the American Bar Association's revision of the rules of professional conduct is imminent. Unfortunately, lawyers will continue to grapple with the problem of criminal client perjury. In this comment, the author critically examines the solutions proposed by the American Bar Association and suggests alternative methods to aid the attorney in dealing with the difficult issues that may arise.

I. INTRODUCTION

One of the most difficult and controversial problems that a criminal defense attorney¹ may face in his practice is when he discovers or a client informs him that he intends to commit perjury at trial.² An attorney so confronted must attempt to resolve the situation by weighing the duty owed to the client as his advocate and advisor against the duty owed to the court as one of its officers. If a criminal defendant admits that he plans to lie on the witness stand, the attorney is caught between two seemingly irreconcilable alternatives: exposing the perjury, and possibly sacrificing his obligation to the client, or remaining silent, and possibly sacrificing his duty owed to the court.

With this conflict as a backdrop, this comment examines the hazy guidelines for attorney behavior relating to client perjury in criminal cases established by the American Bar Association and illustrative case law. In addition, it will analyze the myriad duties an attorney owes the client and the court. Specifically, this comment addresses the failure of established rules and regulations to reconcile these various duties and to provide reasonable alternatives. Finally, various options available to the criminal defense attorney suddenly made aware of his client's potential perjury will be suggested and their consequences examined.

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1. This comment will address a criminal defense attorney's alternatives in dealing with client perjury. For a discussion of the prosecution's duty to prevent perjured testimony, see *McCloskey v. Boslow*, 349 F.2d 119 (4th Cir. 1965); *Smith v. Warden*, 254 F. Supp. 805 (D. Md. 1966). For a discussion of perjury problems in civil cases, see Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 827-32 (1977) [hereinafter cited as Wolfram].

2. Perjury is defined as:

the willful assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false.

BLACK'S LAW DICTIONARY 1025 (5th ed. 1979).

II. BACKGROUND

A. *Conflicting Duties and the Goals of the Judicial System*

The conflict an attorney faces in dealing with client perjury becomes evident upon an examination of the attorney's various duties owed to his client and the court. An attorney owes his client a duty to protect confidential communications,³ to protect the client's right to testify,⁴ to represent the client zealously and effectively,⁵ and to protect the client's right to a fair trial.⁶ It is an attorney's responsibility to perform these duties to the best of his ability, regardless of his client's guilt or innocence.

On the other hand, as an officer of the court, an attorney is prohibited from knowingly presenting false testimony⁷ and is charged with the affirmative duty of reporting his client's intended crimes.⁸ If a client informs his attorney of his plan to lie on the witness stand, the attorney is caught between maintaining his client's confidence and protecting his right to testify or revealing the plan to the court.

Consequently, an attorney confronted with such a situation must resolve this dilemma by weighing the conflicting duties owed and determining which entails the greater obligation. Underlying this conflict are two seemingly opposite goals of the trial system: the truth seeking function⁹ and the adversary function.¹⁰ Those who believe that this balance should favor the search for truth suggest that perjured testimony is the nemesis of justice; it may produce a judgment that is not based on truth and defeats the primary objective of a trial.¹¹ Supporters of the adversary function, however, believe that only through the strongest maintenance of the adversary system will the truth be discovered and a criminal defendant's individual rights be protected.¹²

B. *Professional Standards for the Defense Attorney*

The professional and ethical standards which guide an attorney represent an attempt to reconcile the two opposing functions of the

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981) [hereinafter referred to as MODEL CODE].

4. See *infra* notes 81-83 and accompanying text.

5. MODEL CODE, *supra* note 3, Canons 6, 7.

6. See *infra* notes 105-09 and accompanying text.

7. MODEL CODE, *supra* note 3, DR 7-102(A)(4).

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

9. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

10. See Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975).

11. See *In re Michael*, 326 U.S. 224, 227-28 (1945) (citations omitted).

12. Professor Freedman explains that the protection of one's constitutional rights may impede the search for the truth. An example is the fifth amendment's protection against compulsory self-incrimination. Freedman suggests that it would be much easier to expose a defendant's guilt if he had no right to remain silent. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063-64 (1975).

judicial system. An attorney faced with a client's perjured testimony will normally consult the Model Code of Professional Responsibility (Model Code) adopted in the particular state.¹³ Presently, the American Bar Association is in the process of revising the Model Code.¹⁴ The revised code, known as the Model Rules of Professional Conduct (Model Rules), maintains a philosophy towards client perjury similar to the Model Code. Criminal defense attorneys have also sought guidance from the American Bar Association's Standards Relating to the Defense Function (Defense Standards).¹⁵

1. The Model Code of Professional Responsibility

The Model Code, adopted by the American Bar Association in 1969, is the current standard for determining whether an attorney's professional conduct is appropriate.¹⁶ While the Model Code, through its three component parts, has identified the competing duties of the attorney,¹⁷ it fails to reconcile them. The Canons applicable to client perjury, Canons 4 and 7, illustrate the Model Code's failure.

13. In Maryland, the MODEL CODE has been adopted and codified in MD. R. 1230 (1977 & Supp. 1982). The MODEL CODE has been adopted in various forms by forty-nine states. Comment, *The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 WASH. L. REV. 211, 221 (1979) [hereinafter cited as Comment].

14. See *infra* note 16.

15. Presently, the defense function standard dealing with client perjury has been withdrawn pending the revision of the MODEL CODE. See *infra* note 47.

16. The MODEL CODE was adopted by the ABA House of Delegates in 1969 and became effective on January 1, 1970. MODEL CODE, *supra* note 3, at i. In 1977, the ABA president appointed the Commission on Evaluation of Professional Standards, headed by Robert J. Kutak, to reevaluate and revise the MODEL CODE. In January 1980, a discussion draft of the new rules was released by the Kutak Commission. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980). Subsequently, in June 1982, the revised final draft of the rules was released. MODEL RULES OF PROFESSIONAL CONDUCT (Revised Final Draft 1982). For an analysis of the effect of these new rules on client perjury, see *infra* notes 32-38 and accompanying text.

The current MODEL CODE, which guides the attorney by providing ethical standards for him to follow, MODEL CODE, *supra* note 3, preamble at 1, is made up of three separate but interrelated parts: canons, ethical considerations, and disciplinary rules. The nine canons are "statements of axiomatic norms, expressing in general terms, the standards of professional conduct expected of lawyers in their relationship with the public, the legal system, and with the legal profession." MODEL CODE, *supra* note 3, preliminary statement at 2. The ethical considerations are "inspirational in character and represent the objectives toward which every member of the profession should strive." *Id.* The disciplinary rules are "mandatory in character . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

17. In addition to the duties owed to the client and the court, the MODEL CODE also recognizes the lawyer's responsibility to his fellow attorneys, to the public, and to himself. T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 4 (1981). A discussion of these additional responsibilities, however, is beyond the scope of this comment.

The attorney's duty to maintain the confidences¹⁸ and secrets¹⁹ of the client is established in Canon 4.²⁰ That duty is not absolute, however, since a lawyer can reveal his client's criminal intent and the information necessary to prevent the crime.²¹

The New York Supreme Court is one of the few courts to construe the sections of the Model Code pertaining to client perjury.²² In *People v. Salquerro*²³ the defendant, charged with robbery and murder, "unequivocally" informed his attorney that he intended to lie when he testified in his own behalf.²⁴ The attorney informed the trial judge and assistant district attorney of the client's intended perjury without revealing its nature or substance. The attorney, concerned that he lost the client's confidence, moved both to withdraw from representation and for recusal of the trial judge.

The New York Supreme Court, in an interlocutory decree, affirmed the denial of the defense motions because Canon 4 allows an attorney to reveal the client's intention to commit perjury. The *Salquerro* court also alluded to Canon 7 and its corresponding disciplinary rules in denying the motions.²⁵

Canon 7 of the Model Code,²⁶ in attempting to strike a balance between the attorney's duty to the client and his duty as an officer of the court, advises the attorney to represent his client zealously.²⁷ However, an attorney who knowingly participates in the introduction of fraudulent, false, or perjured testimony or evidence is subject to discipline.²⁸ Based upon these pronouncements, the *Salquerro* court stated that "there can never be a real conflict between the attorney's obligation to provide a zealous defense and his moral duties to himself and

18. Confidence includes information protected by the attorney-client privilege, that is disclosed in the professional relationship. MODEL CODE, *supra* note 3, DR 4-101(A).

19. Secret refers to information, other than that covered by the attorney-client privilege, disclosed in the professional relationship. *Id.*

20. "A Lawyer Should Preserve the Confidences and Secrets of a Client," MODEL CODE, *supra* note 3, Canon 4.

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

22. Because the MODEL CODE involves regulation of professional and ethical behavior, it is rarely applied in cases involving a criminal defendant's perjury. More often, the MODEL CODE is applied in attorney disciplinary proceedings, of which there are few reported opinions.

23. 107 Misc. 2d 155, 433 N.Y.S.2d 711 (N.Y. Sup. Ct. 1980).

24. *Id.* at 155, 433 N.Y.S.2d at 712. The court failed to indicate how the defendant "unequivocally" informed his counsel that he intended to lie.

25. *Id.*

26. "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," MODEL CODE, *supra* note 3, Canon 7.

27. The ethical considerations supporting the zealous representation advocated by Canon 7 suggest that the advocate can argue any permissible construction of the law that favors his client, *id.* EC 7-4, and as an advocate "should resolve in favor of his client doubts as to the bounds of the law." *Id.* EC 7-3.

28. *Id.* EC 7-26. The attorney shall not "[k]nowingly use perjured testimony or false evidence." *Id.* DR 7-102(A)(4).

the court."²⁹ Nonetheless, the Model Code's provisions dealing with client perjury have been criticized as being unclear and confusing³⁰ and as providing little or no guidance to an attorney seeking to fulfill his various obligations.³¹ Basically, the Model Code fails to suggest any course of action for an attorney faced with client perjury, other than revealing it.

2. The Model Rules of Professional Conduct

The American Bar Association's Commission on Evaluation of Professional Standards released its revised final draft of the Model Rules in June, 1982.³² It was hoped that the Model Rules would finally determine how a criminal defense attorney should react to intended client perjury.

While attempting to accommodate the competing considerations of the client perjury dilemma, the Model Rules fail to meet the challenge of providing the attorney with viable alternatives. Like the Model Code, the rules forbid an attorney from knowingly presenting evidence which the lawyer knows to be false.³³ If the attorney subsequently discovers that evidence already presented is false, he must take "reasonable remedial measures."³⁴ Yet the Model Rules fail where the Model Code also failed — in providing reasonable, well thought out options encompassing the remedial measures. The comments to the rule suggest that disclosure is the only alternative if the attorney's efforts to prevent perjury have failed.³⁵ The rules state that the duty to disclose continues even if compliance would require violating attorney-client confidentiality.³⁶ But the rules fail to distinguish disclosure in

29. *People v. Salquerro*, 107 Misc. 2d 155, 156, 433 N.Y.S.2d 711, 712 (N.Y. Sup. Ct. 1980).

30. Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 A.B. FOUND. RESEARCH J. 964, 973.

31. M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 29 (1975) [hereinafter cited as FREEDMAN]; *accord* Note, Professional Responsibility—Ethical Duties of Counsel Who Believes Client's Witnesses Will Commit Perjury, 2 U. BALT. L. REV. 326, 330 (1973) (there is no specific direction from the MODEL CODE for an attorney who has a reasonable belief, but is not certain, that the client will commit perjury).

32. MODEL RULES OF PROFESSIONAL CONDUCT (Revised Final Draft 1982) [hereinafter cited as MODEL RULES]. The ABA House of Delegates began its consideration of the MODEL RULES in August, 1982. *Id.* at 3. Consideration of the MODEL RULES continued at the midyear meeting of the Association in February, 1983. The entire MODEL RULES will be approved or disapproved in August, 1983. Telephone interview with Robin Alexander of the National Center for Professional Responsibility (Mar. 2, 1983). The ABA DEFENSE STANDARDS dealing with client perjury have been withdrawn pending the approval of the MODEL RULES. See *supra* note 47 and accompanying text.

33. MODEL RULES, *supra* note 32, Rule 3.3(a)(4).

34. *Id.*

35. *Id.* comment at 21.

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

jury and nonjury cases, and neglect to analyze the problems in each.

In a feeble effort to accommodate decisions like *Lowery v. Cardwell*,³⁷ the comments to the Model Rules warn that considerations of a defendant's constitutional right to assistance of counsel may supercede the pronouncement of the Model Rules.³⁸ Instead of providing an attorney with reasonable solutions which take into account his various duties, the Model Rules simply add to the murkiness of the dilemma. To be useful a solution must take into account all of the competing ramifications — ethical, constitutional, and practical. Since the Model Rules fail to do this their realistic applicability is limited.

3. The American Bar Association's Standards Relating to the Defense Function

The Defense Standards³⁹ are suggestive, nonmandatory "guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate it and keep it viable."⁴⁰ The Defense Standards are designed to supplement the Model Code,⁴¹ and to provide guidelines of professional practice for lawyers to follow in criminal matters.⁴² These standards were originally approved in 1971 with certain revisions adopted in 1979.⁴³ Those revisions not approved dealt with client perjury.⁴⁴

In the section dealing with attorney-client confidentiality, the re-

37. 575 F.2d 727 (9th Cir. 1978). See *infra* notes 110-123 and accompanying text.

38. MODEL RULES, *supra* note 32, Rule 3.3 comment. The ABA House of Delegates, at its February, 1983 meeting, refused to create an exception to protect a criminal defendant's constitutional rights at trial. Baltimore Sun, Feb. 9, 1983, at 1, col. 3.

39. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND DEFENSE FUNCTION. (Approved Draft 1971) [hereinafter cited as DEFENSE STANDARDS].

The Advisory Committee on the Prosecution and Defense Function worked on the standards from 1964 until 1971, and was chaired until 1969 by then Circuit Judge Warren E. Burger of the District of Columbia Circuit Court of Appeals. The reports were circulated in tentative draft form in March, 1970. In March, 1971 the DEFENSE STANDARDS were approved with amendments by the ABA House of Delegates. ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 481-82 (Compilation 1974).

In August, 1977, the Standing Committee on Association Standards for Criminal Justice was elevated from a special to a permanent committee and was authorized to update the DEFENSE STANDARDS. These updates were adopted, with some revisions by the ABA House of Delegates at its February, 1979 meeting. Comment, *supra* note 13, at 226 n.82. The 18 volumes of the criminal justice standards were revised in 1980. 1 ABA STANDARDS FOR CRIMINAL JUSTICE XV-XVI (2D ED. 1980) [HEREINAFTER CITED AS REVISED STANDARDS].

40. 1 REVISED STANDARDS, *supra* note 39, at xx.

41. Wolfram, *supra* note 1, at 824.

42. Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 504 (1979).

43. See *supra* note 39 and accompanying text.

44. See *infra* note 47 and accompanying text.

vised standards attempt to balance the competing duties of the criminal defense attorney. That section advises the attorney to explain to the client the necessity of full disclosure and the obligation of confidentiality.⁴⁵ It allows an attorney to "reveal the expressed intention of a client to commit a crime" if the crime might "seriously endanger the life or safety of any person or corrupt the processes of the courts."⁴⁶

Whether client perjury is included in the crimes referred to is unknown, however, given that the status of Defense Standard section 7.7, dealing with client perjury, is uncertain.⁴⁷ The American Bar Associa-

45. 1 REVISED STANDARDS, *supra* note 39, § 4-3.1, at 4.28.

46. *Id.* § 4-3.7(d), at 4.48.

47. The new standard that was expected to be included in the 1980 REVISED STANDARDS, as approved by the ABA Standing Committee on Association Standards for Criminal Justice, was withdrawn prior to its submission to the ABA House of Delegates. This section was tabled pending the final recommendations of the ABA Special Commission on Evaluation of Professional Standards (the Kutak Commission). 1 REVISED STANDARDS, *supra* note 39, at 4.95 editor's note. For an analysis of the Kutak Commission's report and its effect on client perjury, see *supra* notes 32-38 and accompanying text. If the recommendations of the Kutak Commission are approved by the ABA House of Delegates, the DEFENSE STANDARD dealing with client perjury will be revised to conform to the MODEL RULES. Telephone interview with Sarah Applegate of the Standing Committee on Association Standards for Criminal Justice (Mar. 3, 1983).

The original and REVISED STANDARDS are similar except for some minor language variations. The REVISED STANDARDS' language is presented here in italicized parentheticals next to the language of the original standard.

7.7 Testimony by the defendant.

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

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

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

tion has delayed the implementation of this revised section pending the final recommendations of the committee revising the Model Code.⁴⁸ Since the revision of the Model Code is not expected to be approved until August, 1983⁴⁹ there is no Defense Standard dealing with client perjury presently in effect. However, it is useful to examine the original section 7.7's advantages and disadvantages because there is little substantive change in the revised section.

Section 7.7 attempts to reach a balance of the attorney's competing interests within the restrictions of the Model Code. According to section 7.7, when a client intends to commit perjury the attorney must advise the client against such conduct.⁵⁰ If the client insists otherwise, the attorney must withdraw when possible.⁵¹ Finally, the attorney should indicate his disapproval of the client's actions without revealing such protests to the fact-finder and allow the defendant to make a narrative statement when he takes the stand.⁵² The statement may not be argued to the jury or used in closing argument.⁵³ This method is predicated on the defendant admitting inculpatory facts to the attorney which have been corroborated by the attorney's own investigation.⁵⁴

Because the defendant's right to testify is protected by section 7.7, that section seems to stress the attorney's obligation to protect his client's right over the attorney's other duties. The standard implies that the defendant's right to testify is utmost and, consequently, it is the fact-finder's job to determine whether that testimony is true or false.

In its first case dealing with client perjury, the District of Columbia Court of Appeals implicitly approved the use of section 7.7. In *Thornton v. United States*,⁵⁵ the defendant claimed that ineffective assistance of counsel led to his conviction for various crimes associated with the robbery of a restaurant and lounge. At his first meeting with his appointed counsel, the defendant asserted that he was at the lounge

not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of the facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.)

1 REVISED STANDARDS, *supra* note 39, at 4-77 (reprinted with permission of Little, Brown and Co.); DEFENSE STANDARDS, *supra* note 39, § 7.7.

48. See 1 REVISED STANDARDS, *supra* note 39, at 4.95 editor's note.

49. See *supra* note 32 and accompanying text.

50. DEFENSE STANDARDS, *supra* note 39, § 7.7(a).

51. *Id.* § 7.7(b). For a discussion of this alternative, see *infra* notes 135-45 and accompanying text.

52. DEFENSE STANDARDS, *supra* note 39, § 7.7(c).

53. *Id.*

54. *Id.* at 276. For a further discussion of the problems involved in determining when an attorney should know of his client's intended perjury, see *infra* note 133.

55. 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976).

to retrieve money he had paid for a stereo. However, at a meeting with counsel several days before trial the defendant was faced with the government's evidence of his arrest near the scene of the crime wearing bloodstained pants and his identification by one of the victims. At the meeting the defendant denied being at the scene and offered an alibi.⁵⁶ Defense counsel moved to withdraw because he did not want to present what he thought was false testimony and also to have the case certified to another judge.

The judge did not rule on the attorney's motion to withdraw, but did certify the case to another judge. The second judge, after refusing the attorney's renewed motion to withdraw, allowed the attorney to follow the recommendations of section 7.7.⁵⁷ In affirming the defendant's conviction the appeals court approved the use of section 7.7 sub silentio, holding that the defendant was not deprived of effective assistance of counsel.⁵⁸ The court determined that although counsel did not question the defendant directly at trial about his perjurious defense, he thoroughly interrogated other witnesses and uncovered weaknesses in the prosecution's case.⁵⁹

In *Thornton*, the defendant's attorney was faced with an obvious situation: his client completely altered his defense midway through the preparation of the case. Because of this, the court allowed the attorney to resort to section 7.7.⁶⁰ Unfortunately, the standard fails to define the point at which an attorney can resort to its suggestions since it is not always as apparent when a client will lie as it was in *Thornton*.

In *Butler v. United States*,⁶¹ the District of Columbia Court of Appeals, citing *Thornton*, held that defense counsel could follow the section 7.7 guidelines "when in possession of substantial facts indicating that his client is going to give perjured testimony before a jury."⁶² The *Butler* court believed, however, that the inconsistent representations

56. The opinion does not indicate the substance of the new alibi. 357 A.2d at 432.

57. *Id.* at 432-33.

58. *Id.* at 437. The court hesitated in affirmatively adopting section 7.7, stating that: [w]hile ABA Standard § 7.7 was adopted after intensive consideration of the problems presented by a defendant's determination to testify in a way in which defense counsel knows to be false, and its content is eminently sound, we do not feel that it is part of our role to adopt or formally sanction any of the standards. We firmly believe, however, that collectively they have made an extraordinary contribution to the criminal justice process.

Id. at 437 n.14.

59. *Id.* at 438.

60. The *Thornton* court held that use of section 7.7 was feasible when "it [was] clear from defense counsel's colloquy with the first trial judge that counsel felt, based on his trial preparation, that the eleventh-hour change in the appellant's story would result in his client's testifying falsely." *Id.*

61. 414 A.2d 844 (D.C. 1980).

62. *Id.* at 850. In *Butler*, trial was before a judge. *Id.* Defense counsel told a motions judge, who later became the trier of fact, that his client intended to commit perjury. *Id.* at 848.

made by the defendant about possession of a gun were insufficient to indicate to the attorney that his client was going to commit perjury.⁶³ The court failed to explain why Thornton's inconsistent statements triggered the use of section 7.7, while Butler's did not.

Through the explicit and implicit approval of section 7.7, the District of Columbia Court of Appeals recognizes an overriding interest in protecting the defendant's right to testify. That recognition places the burden of determining when a defendant is lying on the judge or jury. Accordingly, the attorney is expected to aid in protecting the defendant's right to testify. As *Thornton* indicates, use of the defense standard does not necessarily insulate a defendant from conviction.

Today, the status of revised section 7.7 is questionable because it has been withdrawn pending the revision of the Model Code.⁶⁴ Although the standard does have certain practical disadvantages,⁶⁵ it represents the best attempt yet to deal with the client perjury problem. An examination of the attorney's common law duties owed to his client and the court, and a comparison of those duties with the various alternatives available upon learning of a client's perjury indicates that Defense Standard section 7.7 best accomodates many of those duties.

III. THE ATTORNEY'S COMMON LAW DUTIES

The approach of both the Model Code and the Defense Standards with regard to client perjury represents a statutory attempt to reconcile the attorney's duties to his client with his duties to the court. Providing practical options to reach this balance, however, may result in a withering of the attorney-client relationship and certain individual rights. An examination of the attorney's common law duties must be made in order to determine which of his alternative courses of action, upon learning of his client's intent to commit perjury, best accomodates those duties.

A. *Protecting Confidential Communications*

In responding to intended client perjury, an attorney should consider both the ethical⁶⁶ and evidentiary⁶⁷ aspects of protecting confi-

63. *Id.*

64. 1 REVISED STANDARDS, *supra* note 39, at 4.95 editor's note.

65. Use of a narrative statement has been criticized because it may allow objectionable testimony into trial. Conversely, the reasons for use of the narrative statement may be explained to the fact-finder. See *infra* notes 151-59 and accompanying text.

66. The ethical obligation not to disclose client confidences arises out of the trust a client places in his attorney. *Bar Ass'n v. Marshall*, 269 Md. 510, 519, 307 A.2d 677, 682 (1973). The obligation exists in order to allow free and extensive communication between attorney and client, *Wolfram*, *supra* note 1, at 838, and consequently better representation. *United States ex rel Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

67. The evidentiary aspects are embodied in the attorney-client privilege, which pro-

dential communications. According to one court, "[t]he protection of a client's confidence is so basic a tenet of professional responsibility that it yields only the rarest of ethical dilemmas."⁶⁸

But an exception to both the ethical obligation⁶⁹ and the evidentiary rule⁷⁰ does exist. The Model Code permits, but does not mandate, revealing a client's intention to commit a crime and the information necessary to prevent it.⁷¹ The future crime exception to the evidentiary rule allows disclosure of a client's communications when he either seeks legal advice on a criminal plan or announces his intent to commit a crime.⁷² Thus, an attorney faced with possible client perjury is not bound to disclose that possibility, but may do so without breaching his professional duty.

tests information passed between the attorney and client in a professional relationship from being disclosed. *See generally* 8 J. WIGMORE, EVIDENCE §§ 2290-92 (McNaughton ed. 1961). In describing the privilege, the Court of Appeals of Maryland has stated:

The privilege is an accommodation of competing public interests, the ascendancy for compelling policy reasons of the protection from unauthorized disclosure of communications between an attorney and his client over the general testimonial duty and compulsion in the interest of truth and justice. The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security, is nonetheless essentially interrelated with the specific constitutional guarantees of the individual's right to counsel and immunity from self-incrimination

Harrison v. State, 276 Md. 122, 133, 345 A.2d 830, 837 (1975). The attorney-client privilege has been codified in Maryland. MD. CTS. & JUD. PROC. CODE ANN. § 9-108 (1980).

68. *Butler v. United States*, 414 A.2d 844, 849 (D.C. 1980).

69. MODEL CODE, *supra* note 3, DR 4-101(C)(3).

70. *See generally* *Clark v. United States*, 289 U.S. 1, 15 (1933) (the privilege protecting communications between attorney and client is destroyed if the client attempts to perpetrate a fraud on the court); 8 J. WIGMORE, EVIDENCE § 2298 (McNaughton ed. 1961); Comment, *supra* note 13, at 220.

71. MODEL CODE, *supra* note 3, DR 4-101(C)(3).

72. In a renowned statement discussing the privilege, Justice Cardozo stated:

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

Clark v. United States, 289 U.S. 1, 15 (1933). In a Second Circuit opinion, Judge Clark in *United States v. Bob*, 106 F.2d 37 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939), determined that the attorney for the defendant could testify against the defendant in a trial for mail fraud in the sale of stock in a gold mine. The attorney's testimony related to conversations and communications with the defendant concerning his control of the mining companies. Since the communications occurred during the commission, and in furtherance, of the crime charged in the indictment, they were not privileged. 106 F.2d at 40. The court noted that a *prima facie* showing of the crime must be made before an attorney may testify regarding communications from a client; the simple assertion of a crime or fraud is not enough. *Id.*

The future crimes exception has also been applied in a criminal case when a defendant intended to present false witnesses. *State v. Phelps*, 24 Or. App. 329, 334-35, 545 P.2d 901, 904-05 (1976).

While the attorney may disclose communications involving future crimes, he cannot reveal his client's confessions to past crimes.⁷³ One commentator has noted that by disclosing his client's intention to commit perjury, the attorney is in effect telling the court that the client has committed the crime.⁷⁴ That is, the judge will probably ask the attorney how his knowledge of the truth differs from what the client intends to say. If the client has confessed his guilt to the attorney, he will claim that the attorney-client privilege prevents him from answering. The judge will most likely assume that the client has confessed his guilt, and as a result the duty to keep past crimes confidential is breached.

The difficulty of maintaining attorney-client confidentiality in situations involving client perjury is illustrated in *Johnson v. United States*.⁷⁵ There the District of Columbia Court of Appeals determined that an attempt by the trial judge to fully inquire into the defendant's alleged perjury would interfere with the attorney-client privilege.⁷⁶ Johnson was charged with petit larceny after the government's evidence showed that he attempted to leave a supermarket with several hams placed in a trash can. When the hams were discovered, Johnson claimed that he did not know where the hams came from. At trial, in response to the trial court's request for a proffer of defense, Johnson's attorney explained that the defendant, a cab driver, had driven a passenger to the store and had purchased the trash can for her not knowing its contents. At first the defendant did not testify, but later in the trial Johnson's attorney announced that his client would take the stand. Responding again to the court's request, defense counsel stated that Johnson would testify that he never attempted to leave the store. Due to the discrepancy between the proffered defenses, the trial court announced that the attorney would not be able to question the defendant or argue his testimony to the jury. Finally, the defendant decided not to testify and the jury returned a guilty verdict.

Finding that the trial court impermissibly interjected itself into the case, the appellate court reversed and remanded. The court stated that it was up to the defense attorney to determine when his client would commit perjury, and that it was not within the discretion of the trial judge to "touch upon privileged attorney-client communications."⁷⁷ According to the court, the trial court's finding that the second proffer was false because of the inconsistencies between the defendant's stories was based on surmise.⁷⁸ The court distinguished its previous holding

73. See generally Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 683-87 (1978) [hereinafter cited as Lefstein].

74. Lefstein, *supra* note 73, at 684-85.

75. 404 A.2d 162 (D.C. 1979).

76. *Id.* at 164.

77. *Id.*

78. *Id.*

in *Thornton v. United States*⁷⁹ because the attorney knew the defendant's testimony was false due to his investigations and conversations with the client.⁸⁰

While *Johnson* recognizes the importance of protecting attorney-client communications even in cases involving client perjury, like *Thornton*, it fails to establish a reliable and consistent standard by which the attorney can act in response to client perjury. Because this standard has not been developed, attorneys may find themselves unknowingly breaching their confidential relationship with clients.

B. Protecting the Client's Right to Testify

If a trial court or an attorney keeps a defendant from testifying in order to prevent perjury, an issue arises as to whether the defendant's right to testify has been violated. However, whether the opportunity to testify in one's own behalf is a right is unclear. In Maryland, an accused has the right to testify in his own behalf at trial.⁸¹ At the federal level it is unclear whether a defendant has a right or merely a privilege to testify.⁸² While there may be no right or privilege to testify falsely,⁸³ one case involving client perjury illustrates the difficulty of balancing the defendant's right to testify with the attorney's duty to the court.

79. 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976).

80. *Johnson v. United States*, 404 A.2d 162, 164 (D.C. 1979).

81. *English v. State*, 16 Md. App. 439, 445, 298 A.2d 464, 468 (1973). The statute in effect in 1973, MD. ANN. CODE art. 35, § 4 (1972), provided: "In the trial of all indictments, . . . against persons charged with the commission of crimes and offenses, . . . the person shall at his own request, be deemed a competent witness." *Id.* This section was repealed and replaced by MD. CTS. & JUD. PROC. CODE ANN. §§ 9-101, 9-107 (1980 & Supp. 1982). Section 9-101 states that "a person shall not be excluded from testifying in a proceeding because of incapacity from crime . . ." *Id.* § 9-101. Section 9-107 states that "[a] person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him." *Id.* § 9-107.

82. Compare *Alicea v. Gagnon*, 675 F.2d 913, 920-23 (1982) (defendant has a right to testify) and *Poe v. United States*, 233 F. Supp. 173, 176 (D.D.C.) (defendant has a right to testify on his own behalf and it is the obligation of the courts to inform him of his right), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965) with *United States v. Bentvena*, 319 F.2d 916, 943-44 (2d Cir. 1963) (the defendant has a privilege to testify on his own behalf). See generally Lefstein, *supra* note 73, at 683.

It is equally unclear from where the right or privilege emanates. See, e.g., *United States v. Looper*, 419 F.2d 1405, 1406 (4th Cir. 1969) (whether the right is constitutional or statutory, it may not be denied if a defendant decides to exercise it); cf. 18 U.S.C. § 3481 (1976) ("In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness.").

83. In *Harris v. New York*, 401 U.S. 222 (1971), the United States Supreme Court, holding that a defendant's credibility would be impeached with statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), commented that the defendant's privilege to testify "cannot be construed to include the right to commit perjury." *Harris v. New York*, 401 U.S. 222, 225 (1971) (citations omitted); accord *Butler v. United States*, 414 A.2d 844, 859 (D.C. 1980) (Reilly, C.J., dissenting).

In *United States ex rel. Wilcox v. Johnson*,⁸⁴ an attorney thought his client would present a perjured alibi defense and cooperated with the trial judge to prevent the defendant from testifying. The defendant, Norman Wilcox, was initially tried⁸⁵ and convicted of rape in the County Court of Philadelphia in 1967.⁸⁶ Wilcox attempted to establish an alibi defense of noninvolvement through his own testimony and that of two relatives. Due to a procedural error, however, the case was retried.⁸⁷ At the retrial, Wilcox's newly appointed public defender decided to abandon the alibi theory, and thus the need for Wilcox's testimony, and instead used a consent defense.⁸⁸ The state trial judge subsequently ruled that if Wilcox insisted on testifying his attorney would be permitted to withdraw and Wilcox would have to represent himself during the remainder of the trial.⁸⁹ As a result, Wilcox decided not to testify, the consent defense was used, and Wilcox was again convicted.

Wilcox's second petition for a writ of habeas corpus was granted and the state appealed to the Third Circuit. After a thorough discussion of the right to testify, the court concluded that federal tribunals recognize a criminal defendant's constitutional right to testify in his own behalf.⁹⁰ But instead of grounding its decision on this theory the court found that the trial judge's ruling, permitting Wilcox's appointed counsel to withdraw if the defendant testified, constituted an impermissible infringement on his state right to testify⁹¹ and his sixth amendment right to effective counsel. As a result, the defendant was deprived of his right to a fair trial.⁹²

In dictum, the court commented that Wilcox's attorney may have erroneously concluded that the defendant's alibi defense was perjured. In examining the perjury dilemma, the court stated that:

[i]f an attorney faced with this situation were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that

84. 555 F.2d 115 (3d Cir. 1977).

85. The state proceeding was a nonjury trial. *Id.* at 116.

86. *Id.*

87. Because a verdict of guilty had been announced without a closing argument by Wilcox's counsel, the district court granted the defendant's writ of habeas corpus, which was stayed in order to allow the Commonwealth of Pennsylvania to retry the defendant. *Id.*

88. Wilcox was not made aware of the switch until after the close of the state's case and he objected to it. *Id.* at 116-17.

89. The appeals court surmised that Wilcox's attorney probably explained to the judge that the alibi defense would have been perjured and if used the attorney would make a motion to withdraw. This determination was made by a federal district court judge at a subsequent habeas corpus evidentiary hearing. *Id.* at 121-22.

90. *Id.* at 119.

91. The court determined that "Wilcox definitely had a statutory right to testify under Pennsylvania law." *Id.* at 120.

92. *Id.* at 121.

belief, he would be violating the duty imposed on him as a defense counsel. While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client. It is the role of the judge or the jury to determine the facts, not that of the attorney.⁹³

Wilcox is one of the more sensitive decisions in the client perjury area because it recognizes the defense attorney's opposing duties and the impact of the dilemma on the criminal defendant's rights. The decision implies that a defendant's right to testify is so important that an attorney or judge who believes that the defendant will lie cannot prevent him from testifying. Yet it, like other criminal perjury decisions, fails to establish a standard by which an attorney can gauge when and how to react to intended client perjury.

C. *Representing the Defendant Zealously and Effectively*

As *Wilcox* indicates there is a concomitant professional⁹⁴ and common law duty to represent the client zealously even when confronted with possible client perjury.⁹⁵ Not only is a defendant entitled to zealous representation, he is also entitled to effective representation which may reach constitutional proportions.⁹⁶ If the client intends to commit perjury the attorney may be sacrificing these two duties by deciding to withdraw, by preventing the defendant from testifying, or by offering the client's perjurious intent to the court.⁹⁷

93. *Id.* at 122.

94. "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." MODEL CODE, *supra* note 3, Canon 7.

95. *Wilcox*, 555 F.2d at 122.

96. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (in capital cases, effective aid in preparation and trial of case is mandated); *see also* Comment, *supra* note 13, at 229.

97. *But see* Wolfram, *supra* note 1, at 841 (refusal to represent perjurious defendant should not be breach of duty); *accord* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975).

In Maryland, the duty to provide zealous and effective representation may be sacrificed without subjecting the attorney to charges of ineffective assistance of counsel. A Maryland attorney owes his client competent assistance. *See* *State v. Mahoney*, 16 Md. App. 193, 201, 294 A.2d 471, 475 (1972). The test to be applied for determining whether trial counsel is competent is whether under all the circumstances of a particular case, counsel was so incompetent that the accused was not afforded genuine and effective legal representation. *Id.*; *see also* *State v. Renshaw*, 276 Md. 259, 264, 347 A.2d 219, 224 (1975). But an attorney's error in trial tactics does not deprive his client of adequate representation. *Caviness v. State*, 244 Md. 575, 578, 224 A.2d 417, 418 (1966); *State v. Merchant*, 10 Md. App. 545, 551, 271 A.2d 752, 755 (1970). Consequently, an attorney might defend his decision not to call a lying client to the stand for strategic reasons. For example, allowing the defendant to testify may expose him to detrimental cross-examination.

However, in a recent decision, *State v. Lloyd*,⁹⁸ the Court of Special Appeals of Maryland held that failure to call alibi witnesses whom the attorney thinks will lie is not ineffective assistance of counsel.⁹⁹ Although there are many conflicting rights and responsibilities in determining whether a lying client should be allowed to testify, and *Lloyd* involved lying witnesses as opposed to lying clients, the decision indicates that failure to call a lying client to the stand may be acceptable for strategic reasons. Therefore, it is arguable that in Maryland, when a lying client is not called to testify for strategic reasons, there is no ground for an attack due to ineffective assistance of counsel.

It is unlikely, however, that an attorney will be faced with a client who admits his intent to lie. Rather, a defendant will present an improbable defense. Although an attorney's responsibility includes conducting a proper factual and legal investigation¹⁰⁰ using the utmost good faith,¹⁰¹ failure to raise an available defense at trial is not, by itself, a breach of the attorney's duty.¹⁰² But when representation of a defendant requires investigation of a certain defense, failure to do so may amount to ineffectiveness.¹⁰³ Therefore, depending on the crime with which the defendant is charged, an attorney may have an obligation to investigate a defense and then use that defense at trial, despite the implausibility of the theory.¹⁰⁴

D. *Protecting the Right to a Fair Trial*

While the obligation to protect a defendant's right to a fair trial lies with both the attorney and the court, the attorney undertakes a special responsibility because he represents, to many criminal defend-

98. 48 Md. App. 535, 429 A.2d 244 (1981). The issue of client perjury has not been directly addressed in Maryland. *Id.* at 546, 429 A.2d at 248.

99. *Id.*; accord *Cornell v. State*, 396 F. Supp. 1092 (D. Md. 1975); *State v. Mahoney*, 16 Md. App. 193, 201, 294 A.2d 471, 475 (1972).

100. *See, e.g., Bowler v. Warden*, 236 F. Supp. 400, 404 (D. Md. 1964).

101. *See, e.g., Attorney Grievance Comm. v. Pollack*, 279 Md. 225, 238, 369 A.2d 61, 68 (1977).

102. *State v. Merchant*, 10 Md. App. 545, 551, 271 A.2d 752, 755 (1970).

103. For example, in a rape case, investigation of the prosecutrix's reputation is considered an integral part of proper representation. In *State v. Merchant*, 10 Md. App. 545, 271 A.2d 752 (1970), the Court of Special Appeals of Maryland held that failure to investigate the victim's reputation, when the defendant insisted she had consented and the facts indicated consent was possible, amounted to ineffectiveness of counsel. Although not a client perjury case, one of the attorneys in *Merchant* indicated that he did not believe the defendant's consent theory. *Id.* at 553, 271 A.2d at 756. According to the court the failure to investigate this theory, simply because it was not believed, could not be considered a trial tactic. *Id.* at 563, 271 A.2d at 761.

104. In the District of Columbia, in a jury trial where counsel has determined his client will lie according to the criteria of DEFENSE STANDARD section 7.7 (the defendant admits inculpatory facts which can be corroborated by the lawyer's own investigation) the attorney can follow the DEFENSE STANDARD's suggestions and will not be subject to a subsequent charge of ineffectiveness. *Butler v. United States*, 414 A.2d 844, 850 (D.C. 1980).

ants, the only protection from what may be a confusing and harsh system. Just because a defendant is brought to trial does not mean he is guilty, and just because he is lying does not mean he is attempting to escape a valid conviction.¹⁰⁵

The fifth,¹⁰⁶ sixth,¹⁰⁷ and fourteenth¹⁰⁸ amendments insure the defendant a fair and impartial trial. These provisions implicitly guarantee that the events at trial should not prejudice the defendant in the eyes of the fact-finder.¹⁰⁹ The most important case involving client perjury in relation to due process rights is *Lowery v. Cardwell*,¹¹⁰ a Ninth Circuit decision reversing a denial of a writ of habeas corpus.¹¹¹ At

105. For example, Professor Monroe Freedman presents the situation of a defendant who is falsely accused of a robbery at a particular location. FREEDMAN, *supra* note 31, at 31. The defendant reveals to the attorney that he was in the vicinity of the crime at the time of the incident, but was walking away. Of the two prosecution witnesses, one incorrectly identifies the defendant as the perpetrator. The other witness testifies truthfully and accurately that she saw the defendant five minutes before the crime, near the scene, thus corroborating the erroneous testimony of the first witness. On cross examination, the reliability of the second witness is questioned by demonstrating that she is easily confused and has poor eyesight. This casts doubt in the jurors' minds about the prosecution's case. Subsequently, the defendant insists on testifying to deny the erroneous evidence of the first witness and also to deny the truthful, but highly damaging, evidence of the second. According to Freedman, "if [the defendant] tells the truth and verifies the corroborating witness, the jury will be more inclined to accept the inaccurate testimony of the principal witness, who specifically identified him as the criminal." *Id.* Professor Freedman would advise the defendant that such testimony is unlawful, but would present it to the jury in order to uphold the assurances of confidentiality used to persuade the defendant to reveal all. *Id.* Through this hypothetical, Freedman suggests that although there are mechanisms within the judicial system that protect an innocent defendant, sometimes these mechanisms fail.

106. U.S. CONST. amend. V. *See, e.g.,* United States v. Lovasco, 431 U.S. 783 (fifth amendment due process requires protection of fundamental concepts of justice and community's sense of fair play and decency), *reh'g denied*, 434 U.S. 881 (1978).

107. U.S. CONST. amend. VI. *See, e.g.,* Patterson v. Colorado, 205 U.S. 454, 462 (1967) (impartial jury means that conclusions reached in a case will come only from evidence and argument in open court, and not from any outside influence).

108. U.S. CONST. amend. XIV. *See, e.g.,* Burnett v. State, 11 Md. App. 550, 554, 275 A.2d 176, 178-79 (1977) (the fourteenth amendment mandates that an individual accused of a crime receive a fair and impartial trial).

109. *See* Lane v. Warden, 320 F.2d 179, 185 (4th Cir. 1963) (the jury should have no fixed opinion as to the defendant's guilt or innocence, and the verdict should be based solely on the facts submitted to them). A determination of prejudice towards the defendant at trial is vested in the trial judge. *See, e.g.,* Wilhelm v. State, 272 Md. 404, 429, 326 A.2d 707, 723 (1964); Terrell v. State, 34 Md. App. 418, 429-30, 367 A.2d 95, 102 (1977); Davis v. State, 4 Md. App. 492, 497-98, 243 A.2d 616, 619 (1968). The judge's decision will not usually be disturbed absent an abuse of discretion. Terrell v. State, 34 Md. App. 418, 429-30, 367 A.2d 95, 102 (1977).

110. 575 F.2d 727 (9th Cir. 1978).

111. This was the second appeal of a denial of the writ. The first, *Lowery v. Cardwell*, 535 F.2d 546 (9th Cir. 1976), used here to supplement the factual analysis, vacated the district court's denial of the writ and remanded the case.

trial¹¹² for first degree murder the defendant, Jacqueline Lowery, pleaded not guilty. During the trial, the state's principal witness indicated he had seen Lowery walk to the deceased's car as the victim approached and that he then heard popping noises. Lowery, the only defense witness, denied walking out with the deceased to his car and firing the fatal shot. Immediately after the defendant's testimony the defense counsel asked for and received a recess. In the judge's chambers, outside the defendant's presence, Lowery's attorney moved to withdraw but refused to give a reason. The motion was denied. No further questions were asked of the defendant, and her attorney did not refer to her testimony in closing argument. Lowery was found guilty and the Supreme Court of Arizona affirmed her conviction.¹¹³

Upon appeal of the denial of the first writ of habeas corpus, the Ninth Circuit remanded in part to discover why the attorney made the motion to withdraw. After determining that the motion was made because the attorney thought Lowery was lying, the district court again denied the defendant's writ and another appeal was taken. The Ninth Circuit finally determined that the attorney's motion to withdraw, made in the midst of Lowery's denial of participation in the crime and before the judge trying the case, deprived the defendant of a fair trial.¹¹⁴ The court concluded that the attorney's actions prevented the fact-finder from making an impartial judgment and placed himself in opposition to his client's position.¹¹⁵ Contrasting the attorney's motion to withdraw with his passive refusal to lend aid to his client (as provided for in Defense Standard section 7.7), the court suggested that while following section 7.7 might notify a perceptive fact-finder of the ethical problem faced by the attorney it would not amount to a violation of due process.

Lowery is unique in that it recognizes a due process violation when an attorney's motion to withdraw notifies the fact-finder of a defendant's possible perjury. But the decision's weaknesses serve only to thicken the client perjury morass. The Ninth Circuit, in *Lowery*, refused to establish a standard by which an attorney can ascertain if a client will testify falsely.¹¹⁶ Moreover, *Lowery's* peculiar circumstances may limit it to its facts — the evidence against the defendant was tenuous at best.¹¹⁷ Also, the motion to withdraw was made in front of the

112. There was no jury in the state trial. *Id.* at 547.

113. *State v. Lowery*, 111 Ariz. 26, 523 P.2d 54 (1974).

114. *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

115. *Id.* at 730.

116. *Id.* at 731 n.6.

117. In the first habeas corpus appeal, the Ninth Circuit noted the weaknesses of the state's case:

[The principal witnesses' testimony] amounts to nothing more than that he saw the appellant go with [the] decedent to the vehicle in which [the] decedent's body was found some time later and that hearing noises that sounded like firecrackers, he saw appellant walk away from the vehicle

judge, who was the trier of fact, immediately after the defendant denied being present at the scene of the crime. The lawyer's actions, according to the court, signaled that he disagreed with the defendant's denial and believed that the defendant had committed the crime.

A subsequent Ninth Circuit decision illustrates *Lowery's* limited applicability. In *United States v. Campbell*,¹¹⁸ the defendant was indicted for armed bank robbery. After the defendant insisted on testifying his attorney announced to the court, in front of the jury, that Campbell was testifying against his advice. Attempting to adhere to Defense Standard section 7.7, the attorney refrained from arguing the defendant's testimony to the jury, who found the defendant guilty.¹¹⁹

Affirming the lower court, the Ninth Circuit determined that although defense counsel waived from the American Bar Association Defense Standard by informing the court and jury of his dispute with the defendant, there was no deprivation of the defendant's right to effective assistance of counsel or to a fair trial.¹²⁰ The court found that the attorney's actions were not prejudicial to Campbell, especially since the evidence was overwhelmingly against him.¹²¹ In contrast to *Lowery*, the court held that Campbell's attorney did not deprive him of a fair trial because the lawyer's behavior did not amount to telling the trier of fact that his client was lying. Additionally, the *Campbell* court noted that a jury, not alert to the attorney's ethical problems,¹²² might think that the attorney wanted to prevent impeachment or damaging cross-examination of the defendant. Because the *Lowery* court determined that a jury might interpret a lawyer's passive refusal to lend aid as evidence of perjury,¹²³ *Campbell's* hypothesis is weak. A jury that sees and hears a defense attorney abandon his client is likely to believe the defendant is lying.

E. Protecting the Interests of the Court

If an attorney only owed a responsibility to his client, there would be no perjury dilemma. But an attorney faced with possible client perjury must also remember that he owes a duty to the court to seek the truth and maintain judicial integrity. A lawyer must constantly be

with what appeared to be a small gun in her hand [but which may have been a purse].

535 F.2d at 547.

118. 616 F.2d 1151 (9th Cir. 1980).

119. *Id.* at 1152.

120. *Id.*

121. "[D]uring cross-examination Campbell admitted that he: (1) had previously been convicted of robbery; (2) was previously acquainted with his co-defendant; and (3) was in a motel room in which marked bills from the robbery were recovered." *Id.* at 1153. In addition five witnesses identified Campbell as one of the participants. *Id.* at 1152.

122. *But see* FREEDMAN, *supra* note 31, at 37 (author suggests that the use of section 7.7 would alert a perceptive jury to the attorney's ethical problems).

123. *Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978).

aware of the fact that he is an "officer of the court sworn to aid in the administration of justice."¹²⁴

The problem with most of the rules developed by the legal establishment is that they fail to provide an attorney faced with client perjury any viable alternatives in meeting his duty to the court.¹²⁵ The Model Code's ethical considerations¹²⁶ and disciplinary rules¹²⁷ are vehement in their position but they do not provide a means for reconciling the opposing duties.¹²⁸

Some state courts are very rigorous in their support of the attorney's obligation to the court. In *State v. Henderson*,¹²⁹ a defendant insisted on a defense that his attorney believed was totally false. The court determined that the attorney, by disclosing to the court the announced intention of the client to commit perjury and moving to withdraw, did not deny the defendant his right to full and fair representation. The Kansas Supreme Court oversimplified the situation by viewing it as a matter of honesty with the court versus tendering false evidence.¹³⁰ Factually it is important to note that Henderson had made his attorney aware of an "avowed intention of presenting perjured testimony."¹³¹ Additionally, the attorney's motion to withdraw was made prior to the impaneling of the jury, thus preventing any prejudice.¹³²

In cases such as *Henderson*, where a fact-finder is unaware of the dispute between attorney and client and the defendant's right to a fair trial is not jeopardized, the attorney's motion to withdraw can be denied and the trial can continue. But in situations similar to *Lowery*, where the fact-finder may become aware of the defendant's perjury, no guidelines are provided for the attorney other than the Model Code's command against using perjured testimony. If this command is to be met, practical options must be provided.

124. *Baker v. Otto*, 180 Md. 53, 55, 22 A.2d 924, 926 (1941).

125. The only rules which attempt to provide an alternative are the now outdated DEFENSE STANDARDS. See *supra* note 47.

126. MODEL CODE, *supra* note 3, EC 7-26.

127. *Id.* DR 7-102(A)(4).

128. While the American Bar Association's DEFENSE STANDARD section 7.7 is an attempt to provide a practical solution to the problem, its use is questionable due to its uncertain status. See *supra* note 47. When the standard was in force, it was praised as allowing the attorney to fulfill his obligations to the court. *Thornton v. United States*, 357 A.2d 429, 438 (D.C.), *cert. denied*, 429 U.S. 1024 (1976). However, use of the standard has also been criticized as sacrificing the lawyer's duty to the court. *Butler v. United States*, 414 A.2d 844, 857 (D.C. 1980) (Reilly, C.J., dissenting). Critics felt that disclosing the perjury was a better accommodation of that duty embodied in the MODEL CODE.

129. 205 Kan. 231, 468 P.2d 136 (1970).

130. *Id.* at 236, 468 P.2d at 140.

131. *Id.* at 237, 468 P.2d at 141.

132. *Id.* at 234, 468 P.2d at 139-40. At trial, the defendant, for an unknown reason, refused to testify, enabling his attorney to proceed with his original defense without referring to his client's story.

IV. THE ATTORNEY'S OPTIONS

The attorney faced with a client who may commit perjury¹³³ can examine four options developed from case law and professional standards: (1) motioning to withdraw from representation; (2) notifying the fact-finder; (3) allowing the defendant to make a narrative statement; and (4) refraining from taking any action at all. Each option is replete with practical, procedural, and constitutional consequences and each court's reaction to the choice of any option varies among jurisdictions.¹³⁴

133. Before analyzing his options, an attorney must assure himself that his client's planned testimony will be perjured. Without this knowledge the dilemma cannot arise. Although the MODEL CODE does not offer practical solutions to the perjury problem, its command once a client expresses a perjurious intent is clear: a lawyer cannot knowingly use perjured testimony. MODEL CODE, *supra* note 3, DR 7-102(A)(4). Thus, once an attorney knows, or from facts within his knowledge, should know, *id.* EC 7-26, that a client's testimony is perjured, the MODEL CODE provisions ostensibly apply. DEFENSE STANDARDS section 7.7 explains that its provisions can be followed when "the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true." DEFENSE STANDARDS, *supra* note 39, § 7.7(a).

But determining to a court's satisfaction that a client will lie may prove difficult. Simple conjecture by the attorney that his client will lie will not suffice. *United States ex rel Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977). Discussing this conjecture with the trial judge without any firm factual basis would violate the duty of defense counsel, and might usurp the judge's and jury's function. *Id.*; *accord* *State v. Lloyd*, 48 Md. App. 535, 542, 429 A.2d 244, 247 (1981). The difference between knowledge and conjecture, however, is murky. Courts are divided, for instance, on whether a change in a defendant's story suggests perjury. *Compare* *Butler v. United States*, 414 A.2d 844, 850 (D.C. 1980) (attorney's determination that the defendant would lie because of inconsistent stories was based on surmise) and *Johnson v. United States*, 404 A.2d 162, 164 (D.C. 1979) (same is true for a judge) *with* *Maddox v. State*, 613 S.W.2d 275, 283-84 (Tex. Crim. App. 1981) (defendant's attorneys were justified in moving to withdraw when the defendant changed an alibi defense, relied upon for some time, immediately before trial).

The confusion among courts makes it even more difficult for an attorney to make a rational choice in dealing with client perjury. Courts seem to analyze a defendant's behavior and his attorney's reaction on a case-by-case basis making it difficult to cull any favored options. Regardless of this division among the courts, a defense attorney must keep in mind his obligation to defend. *United States ex rel Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977). This obligation remains despite knowledge of the defendant's guilt. *State v. Lloyd*, 48 Md. App. 535, 547, 429 A.2d 244, 250 (1981).

134. The reasons for this confusing diversity are numerous. First, the factual situations under which the dilemma arises are not consistent. There are cases where the client actually informs the attorney of his plans to commit perjury, *see* *People v. Salquerro*, 107 Misc. 2d 155, 433 N.Y.S.2d 711 (N.Y. Sup. Ct. 1980), cases where the attorney determines himself that the client will lie, *see* *Thornton v. United States*, 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976), and cases where the judge determines that a defendant will testify perjurally. *See* *Johnson v. United States*, 404 A.2d 162 (D.C. 1979).

Second, determining when a client will lie is problematic. *See supra* note 133. Finally, use of the standards governing professional behavior is questionable: the MODEL CODE provides no practical option, *see supra* notes 30-31 and accompanying text, and the DEFENSE STANDARD section 7.7's status is in limbo. *See supra*

A. Motioning to Withdraw

An attorney's initial reaction when faced with possible client perjury is often to attempt to withdraw from representation of the defendant. While this option is supported by some authorities,¹³⁵ its use can create practical and constitutional problems depending on when and before whom the motion is made.

If the motion to withdraw is made and granted before trial begins, practical problems arise. Once the court appointed or privately retained attorney leaves the defendant may realize his mistake and simply withhold his plans to commit perjury from the new attorney.¹³⁶ Alternatively, delay might result if the defendant is equally frank with the new attorney who also decides to withdraw.¹³⁷ Withdrawal may even facilitate perjury if the second attorney lacks the scruples of the first and either aids in the commission of perjury or fails to prevent it.¹³⁸ Since reasons for the request usually must accompany a motion to withdraw,¹³⁹ judicial impartiality may be destroyed if the case is tried before a judge.¹⁴⁰ Also, by giving reasons to a judge for the motion, the attorney's obligation of confidentiality may be violated.

Depending on the circumstances surrounding the motion, constitutional problems may also arise when a motion to withdraw is made. In *Butler v. United States*¹⁴¹ the defendant's attorneys made a motion to withdraw to a judge who eventually became the trier of fact. Because

note 47. Even when the DEFENSE STANDARD was in effect, its use was disputed. Compare *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (implicit rejection of DEFENSE STANDARD when judge is the fact-finder) with *Butler v. United States*, 414 A.2d 844 (D.C. 1980) (use of section 7.7 approved in certain situations).

Confusion also results from the fact that an attorney's options are interrelated and are not easily separable. For example, if an attorney moves to withdraw as defense counsel, and that motion is denied, he can use the alternative suggested by the DEFENSE STANDARD. But if that motion was made in front of the fact-finder, the attorney may have already jeopardized his client's chances for a fair trial through notification.

135. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975); DEFENSE STANDARDS, *supra* note 39, § 7.7(b).

136. FREEDMAN, *supra* note 31, at 33; see also *People v. Salquerro*, 107 Misc. 2d 155, 158, 433 N.Y.S.2d 711, 713 (N.Y. Sup. Ct. 1980).

137. *People v. Salquerro*, 107 Misc. 2d 155, 158, 433 N.Y.S.2d 711, 713 (N.Y. Sup. Ct. 1980). That delay might be deliberately invoked by the defendant.

138. *Id.*

139. FREEDMAN, *supra* note 31, at 33-34.

140. See, e.g., *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978). Recusal of the judge may be an alternative in such a situation. *Butler v. United States*, 414 A.2d 844, 852 (D.C. 1980). The *Butler* court determined that recusal was mandated after an attorney told the hearing and trial judge that the government could prove its case beyond a reasonable doubt and that the defendant intended to commit perjury. *Id.* But recusal has been criticized. See *People v. Salquerro*, 107 Misc. 2d 155, 160-61, 433 N.Y.S.2d 711, 714-15 (N.Y. Sup. Ct. 1980) (recusal of sentencing judge is not necessary when he becomes aware of defendant's intention to commit perjury because there are many situations when the judge becomes aware of a defendant's incriminating statements but is not disqualified).

141. 414 A.2d 844 (D.C. 1980).

the attorneys had previously explained to the judge the specifics of the client's plan to commit perjury, a violation of the defendant's sixth amendment right to effective assistance of counsel occurred.¹⁴² However, in *Maddox v. State*¹⁴³ no violation of the defendant's sixth amendment right was found when the motion was made, without explanation, to a judge in a jury trial.¹⁴⁴

Accordingly, an attorney's motion to withdraw can violate the various duties he owes to the defendant and to the court. By making such a motion, an attorney jeopardizes attorney-client confidentiality because the client may withhold information from his first lawyer or a replacement. The duty to the court may also be jeopardized if the new attorney aids in the commission of the perjury. Protection of the defendant's right to a fair trial may be lost if the fact-finder's impartiality is affected by the motion. Finally, the defendant's right to effective assistance of counsel may be violated by a motion to withdraw.

Because this option may violate the various duties of the attorney, its use should be limited. This alternative should only be considered if an attorney can assure himself that the problems discussed will not arise. In any event, motions to withdraw are likely to be denied as long as the attorney can provide some measure of effective assistance.¹⁴⁵

B. Notifying the Fact-Finder

Another initial reaction to client perjury may be to notify the court of the client's intention, in hopes of shifting the burden of deciding how to react to the trial judge. Notification to the court of the defendant's proposed perjury can occur both knowingly and unknowingly. Notification can occur unknowingly through a motion to withdraw, depending on when the motion is made, if the reasons for the motion are not given.¹⁴⁶ Outright notification takes place when the attorney explains the client's intentions to the judge. Although this alternative has been suggested by several sources,¹⁴⁷ it presents the same constitutional ob-

142. *Id.* at 850; *accord* Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstedler, J., specially concurring).

143. 613 S.W.2d 275 (Tex. Crim. App. 1981).

144. *Id.* at 284. At the same time a due process analysis has been utilized. When a motion was made in the middle of the defendant's testimony denying participation in the crime and in front of the judge trying the case, the defendant was deprived of his right to a fair trial. Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978). According to the Ninth Circuit, the attorney's actions "disabled the fact-finder from judging the merits of the defendant's defense." *Id.* at 730.

145. *People v. Salquerro*, 107 Misc. 2d 155, 159-60, 433 N.Y.S.2d 711, 714 (N.Y. Sup. Ct. 1980).

146. *See, e.g.,* Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978). *But see* *People v. Salquerro*, 107 Misc. 2d 155, 160-61, 433 N.Y.S.2d 711, 714-15 (N.Y. Sup. Ct. 1980) (no prejudicial notification from motion made to judge who was not fact-finder).

147. *See, e.g.,* *State v. Henderson*, 205 Kan. 231, 468 P.2d 136 (1970); ABA Comm. on Professional Ethics and Grievances, Informal Op. 1314 (1975).

stacles as notification through a motion to withdraw. That is, if the notification is made to the fact-finder, it may impermissibly prejudice his decision. Yet in *United States v. Campbell*,¹⁴⁸ when the attorney announced to the judge, in front of the jury, that the defendant was testifying against the attorney's will no prejudice was found.¹⁴⁹ While the announcement was not a literal notification of the defendant's perjury, surely a perceptive jury knew what was going on.

Although notification probably does not violate an attorney's duty to the court, it fails to protect the defendant's rights to effective representation, to receive a fair trial, and to testify. Additionally, notification may destroy attorney-client confidentiality. Since the standards and case law which allow notification to the court fail to distinguish situations in which the option can be safely used and instances where its use may harm the defendant's right to a fair trial, an attorney should not choose this option unless he can insure that his client's rights will be protected.¹⁵⁰

C. *Allowing a Narrative Statement*

The alternative suggested by Defense Standard section 7.7¹⁵¹ may come closest to accommodating both the search for the truth and the protection of the defendant's rights.¹⁵² The standard suggests that the attorney should first advise his client that perjury is illegal; if his client persists counsel should attempt to withdraw. Should the court deny the motion or if it is too far into the trial to withdraw, then the attorney should allow the defendant to make a narrative statement. Counsel should, however, refrain from interrogating his client or arguing the testimony to the jury. This approach allows the attorney to refrain from active participation in the client's testimony, while giving the defendant a chance to take the stand.¹⁵³

While use of the standard has been praised and has been held to protect attorneys from challenges of ineffective representation,¹⁵⁴ it has

148. 616 F.2d 1151 (9th Cir. 1980).

149. *Id.* at 1152-53. In *Campbell*, the court found that the "[m]istake was one that a 'reasonably competent attorney' might make in an effort to comply with his ethical duties." *Id.* at 1152. Additionally, the evidence in the case showed that the defendant was overwhelmingly guilty. *Id.* at 1152-53. Nonetheless, the attorney's notice probably prejudiced the defendant's right to a fair trial.

150. This option may be useless because it simply shifts the burden of decision onto the judge in a jury trial. If it is a bench trial, the judge's evenhandedness may be jeopardized. Notification may also be a breach of the attorney-client confidential relationship. Lefstein, *supra* note 73, at 684-85.

151. DEFENSE STANDARDS, *supra* note 33, § 7.7. For the text of both the original and revised defense standard see *supra* note 47.

152. *Thornton v. United States*, 357 A.2d 429, 437-38 (D.C.), *cert. denied*, 429 U.S. 1024 (1976).

153. 357 A.2d at 437-38.

154. *Maddox v. State*, 613 S.W.2d 275, 284 (Tex. Crim. App. 1981).

also been criticized.¹⁵⁵ Its practical shortcomings may arise during trial. The prosecution may object to use of the standard because it deprives the state of the right to object to what may be inadmissible testimony.¹⁵⁶ Also, even if the narrative statement is allowed, the prosecution might expose the reason for its use by cross-examining the defendant or explaining to the fact-finder the reasons for the statement. The explanation that a defendant is making a narrative statement because his attorney does not want to elicit perjured testimony would most certainly influence the fact-finder and deprive the defendant of a fair trial.

Despite these criticisms, and despite the fact that the standard's status is in limbo,¹⁵⁷ the Defense Standard's approach may be the only means of accommodating the interests of the defendant, the attorney, and the court. The defendant's right to testify is protected by use of the narrative statement. The right to effective representation is not violated because the attorney can still defend his client without referring to the narrative testimony. Additionally, the defendant's right to a fair trial would be protected because, in a jury trial, the fact-finder theoretically would not be made aware of the defendant's actions. Attorney-client confidentiality would also be promoted, since by using the defense standard no breach occurs. Finally, the attorney's duty to the court is upheld since counsel, through use of the standard, does not actively participate in the defendant's actions.

The practical problems associated with the use of a narrative statement might be alleviated in a jury trial¹⁵⁸ by a judge who maintains control over the prosecution's behavior.¹⁵⁹ As a result of the narrative statement, the defendant has a chance to testify, the attorney does not aid in the testimony, and the court or the jury remain unbiased.

D. Taking No Action

Professor Monroe Freedman has promoted what is undoubtedly the most controversial alternative based on his belief that the attorney's duty to maintain his client's confidences is of the utmost importance.¹⁶⁰ This alternative involves treating the lying client like any other witness including interrogating him on direct examination and arguing his tes-

155. *See* *Butler v. United States*, 414 A.2d 844, 859 (D.C. 1980) (Reilly, C.J., dissenting) (use of the standard comes dangerously close to allowing a defendant to lie).

156. FREEDMAN, *supra* note 31, at 37.

157. *See supra* note 47.

158. Whether this alternative would work in a bench trial is questionable, since a judge is likely to know the circumstances surrounding use of the standard.

159. In one case, the judge protected the defendant from objectionable cross-examination. *Maddox v. State*, 613 S.W.2d 275, 277-78 (Tex. Crim App. 1981).

160. *See* FREEDMAN, *supra* note 31, at 29; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). *Contra* Wolfram, *supra* note 1, at 868 (author suggests client can waive attorney-client privilege by written agreement).

timony in closing to the jury. Implicit in the support for this alternative is the belief that the fact-finder's job in an adversarial system is to sort through all the testimony to determine which is true and which is false.

This alternative has received a handful of case support.¹⁶¹ In *People v. Blye*,¹⁶² the defendant had a right to take the stand even though his appointed defense counsel felt that to do so would be to allow the defendant to "obviously perjure himself."¹⁶³ The state's evidence showed that the defendant, an escaped mental patient, was found leaving a trail of blood near the scene of a looting with items from the crime in his possession.¹⁶⁴ His attorney refused to call the defendant to testify because he intended to deny participation in the incident.¹⁶⁵ Blye was eventually convicted of burglary.

The District Court of Appeals of California reversed on appeal and awarded a new trial. The court, holding that the defendant had a right to testify, stated:

if the record shows that a defendant makes a proper and timely demand to take the stand contrary to the advice given by his counsel, such a defendant has the right to give an exposition of his defense before a jury. This insistence may be fatal to his chances of acquittal, but to prevent him from doing so, if the record shows his firm desire to testify, would be to deny him a right that every defendant should have in a criminal case.¹⁶⁶

Ignoring the problems inherent in withdrawing,¹⁶⁷ the court suggested that if the attorney could not support his client's testimony he should have withdrawn.¹⁶⁸ While this decision recognizes the importance of a client's right to testify, its precedential value is limited because the court failed to analyze the entire client perjury problem.

The *Blye* decision implicitly supports Professor Freedman's alternative without recognizing its potential problems. Supporters of Freedman's alternative are aware of these problems and suggest that before resorting to this action an attorney should inform the defendant that committing perjury is illegal, attempt to persuade the defendant against such behavior, and advise him that a sentencing judge might consider the perjury in the final determination of a sentence.¹⁶⁹ Critics have

161. See *People v. Blye*, 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965); *Allen v. State*, 518 S.W.2d 170 (Mo. 1979).

162. 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965).

163. *Id.* at 148, 43 Cal. Rptr. at 235.

164. *Id.* at 144-45, 43 Cal. Rptr. at 232-33. The evidence showed that the defendant had kicked in a store window and cut his foot.

165. *Id.* at 148, 43 Cal. Rptr. at 235.

166. *Id.* at 149, 43 Cal. Rptr. at 236.

167. See *supra* notes 135-45 and accompanying text.

168. *People v. Blye*, 233 Cal. App. 2d 143, 149, 43 Cal. Rptr. 231, 235-36 (1965).

169. FREEDMAN, *supra* note 31, at 31-32; see also Wolfram, *supra* note 1, at 842.

pointed out that this option distorts the truth,¹⁷⁰ and have mistakenly referred to it as subornation of perjury.¹⁷¹

Ironically, this alternative may be the most frequently used among practicing attorneys.¹⁷² For it to be accepted among the members of the American Bar Association and its established policing bodies, however, would require a broad reevaluation of the traditional duties of the lawyer and goals of the judicial system. While protecting the defendant's rights, this option sacrifices the attorney's duty to the court. By using this option, counsel effectively aids in the presentation of perjured testimony.

V. CONCLUSION

The attorney faced with a client who proposes to falsely testify is confronted by an almost insurmountable dilemma. It arises from the attorney's conflicting duties to the client and the court. The dilemma cannot be reconciled by viewing client perjury in the vacuum of professional ethics. To reach a reasonable solution, the constitutional rights of the defendant and the practical constraints mandated by trial practice must be taken into account. Additionally, the lawyer's common law duties to the defendant and the judicial system must be analyzed.

Both the Model Code and the new Model Rules fail to consider all of the attorney's competing obligations in their respective solutions to the problem. The Model Code provides the attorney with rules of conduct, but fails to suggest practical alternatives. The Model Rules demand disclosure to the court, but fail to consider the constitutional ramifications of such an alternative.

The solution that comes closest to reconciling the attorney's duties and the practical consequences of various alternatives is the American Bar Association's Defense Standard section 7.7. Because this standard was withdrawn pending approval of the new Model Rules, its use may be questionable. Nonetheless, by allowing the defendant to make a narrative statement, the standard protects the defendant's right to testify while preventing the attorney from actually presenting and arguing perjured testimony. Lawyers concerned with establishing a practical

170. See, e.g., Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers, Lying Clients, and the Adversary System*, 1980 A.B. FOUND. RESEARCH J. 964, 973. But see *In re Michael*, 326 U.S. 224, 227-28 (1945) (function of trial is to sort through all the testimony to determine which is true and which is false. For perjury to result in a finding of contempt, it must be an obstruction of the court or jury in performing the task of finding the truth).

171. See FREEDMAN, *supra* note 31, at 31.

172. *Id.* at 38. In an informal survey of Washington, D.C. attorneys conducted by Professor Freedman concerning their reaction to intended client perjury 95% said they would call the defendant to testify, and of that group 90% said they would question the defendant normally. *Id.*

solution in such a situation should reevaluate this alternative in light of the failure of others to solve the dilemma of proposed client perjury.

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