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Nix v. Whiteside: Is a Client's Intended Perjury a Real Dilemma

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NIX v. WHITESIDE: IS A CLIENT'S INTENDED PERJURY A REAL DILEMMA?

I. INTRODUCTION

Courts, legal scholars, and law students have long grappled with the complex issues that arise when a criminal defense attorney[1] is faced with a client who intends to perjure himself on the stand.[2] The ethical dilemma has been unanimously described as one of the most difficult and controversial problems presently facing attorneys.[3] The controversy arises from the conflicting ethical obligations of the attorney to the court[4] and to the client.[5] The criminal defense attorney confronted with a client intending to commit perjury[6] must make a difficult choice, and each alternative is fraught with possible disciplinary consequences. The attorney who elects to reveal that his client plans to offer perjured testimony may compromise his client's due process right to effective assistance of

1. Many sources discuss client perjury in contexts other than criminal defense. However, this Note will only discuss a criminal defense attorney's obligations when dealing with intended client perjury. For a general discussion of client perjury in adversary litigation, see Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977). *See also* Committee on Professional Ethics & Conduct v. Crary, 245 N.W.2d 298 (Iowa 1976) (wherein the court discusses the duties of an attorney regarding deposition perjury of a client).

2. The debate over the obligations of an attorney when dealing with client perjury dates back to a controversial article by Monroe H. Freedman. *See* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). For current articles discussing the Nix v. Whiteside case, see MacCarthy & Mejia, *The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. CRIM. L. & CRIMINOLOGY, 1197 (1984); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985).

3. In Maddox v. State the court stated, "[t]he problem of representing a defendant who insists on testifying falsely has been called, correctly, one of the hardest questions a criminal defense lawyer faces." 613 S.W.2d 275, 280 (Tex. Crim. App. 1980). This case also serves as a good illustration of how an attorney establishes a foundation for the "free narrative" option provided for under Model Rule 3.3. *Id.* at 277.

4. "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law" MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) [hereinafter MODEL CODE]. "In his representations of a client, a lawyer shall not: . . . [k]nowingly *use* perjured testimony or false evidence." *Id.* at DR 7-102 (A)(4) (emphasis added).

5. Canon 4 states that "[a] Lawyer Should Preserve the Confidences and Secrets of a Client" *Id.* at Canon 4.

6. 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 . . . upon oath . . . 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).

counsel[7] or his right to testify. The attorney who, in the alternative, chooses to remain silent risks facing disciplinary charges for assisting in the presentation of false evidence.[8]

Faced with such an impossible choice, the attorney should be able to turn to the professional guidance of the courts and fellow attorneys. Unfortunately, the problem has stirred debate among attorneys[9] and has not yet been resolved in the courts,[10] leaving ambiguous and conflicting guidelines for the attorney. Particularly perplexing is a reading of *Whiteside v. Scurr*,[11] in which the court praised a colleague for abiding by the ethical guidelines promulgated by the American Bar Association (ABA) but nevertheless, found that the client was deprived of his right to effective assistance of counsel by the attorney's actions.[12]

The journey of Emanuel Charles Whiteside's case through the legal system is a case study of the competing ethical obligations of confidentiality and candor to the court. The United States Supreme Court recently decided *Nix v. Whiteside*,[13] a final resolution of Whiteside's case which offers the attorney long-awaited guidance. The Court determined that the primary goal of a trial is to be the search for truth,[14] and resolved the competing interests in order to serve that goal.

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7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983) [hereinafter MODEL RULES].

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

9. The following is a list of articles discussing the general issues of client perjury: Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11 (1966); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75 (1981); Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Comment, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545 (1978).

10. Courts debating client perjury issues tend to favor the more stringent approach of the Model Rules. *See* United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 1374 (1986); McKissick v. United States, 379 F.2d 754 (5th Cir. 1967), *aff'd on remand*, 398 F.2d 342 (5th Cir. 1968); Dodd v. Florida Bar, 118 So. 2d 17 (Fla. 1960).

11. 744 F.2d 1323 (8th Cir. 1984).

12. *Id.* at 1327-28. The court found that counsel "conscientiously attempt[ed] to address the problem of client perjury in a manner consistent with professional responsibility" but held that Robinson's threat to disclose proposed perjury constituted a violation of Whiteside's right to effective assistance of counsel and his constitutional right of receiving due process. *Id.* at 1329-30.

13. 106 S. Ct. 988 (1986). "[T]he responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, ..." *Id.* at 998.

14. *Id.* at 997.

II. STATEMENT OF THE CASE

Late at night on February 8, 1977, in Cedar Springs, Iowa, Whiteside and two others went to the apartment of Calvin Love to purchase some marijuana. Whiteside and his companions found Love in bed. An argument broke out concerning the marijuana. Love instructed his girlfriend to get his "piece," he then got up and returned to bed. Later, at trial, Whiteside testified that Love began to reach under his pillow and move toward Whiteside.[15] Whiteside, fearing that his life was in danger, "stabbed Love in the chest, inflicting a fatal wound."[16] Whiteside was formally charged with Love's murder. The court appointed Gary L. Robinson as the attorney to represent Whiteside. After some investigation and inquiry, Robinson learned that Whiteside had believed Love was reaching for a gun hidden under the pillow, but that Whiteside had never actually seen a gun. A police search of Love's apartment did not turn up a gun, and neither of Whiteside's companions recalled seeing a gun at the scene of the incident.[17]

Robinson advised his client that the claim of self-defense required only a belief that Love had a gun nearby, and therefore did not require the claim that the gun actually existed. Whiteside then informed Robinson that he would testify that he saw "something metallic" in Love's hand. Whiteside reasoned that "[i]f I don't say I saw a gun I'm dead."[18] This statement indicates that Whiteside believed he had to support his claim of self-defense even with fabricated testimony in order to have a chance of acquittal. Robinson admonished Whiteside, telling him that such testimony was perjury and reiterated that actual proof of a gun was unnecessary. Robinson also counseled Whiteside that, as an officer of the court, he could not allow perjured testimony and would be forced to withdraw from the case if Whiteside insisted on presenting perjured testimony.[19]

Whiteside testified on his own behalf without perjuring himself, and the jury returned a verdict of second degree murder. Whiteside moved for a new trial, *pro se*, claiming inadequate assistance of counsel. The trial court denied his motion.[20] On appeal, the Supreme Court of Iowa

15. *Id.* at 991.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 992.
20. *Id.*

affirmed Whiteside's conviction.[21] Thereafter, the United States District Court denied Whiteside's writ of habeas corpus.[22] The United States Court of Appeals for the Eighth Circuit later reversed the district court and granted the writ.[23] Finally, the United States Supreme Court granted certiorari "to decide whether the sixth amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting intended perjured testimony at trial."[24]

III. LAW PRIOR TO THE CASE

A. *Ethical Considerations*

1. The Conflict

This ethical dilemma has its roots in the ambiguous and contradictory language of the codes and standards of professional conduct.[25] The codes place a high value on an attorney's professional obligation to the court[26] and his obligations to preserve attorney-client confidentiality.[27] An attorney who violates either obligation is subject to the possibility of disciplinary action.[28] If a client confides in his attorney that he will tes-

21. *Id.* "[T]he right to have counsel present all appropriate defenses does not extend to using perjury, and that an attorney's duty to a client does not extend to assisting a client in committing perjury." *Id.* (paraphrasing State v. Whiteside, 272 N.W.2d 468, 471 (1978)).

22. *Nix*, 106 S. Ct. at 992. The United States District Court for the Southern District of Iowa "concluded that there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense." *Id.*

23. "[T]he Eighth Circuit reversed and directed that the writ of habeas corpus be granted on the grounds that an attorney's threat to disclose his client's proposed perjury constituted a violation of his client's due process rights to effective representation and a violation of the attorney's ethical obligation to preserve client confidences." *Id.* at 992-93.

24. *Id.* at 991.

25. For the purpose of this Note, discussion will be limited to the MODEL CODE, *supra* note 4; the MODEL RULES, *supra* note 7; the STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1979) [hereinafter DEFENSE STANDARDS]; and THE AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe Pound-American Lawyer's Foundation, Revised Draft, May 1982) [hereinafter ATLA CODE]. For an overview of the ATLA CODE, see Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487, 500-04 (1983).

26. MODEL CODE, *supra* note 4.

27. *Id.*

28. The attorney may be subject to reprimand, suspension, or disbarment for using perjured testimony or false evidence, MODEL CODE, *supra* note 4, at DR 7-102(A)(4); for assisting his client in fraudulent or illegal conduct (perjury), *id.* at DR 7-102(A)(7); for offering evidence that the attorney knows to be false, MODEL RULES, *supra* note 7, at Rule 3.3(a)(4); and for disclosing attorney-client confidences, MODEL CODE, *supra* note 4, at Canon 4, DR 4-101(B)(1)-(3), or MODEL RULES, *supra* note 7, at Rules 1.6(a) and 1.16. Rule 8.4 subjects an attorney to punishment for violating the rules of professional conduct; for engaging in fraudulent, dishonest or deceitful conduct; and for engaging in conduct that prejudices the administration of justice. MODEL RULES, *supra* note 7, at Rule 8.4(a), (c), (d).

tify falsely, the attorney must struggle with the choice of honoring his obligation to the court or protecting his client's confidences.

The difficult choice sets up a competition between two underlying social interests of the legal system. Some advocate a truth seeking system (Truth Seekers),[29] and others advocate an adversarial system (Adversaries).[30] The Truth Seekers maintain that perjury is repugnant to the purpose of a trial and that it therefore falls outside of the domain of attorney-client confidentiality.[31] The Adversaries claim that only by protecting the adversary system through strictly guarding attorney-client confidentiality will the rights of the client be safeguarded.[32] An examination of the rules on professional ethics shows that the *Model Code* espouses the position of the Adversaries, whereas the more recent *Model Rules* support the viewpoint of the Truth Seekers. The Roscoe Pound-American Trial Lawyer's foundation commissioned a new code on professional responsibility in response to the new Truth Seekers oriented *Model Rules*. Entitled as the American Lawyer's Code of Conduct,[33] the new code retains attorney-client confidence as the first principle of being a lawyer.[34] The Supreme Court's recent decision in *Nix v. Whiteside* attacked a weakness in the argument of the Adversaries and resolved the conflict in favor of the Truth Seekers.

2. The Attorney's Standards of Conduct

The ABA has published three sets of rules by which an attorney should govern his conduct: the *Model Code of Professional Responsibility* (*Model Code*), the *Model Rules of Professional Conduct* (*Model Rules*), and the *Standards Relating to the Administration of Criminal Justice* (*Defense Standards*).[35] Many legal commentators have pointed out the lack of guidance and inherent contradictions these standards provide.[36] Perhaps the strongest message to lawyers from the ABA can be inferred

29. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). " '[T]he basic purpose of a trial is the determination of truth . . . and . . . 'the right result' as not merely 'basic' but 'the sole objective of the judge . . . .' " *Id.* at 1033 (citations omitted).

30. *See* Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975). "A trial is, in part, a search for truth. . . . We are concerned, however, with far more than a search for truth, and the constitutional rights that are provided by our system of justice serve independent values that may well outweigh the truth-seeking value . . . ." *Id.* at 1063.

31. *See In re* Michael, 326 U.S. 224 (1945). "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." *Id.* at 227.

32. *See* Freedman, *supra* note 30, at 1063-64.

33. ATLA CODE, *supra* note 25.

34. *Id.*, preface by Theodore J. Koskoff.

35. DEFENSE STANDARDS, *supra* note 25.

36. *See* Rieger, *supra* note 2, at 123; MacCarthy & Mejia, *supra* note 2, at 1198.

from the drastic change in emphasis from the *Model Code* to the *Model Rules*.

The *Model Code* favors the position of the Adversaries by placing a high value on the preservation of the attorney-client privilege.[37] The Canons, the Ethical Considerations, and the Disciplinary Rules of the *Model Code* address the perjury problem as well as attorney-client confidentiality. Canon 4 states that "[a] lawyer should preserve the confidences and secrets of a client."[38] Disciplinary Rule 4-101 elucidates Canon 4 by stating that, "a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client . . . [or] . . . [u]se a confidence or secret of his client to the disadvantage of the client."[39] The attorney-client privilege is not absolute, however, as illustrated by Disciplinary Rule 4-101(C) which lists those things a lawyer may reveal.[40]

Canon 4 is also subject to the balancing restrictions of the Disciplinary Rules of Canon 7 that "[a] lawyer should represent a client zealously within the bounds of the law."[41] Disciplinary Rule 7-101 states that a lawyer shall not "[p]rejudice or damage his client during the course of the professional relationship."[42] Disciplinary Rule 7-102 lists the various activities which are considered to be outside the bounds of law. For example, a lawyer shall not "[k]nowingly use perjured testimony or false evidence," or "[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."[43] A lawyer who *learns* that a "client *has* . . . perpetrated a fraud upon a . . . tribunal shall promptly call upon his client to rectify the same."[44] If the client refuses, the attorney must expose the fraud unless "the information is protected as a privileged communication."[45]

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37. For a detailed historical and analytical discussion of the Model Code rules on disclosure, see Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 351-65 (1976).

38. MODEL CODE, *supra* note 4, at Canon 4.

39. *Id.* at DR 4-101(B)(1)-(3).

40. A lawyer may reveal:

> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id. at DR 4-101(C).

41. *Id.* at Canon 7.

42. *Id.* at DR 7-101(A)(3).

43. *Id.* at DR 7-102(A)(6).

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

45. *Id.*

While it appears that an attorney clearly may not knowingly use perjured testimony, false evidence, or create or preserve false evidence,[46] the attorney is also forbidden from disclosing secrets and confidences that will prejudice or damage his client.[47] The attorney seems powerless to prevent perjury, because if the defendant confides in his attorney that he intends to commit perjury and actually gives such false testimony, the attorney is barred by Disciplinary Rule 7-102(B)(1) from exposing the fraud. In most instances, the defense attorney will learn of the intended perjury through client confidences.[48] Thus, the exception made for information protected as a privileged communication overcomes the rule. The rule against using perjury and false evidence appears to be limited to knowledge obtained through private investigation outside the attorney-client relationship.

Even though the *Model Code* seems to forbid putting on perjured evidence, a closer reading of the code reveals a strong emphasis in protecting client confidences at the expense of perpetrating a fraud upon a tribunal. Subornation of perjury is a crime in most jurisdictions.[49] Whether a perjury statute supercedes the attorney-client privilege is unclear. If the attorney chooses to disclose the perjury, he risks disciplinary conduct from the bar; but if he chooses to respect the confidence privilege, he risks charges of subornation of perjury. Unfortunately, these rules offer little guidance to an attorney who suspects or knows that his client *will* perjure himself during the trial. The question of what an attorney should do when faced with a client intending to give false testimony had, until *Nix*, remained unanswered.

The *Model Rules* address more directly than the *Model Code* the problem of what an attorney should do when a client reveals his perjurious plan. For example, under Rule 1.2(d), a lawyer is forbidden to "counsel a client, to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[50] The official comments following Rule 1.2 as a whole suggest this prohibition is directed more toward business transactions as opposed to courtroom candor.[51] To protect the uninhibited trust required in an attorney-client relationship, the *Model*

46. *Id.* at DR 7-102(A)(3), (4), (6).
47. *Id.* at DR 4-101(A), (B)(2).
48. *See* Rieger, *supra* note 2, at 123-24.
49. *See, e.g.*, 18 U.S.C. § 1621 (1982); ARK. STAT. ANN. § 47-2602 (1984); COLO. REV. STAT. § 18-8-502 (1973); IOWA CODE § 720.3 (1985); MO. REV. STAT. § 575.040 (1978); OKLA. STAT. tit. 21, §§ 491, 504 (1985).
50. MODEL RULES, *supra* note 7, at Rule 1.2(d).
51. *Id.* at comments.

Rules, prohibit the revelation of "information relating to [the] representation of a client."[52] Nevertheless, the comments distinguish counseling or assisting a client in criminal or fraudulent conduct as a "special instance of the duty prescribed in Rule 1.2(d)."[53] In the event the client is using the attorney's representation to perpetrate crime or fraud, or this representation will result in a violation of the *Model Rules*, the rules mandate declining proffered employment or terminating existing employment.[54] Sometimes the situation can become highly strained when the tribunal declines counsel's withdrawal request.[55] The above-cited rules focus on the relationship between the attorney and the client in a non-adversarial position. It is quite clear, however, that these rules strongly speak out against a lawyer's participation in criminal or fraudulent acts.

The motif continues in the rules governing the attorney-client relationship in an adversarial situation. Rule 3.3 speaks directly to a lawyer's ethical obligation to be candid with the court.[56] "A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."[57] More simply put, a lawyer must not knowingly offer false evidence. For example, a lawyer cannot put on false alibi testimony regardless of his client's wishes.[58] The comments specifically single out the issue of perjury by a criminal defendant and recommend a course of conduct.

When an attorney confronts a criminal defendant intending to perjure himself, the lawyer must try "to persuade the client to refrain from perjurious testimony."[59] In *Nix*, Robinson's efforts to persuade his client to refrain were successful, creating a relatively simple issue on ethics for the appellate court. The real dilemma begins when persuasion fails and

52. *Id.* at Rule 1.6(a). "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." *Id.* The client confidentiality rule is balanced against the usual exceptions concerning criminal acts and personal defenses against criminal charges and civil claims. *Id.* at Rule 1.6(b).

53. *Id.* at comments (Disclosure Adverse to Client).

54. *Id.* at Rule 1.16(a)(1), (b)(1)(2).

55. *Id.* at Rule 1.16(c). While the Model Rules suggest the alternative of withdrawal, a trial court is most likely to deny an attorney's request to withdraw. *See, e.g.*, Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978); State v. Henderson, 205 Kan. 231, 234, 468 P.2d 136, 139 (1970); Maddox v. State, 613 S.W.2d 275, 277 (Tex. Crim. App. 1980).

56. *Id.* at Rule 3.3.

57. *Id.* at Rule 3.3(a)(4). The term "remedial measures" is discussed in the comment "Remedial Measures" following the statement of the rule.

58. *Id.* at Rule 3.3 comment (False Evidence).

59. *Id.* at Rule 3.3 comment (Perjury by a Criminal Defendant).

withdrawal is not possible.[60] The *Model Rules* list three proposed resolutions to this dilemma: (1) permit the accused to give a narrative without guidance from the lawyer; (2) excuse the attorney from the ethical obligation to reveal the perjury; and (3) require the attorney to reveal the perjury on the grounds that a criminal defendant does not have a right to assistance of counsel in committing perjury.[61] The *Model Rules* disfavor withdrawal because it merely prolongs the problem instead of resolving it.[62] Should the attorney elect to reveal the alleged perjury, the *Model Rules* suggest giving the client an opportunity to controvert his attorney's statement.[63] To further complicate the issue, the *Model Rules* warn that to reveal the client's perjury may infringe on the criminal defendant's constitutional rights to due process and effective assistance of counsel.

The *Model Rules* also demand a level of fairness and honesty between opposing parties.[64] Rule 3.4(b) states that "a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely . . . ."[65] The purpose of this rule is to ensure fair competition in the adversarial system.[66] The drafters of the *Model Rules* essentially repeated the rule stated in Disciplinary Rule 7-102(A)(6). Allowing the defendant to testify falsely violates the attorney's obligation to put on a fair and honest defense.

While the *Model Rules* clearly place a much stronger emphasis on the truth seeking purpose of a trial, the rules provide little actual guidance for the practicing attorney. The attorney attempting to follow the rules would soon find himself faced with conflicting obligations.

The *Model Rules* at least recognize the dilemma posed by the earlier *Model Code* and attempt to give an attorney some guidance. The *Model Rules* strongly support disclosure of intended client perjury over the preservation of attorney-client confidentiality, as long as the defendant's constitutional rights are not compromised. Although the *Model Rules* do not suggest what action may infringe on a defendant's rights, they are at least a positive step toward giving guidance to a criminal defense attorney facing a perjurious client.

60. *Id.*
61. *Id.*
62. *Id.* at Rule 3.3 comment (Remedial Measures).
63. *Id.*
64. *Id.* at Rule 3.4.
65. *Id.* at Rule 3.4(b).
66. *Id.* at Rule 3.4 comment.

The ABA has also approved a set of standards which serve to provide more specific guidance for the administration of criminal justice.[67] *Defense Standard* 4-7.7 unequivocally states, "it is unprofessional conduct for the lawyer to lend aid" to perjury or use perjured testimony.[68] The *Defense Standards* permit a lawyer to withdraw from representation if feasible and allowed by the court.[69] When the court will not grant the request of the attorney to withdraw, the *Defense Standards* favor the "free narrative" option of the *Model Rules*.[70] The *Defense Standards* recommend the following procedure: (1) make a record that the defendant is taking the stand against the advice of his attorney; (2) identify the witness as the defendant; (3) ask only those questions which the attorney believes the defendant will answer truthfully; (4) do not ask those questions which the attorney believes will be answered perjuriously; and (5) ask the defendant if he has any additional statements to make for the court.[71] By following this procedure, the attorney disassociates himself from the perjured testimony and signals to the judge his belief that the defendant is not telling the truth. The rule also forbids making any reference to the free narrative of the defendant during closing argument.[72]

Unfortunately, *Defense Standard* 4-7.7 existed only as a passing spectre in the law.[73] The standard was first approved by the ABA House of Delegates in 1971, was deleted from the approved draft in February, 1979, and was subsequently scheduled for consideration by the ABA Special Commission on the Evaluation of Professional Standards.[74] As of this writing, the final fate and form of proposed standard 4-7.7 remains unknown and the standard is noticeably absent. Even though the corpus of 4-7.7 was put to rest long ago, its spirit lives on in many recent cases

67. DEFENSE STANDARDS, *supra* note 25. For in depth discussion of the Defense Standards, see Edwards, *A Comparison of the First and Second Editions of the ABA Standards for Criminal Justice*, 59 DEN. L.J. 25, 34-36 (1981); Erickson, *supra* note 9, at 82-84.

68. DEFENSE STANDARDS, *supra* note 25, at Rule 4-7.7(c). It should be noted that Rule 4-7.7 also requires counsel to "strongly discourage" perjured testimony before taking further action. *Id.* at Rule 4-7.7(a).

69. *Id.* at Rule 4-7.7(b).

70. *Id.* at Rule 4-7.7(c).

71. *Id.* For a criticism of this procedure, see Vickrey, *Tell it Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct*, 60 N.D.L. REV. 261 (1984).

72. DEFENSE STANDARDS, *supra* note 25, at Rule 4-7.7(c).

73. Defense Standard 4-7.7 received approval by the ABA Standing Committee on Association Standards for Criminal Justice but was not enacted by the ABA House of Delegates during their February, 1979 meeting. *Id.* The ABA Commission on Evaluation of Professional Standards will determine the resolution of Standard 4-7.7. *Id.*

74. *Id.*; *see also* Rieger, *supra* note 2, at 126 n.28; MacCarthy & Mejia, *supra* note 2, at 1200 n.13.

and scholarly writings.[75]

Until the ABA resurrects *Defense Standard* 4-7.7, the Truth Seekers will have to rely on 4-7.5.[76] *Defense Standard* 4-7.5 merely echoes the provisions of the *Model Code* and *Model Rules*. While the standard states that "[i]t is unprofessional conduct for a lawyer knowingly to offer false evidence . . . or fail to seek withdrawal,"[77] it fails to give the attorney the guidance of 4-7.7 when the request for withdrawal is rejected. *Defense Standards* 4-7.5 and 4-1.1(c)[78] clearly demonstrate that the ABA now favors the position of the Truth Seekers.

In response to the change of emphasis of the ABA in the *Model Rules* and *Defense Standards*, the Adversaries banded together and produced a code of ethics protecting the sanctity of the attorney-client privilege.[79] The *American Lawyer's Code of Conduct* (ATLA Code) opens with rules on attorney-client confidences.[80] The ATLA Code places such a high value on attorney-client confidences that the longstanding rule requiring an attorney to reveal a confidence when disclosure is necessary to prevent imminent danger to human life exists only as a supplemental rule.[81] Even the briefest review of the rules governing client perjury reflects the philosophy that protecting attorney-client confidences is essential to safeguarding the rights of the client.[82]

The pertinent ATLA Code sections on client perjury are Rules 1.2, 3.7, and 6.6. Rule 3.7 proscribes a lawyer from knowingly presenting materially false evidence.[83] A lawyer reading this rule alone would con-

75. For recent cases, see United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980); Maddox v. State, 613 S.W.2d 275, 280-83 (Tex. Crim. App. 1980); Thornton v. United States, 357 A.2d 429, 433 n.3 (D.C.), *cert. denied*, 429 U.S. 1024 (1976).

76. DEFENSE STANDARDS, *supra* note 25, at Rule 4-7.5(a).

77. *Id.*

78. *Id.* at Rule 4-1.1(c). "The defense lawyer . . . is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. The defense lawyer has no duty to execute any directive of the accused which does not comport with law or such standards. . . " *Id.*

79. ATLA CODE, *supra* note 25. The American Bar Association's "Evaluation of Professional Standards" "demanded from us a viable alternative code." *Id.* Chairmen's Introduction.

80. *Id.* at Chapter I "The Client's Trust and Confidences."

81. *Id.* The drafters of the ATLA Code proposed Rule 1.6 which states, "a lawyer may reveal a client's confidence when . . . divulgence is necessary to prevent imminent danger to human life." *Id.* The Commission did not approve this rule, however, Rule 1.6 exists as a supplemental rule because so many members supported it. *Id.*, ed. note.

82. *Id.* The drafters of the ATLA Code openly state that their code is more protective of client confidentiality than the ABA Codes, Canons, and Rules. "The Rules to this Chapter are more protective of confidentiality than the Code of Professional Responsibility or the A.B.A. Commission's Rules." *Id.*, Chapter I, comment.

83. *Id.* at Rule 3.7. "A lawyer shall not knowingly . . . present materially false evidence, or make a materially false representation to a court . . . ." *Id.*

clude that he must prevent his client from lying on the stand. The rule does not suggest how this could be accomplished. The rule goes on to say that the lawyer may be required to present false evidence to avoid a "direct or indirect divulgence of a client's confidence."[84] Rule 1.2 also qualifies the lawyer's option to withdraw to prevent a violation of the *Model Code*.[85] Indeed, a comment following the chapter on withdrawal states that, "Rule 6.6 is not absolute, because the duty it embodies . . . is sometimes subordinate to the *paramount* duty not to reveal clients' confidences."[86] Rules 3.7, 1.2, and 6.6 make it clear that an attorney's ethical duty to maintain the confidence of his client is the highest duty.

B. *Prior Case Law*

One facet of the dilemma is the attorney's competing obligations to be candid to the court and to maintain the confidentiality of the client's revelations. But, as the Adversaries are quick to point out, the decision of the attorney has consequences which may adversely affect the client's constitutional rights to due process and effective assistance of counsel. The *Model Rules* warn the attorney that ethical duties "may be qualified by constitutional provisions for due process and the right to counsel in criminal cases."[87] The *Model Rules* also concede that constitutional requirements are superior to ethical obligations of an attorney.[88] Having looked at how the codes try to offer guidance, the background will be rounded off with a review of: (1) the case law on professional ethics; (2) the development of the right to testify; and (3) the present standard of review for reasonably effective assistance of counsel.

1. Ethics Cases

The United States Supreme Court has noted that most courts confronted with the client purjury dilemma have "insisted on a more rigor-

84. *Id.*

85. *Id.* at Rule 1.2. "A lawyer shall not directly or indirectly reveal a confidence of a client or former client . . . ." *Id.* The drafters of the ATLA Code provide two illustrative cases on this point. In the first case, a lawyer who has learned that his client intends to give false testimony follows the "free narrative" option of Model Rule 3.3. The drafters of the ATLA Code state that doing so is a violation of confidence because it indirectly reveals to the judge that the defendant lied. In the second case, a lawyer does not withdraw, presents his client's testimony, and refers to it in summation. The drafters of the ATLA Code would not consider this a disciplinary violation. *Id.* Illustrative Cases 1(i) and 1(j).

86. *Id.* Chapter VI; comment (emphasis added).

87. MODEL RULES, *supra* note 7, at Rule 3.3 comment.

88. *Id.*

ous standard" than those suggested by the codes.[89] Federal and state courts have consistently held that presenting false evidence at trial not only violates a lawyer's professional duty, but also erodes the integrity of the adversarial system.[90] To protect the purpose of the trial process, the law should be clear that false testimony must be barred.[91] The ethical standards of the defense attorney to zealously represent his client cannot be construed to compromise "the truth finding goal of our legal system."[92]

Two cases, *United States v. Curtis*[93] and *McKissick v. United States*,[94] have recently spelled out the position of the Truth Seekers. In each case, counsel refused to allow false testimony[95] because ethical responsibilities obligated the attorney to refrain from knowingly putting on false testimony.[96] The courts held that a defendant does not have a constitutional right to testify falsely and supported the decision of the attorneys to prevent the perpetration of false evidence.[97] These decisions support the proposition that the supreme goal of a trial is to ascertain the truth and that an attorney's ethical obligation of candor toward the court is superior to attorney-client privileges.

The opposite conclusion is reached in *Whiteside v. Scurr*,[98] which represents the position of the Adversaries. In *Whiteside*, counsel for the defendant persuaded his client not to testify falsely by threatening to inform the court about the perjury and to withdraw.[99] The Eighth Circuit held that the threat to "tell or withdraw" violated attorney-client confi-

89. *Nix*, 106 S. Ct. at 996 n.6.

90. United States v. Havens, 446 U.S. 620, 626-27, *reh'g denied*, 448 U.S. 911 (1980), *cert. denied*, 450 U.S. 995 (1981); People v. Schultheis, 638 P.2d 8, 11-12 (Colo. 1981) (citations omitted).

91. Harris v. New York, 401 U.S. 222, 225 (1971); United States v. Curtis, 742 F.2d 1070, 106 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 1374 (1986).

92. *Schultheis*, 638 P.2d at 12.

93. 742 F.2d 1070 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 1374 (1986).

94. 379 F.2d 754 (5th Cir. 1967).

95. In *Curtis*, the defendant wanted to call witnesses to testify falsely about an alibi. 742 F.2d 1072. The attorney would not put the witnesses on the stand because he knew their testimony would be false. *Id.* at 1073. The attorney also refused to allow his client to testify because he knew it would be fabricated testimony. *Id.* In *McKissick*, the attorney for McKissick told the judge that "McKissick . . . called me by telephone . . . [and] . . . admitted the fact that he had perjured himself at trial . . . ." 379 F.2d at 758. The attorney was granted a mistrial and withdrew from representation. *Id.* at 757-58. The court stated that the attorney was obligated to disclose the perjury for the good of judicial administration and to protect the public. *Id.* at 761 & n.2. The *McKissick* case also serves as a good example of how withdrawal leads to redundant trials and constitutional issues of double jeopardy.

96. *See Curtis*, 742 F.2d at 1074; *McKissick*, 379 F.2d at 761.

97. *Curtis*, 742 F.2d at 1076; *McKissick*, 379 F.2d at 762.

98. 744 F.2d 1323 (8th Cir. 1984), *rev'd*, 106 S. Ct. 988 (1986).

99. *Id.* at 1326.

dences and compromised the defendant's right to effective assistance of counsel.[100]

An earlier case, *United States ex rel. Wilcox v. Johnson*,[101] also favors the protection of attorney-client confidences. Wilcox's attorney did not allow her client to testify because she *believed* his testimony would be false.[102] If the court had permitted Wilcox to testify, his attorney threatened to withdraw on the grounds that any passive involvement with putting on false testimony would be unethical.[103] The court held that an attorney must have a firm factual basis to support any disclosure of proposed client perjury.[104] Otherwise, the disclosure violates the ethical obligations of the attorney to represent his client zealously.[105] "It is the role of the judge or jury to determine the facts, not that of the attorney."[106] To allow the attorney to disclose client confidences because the attorney merely *believes* the information to be false "would undermine a cornerstone" of our criminal justice system.[107]

It is clear from these decisions that there is no uniform consensus on how to treat the client perjury issue. State courts are also divided over the manner in which the dilemma should be resolved.[108] There is some agreement, though, that the issue of client perjury affects the constitutional rights of the criminal defendant. Indeed, the client perjury issue is invariably connected with the issue of whether the attorney's choice of conduct violates the constitutional rights of the defendant to effective assistance of counsel and the right to testify.

2. Right to Testify

While the criminal defendant's right to testify is a recent addition to due process,[109] it does have a long history.[110] The fifth, sixth, and four-

100. *Id.* at 1328; *see also* Callan & David, *supra* note 37, at 365-77.
101. 555 F.2d 115 (3rd Cir. 1977).
102. *Id.* at 117 (emphasis added).
103. *Id.*
104. *Id.* at 122.
105. *Id.*
106. *Id.*
107. *Id.*
108. *See* People v. Schultheis, 638 P.2d 8 (Colo. 1981); State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970); *but see* Newcomb v. State, 651 P.2d 1176 (Alaska Ct. App. 1982).
109. *Nix*, 106 S. Ct. at 993.
110. *Id.* The right to testify on your own behalf began as the right to be heard. For a discussion of the history of the right to be heard, see Ferguson v. Georgia, 365 U.S. 570, 572-95 (1961). The Supreme Court recognized the right to be heard early in history: Windsor v. McVeigh, 93 U.S. 274, 277 (1876); Galpin v. Page, 85 U.S. (18 Wall.) 350, 368-69 (1873); and McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870). *See* Clinton, *The Right to Present a Defense: An Emergent Constitu-*

teenth[111] amendments are the often cited sources of the defendant's right to testify.[112] The due process clauses of the fifth and fourteenth amendments better support the right than does the language of the sixth amendment.[113] The elasticity of the due process clause expands the concept[114] of which rights people consider "basic to a free society."[115] The confrontation clause of the sixth amendment, on the other hand, must be strained to create an independent right to testify on one's own behalf.[116]

Today, the right to testify is considered a personal constitutional right to the defendant[117] and "a fundamental element of due process of law."[118] Although the Supreme Court has not squarely held that a criminal defendant has a constitutional right to testify,[119] modern cases suggest that the Court favors the right.[120] In *In re Oliver*,[121] the Court stated that the right of a defendant to offer testimony was "basic in our system of jurisprudence."[122] Almost twenty-five years later, the Court in *Harris v. New York*,[123] stated, in passing, that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so."[124] More recently, in *Faretta v. California*,[125] the Court, again in dictum, stated that the right of the defendant to testify on his own behalf is "essential to due process of law in a fair adversary process."[126] The historical context of the due process clause combined with the favorable

tional Guarantee in Criminal Trials, 9 IND. L. REV. 713, 747-49 (1976); Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U.L.Q. 454.

111. U.S. CONST. amend. V, VI, XIV § 1.

112. Rieger, *supra* note 2, at 136-37.

113. *Id.* at 137.

114. *Id.* at 137 n.95.

115. Wolf v. Colorado, 338 U.S. 25, 27 (1949) (overruling Mapp v. Ohio, 367 U.S. 643 (1961)).

116. Rieger, *supra* note 2, at 136-37.

117. United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984). The Seventh Circuit held "that a defendant's *personal* constitutional right to testify truthfully in his own behalf may not be waived by counsel as a matter of trial strategy." *Id.* at 1076 (emphasis added). *See* Rieger, *supra* note 2, at 142 & n.117.

118. Washington v. Texas, 388 U.S. 14, 19 (1967).

119. *Nix*, 106 S. Ct. at 993.

120. For federal decisions, see United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984); United States v. Bifield, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); Hollenbeck v. Estelle, 672 F.2d 451, 452-53 (5th Cir), *cert. denied*, 459 U.S. 1019 (1982); and United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 119-20 (3d Cir. 1977); Ashe v. North Carolina, 586 F.2d 334, 336 (4th Cir. 1978), *cert. denied*, 441 U.S. 996 (1979). For state decisions, see People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Robles, 2 Cal. 3d 205, 85 Cal. Rptr. 166, 466 P.2d 710 (1970); State v. Noble, 514 P.2d 460 (Ariz. 1973); and State v. Rosillo, 281 N.W.2d 877, 878-79 (Minn. 1979).

121. 333 U.S. 257 (1948).

122. *Id.* at 273.

123. 401 U.S. 222 (1971).

124. *Id.* at 225; *see* United States v. Knox, 396 U.S. 77 (1969).

125. 422 U.S. 806 (1975).

126. *Id.* at 819 n.15.

comments of the Supreme Court support the conclusion that the right of the criminal defendant to testify is basic to current American jurisprudence.

While the Supreme Court has only acknowledged in dictum a criminal defendant's due process right to testify, the federal circuit courts and state courts have expressly held that the right to testify is inherent in our concept of due process.[127] In *United States ex rel. Wilcox v. Johnson*,[128] the court held that, "a criminal defendant's right to testify in his own defense is of such fundamental importance"[129] that a defendant could insist upon testifying over his attorney's advice.[130] A similar stand has been adopted by the Second, Fourth, Fifth, Seventh, and Eighth Circuits and several state supreme courts.[131]

3. Right to Effective Assistance of Counsel

The United States Supreme Court has been much more direct in declaring that a criminal defendant has a sixth amendment right to assistance of counsel.[132] The Court in the landmark case of *Gideon v. Wainwright*[133] held that the due process clause of the fourteenth amendment incorporated the sixth amendment right to assistance of counsel to protect indigent felony defendants in state criminal trials.[134] In *Reece v. Georgia*,[135] the Court held that the right to assistance of counsel is the right to effective assistance of counsel.[136] Finally, in *Argersinger v. Ham-*

127. *See supra* note 108.

128. 555 F.2d 115 (3d Cir. 1978).

129. *Id.* at 119-20.

130. United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984). For articles discussing the right to testify, see Hammerman, *A Criminal Defendant's Constitutional Right to Testify — The Implications of United States* ex rel. *Wilcox v. Johnson*, 23 VILL. L. REV. 678 (1977); Popper, *supra* note 110; Note, *Due Process v. Defense Counsel's Unilateral Waiver of the Defendant's Right to Testify*, 3 HASTINGS CONST. L.Q. 517 (1976).

131. *See supra* note 120.

132. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall have the right to . . . have the assistance of counsel for his defense."); Strickland v. Washington, 466 U.S. 668 (1984) (stating that the purpose of the sixth amendment is to "ensure a fair trial"); Argersinger v. Hamlin, 407 U.S. 25 (1972). In United States v. Wade, the Court extended the right to effective assistance of counsel to the time before trial to protect the accused from the prosecution during the entire process of defense. 388 U.S. 218, 225 (1967). Earlier, in Douglas v. California, the Court extended the right to effective assistance of counsel to post-trial proceedings to protect the rights of the defendant on appeal. 372 U.S. 353, 355-56 (1963).

133. 372 U.S. 335 (1963).

134. *Id.* "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

135. 350 U.S. 85 (1955).

136. *Id.* at 90. "The *effective* assistance of counsel in [a capital case] is a constitutional requirement of due process which no member of the Union may disregard." *Id.* (emphasis added). The right to *effective* assistance of counsel was expanded to include felony convictions in McMann v.

lin,[137] the Court recognized that the right to effective assistance of counsel applies to any offense which involves a potential sentence of imprisonment.[138] Because every criminal defendant has a right to effective assistance of counsel, the Court needed to establish some standards to determine if a criminal defendant has been denied effective assistance of counsel.

4. Standard For Effective Assistance of Counsel

In *Strickland v. Washington*,[139] the Court established a two-pronged test to judge whether an attorney provided effective assistance of counsel. The first step requires the defendant to show "that counsel's performance was deficient."[140] The second step requires the defendant to show "that the deficient performance prejudiced the defense."[141] In setting down this test, the Court claimed to be giving meaning to the constitutional requirement of effective assistance of counsel — "to ensure a fair trial."[142]

The Court went on to adopt a standard for determining whether a counsel's representation was deficient. Instead of enumerating a list of mechanical rules, the Court employed a balancing test. A defendant will succeed in a showing of deficient counsel if counsel's conduct was so ineffective as to undermine the adversarial process and result in an unjust outcome.[143] This balancing test will apply to all cases whether civil, criminal, or capital.[144] Various factors the Court will consider when judging whether counsel's representation was deficient include the duty

Richardson, 397 U.S. 759 (1970). "[D]efendants facing felony charges are entitled to the *effective* assistance of competent counsel." *Id.* at 771 (emphasis added); *see also* Powell v. Alabama, 287 U.S. 45 (1932) (wherein the Court held that the trial court has the duty to appoint an attorney for the accused).

137. 407 U.S. 25 (1972).

138. "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

139. 466 U.S. 668 (1984). For a more detailed discussion of *Strickland*, see Note, *Sixth Amendment — Defendant's Dual Burden in Claims of Ineffective Assistance of Counsel*, 75 J. CRIM. L. & CRIMINOLOGY 755 (1984); Note, *Constitutional Law—Sixth Amendment Guarantees Assistance of Counsel that is Reasonably Effective and Does Not Prejudice the Fairness of the Proceeding*, 14 U. BALT. L. REV. 335 (1985).

140. *Strickland*, 466 U.S. at 687. The standard for determining the reasonableness of an attorney's representation is an objective standard. *Id.* at 688.

141. *Id.* at 687.

142. "The benchmark for judging any claim of effectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."*Id.* at 686.

143. *Id.* at 681.

144. *Id.* at 686.

of counsel to be loyal and honest with his client, the duty to keep his client informed about the progress of the case, and the duty to consult with his client on important decisions.[145] Of course, the Court will evaluate the skill and knowledge employed by the attorney to advocate the client's case at trial.[146] While the codes have obviously influenced the Court's choice of factors, the justices caution that the codes are not exhaustive and should only be used as guidelines in light of the "variety of circumstances faced by defense counsel or the range of legitimate decisions" open to the discretion of the attorney.[147] In essence, the Court gave wide deference to the decisions of the attorney because of the dangers of twenty-twenty hindsight and to respect counsel's independence.[148] Using this rationale, the Court will presume the attorney's performance meets constitutional muster unless the defendant can show that his attorney's representation falls outside reasonable professional assistance.[149]

Should the defendant satisfy the first prong, that the conduct of his attorney was deficient, the defendant must still satisfy the second prong, that the errant conduct prejudiced the outcome of the trial.[150] Every error will have some effect on the trial, but unless the defendant shows with a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" any deficient representation will be considered harmless.[151] The Court in *Strickland* then discussed some practical considerations that will control judicial review of client representation.[152]

145. *Id.* at 688.

146. *Id.*

147. *Id.* "Prevailing norms of practice as reflected in American Bar Association standards and the like, . . . are guides to determining what is reasonable, but they are only guides." *Id.*

148. *Id.* at 689.

149. *Id.* The Court did say that prejudice will automatically be presumed in cases where no counsel is appointed either actually or constructively, where the state has interfered with counsel's assistance, and where there is a conflict of interest. *Id.*

150. *Id.* at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*

151. *Id.*

152. *Id.* at 694-95. The practical considerations the court mentioned are: (1) the rules for reviewing attorney representation are not mechanical, (2) the rules "do not require reconsideration of ineffectiveness claims" (3) the rules "should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial," and (4) a state court finding that a counsel rendered effective assistance of counsel, in a federal habeas challenge to a state criminal judgment, "is not a finding of fact binding on the federal court." *Id.*

IV. ANALYSIS

In light of conflicting decisions of the federal and state courts, and the lack of clear guidance from the codes, it was only a matter of time before the United States Supreme Court had to resolve some of the conflicts. The decision of the Eighth Circuit in *Whiteside v. Scurr*[153] almost forced the Supreme Court to settle the dispute and they granted certiorari.[154] The decision of the Supreme Court in *Nix v. Whiteside* answered some of the conflicting issues, but left others unanswered while leaving clues as to how they should or might be decided given the occasion.

The decision of the Supreme Court in *Nix v. Whiteside* was a limited unanimous decision. The best way to analyze the case is to start with those premises upon which all of the justices agreed and proceed to examine the significance of the similarities and differences. Chief Justice Burger delivered the opinion of the Court in which Justices White, Powell, Rehnquist, and O'Connor joined. Justices Brennan and Stevens filed concurring opinions and Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens filed a concurring opinion. The decisions of the Justices of the Supreme Court represent the debate between the Truth Seekers and the Adversaries.

The issue before the Supreme Court in *Nix v. Whiteside* was whether Whiteside's sixth amendment right to assistance of counsel was violated when his attorney, Robinson, refused to cooperate in presenting perjured testimony at trial.[155] The nine Justices agreed that Whiteside's rights to assistance of counsel were not compromised under the *Strickland*[156] standard by his attorney's refusal to present false testimony.[157] The Court, however, was sharply divided over the rationale supporting their conclusions. The dispute centers on the application of the *Strickland* standard to the issues.[158]

Blackmun's concurring opinion limits the issue to whether the defendant had been deprived of a fair trial, not whether the attorney behaved ethically.[159] Blackmun's opinion focuses entirely on whether the defendant successfully proved attorney prejudice and whether that preju-

153. 744 F.2d 1323 (8th Cir. 1984).
154. *Nix*, 105 S. Ct. 2016 (1985).
155. *Nix*, 106 S. Ct. at 992.
156. Strickland v. Washington, 466 U.S. 668 (1984).
157. *Nix*, 106 S. Ct. at 999; *id.* at 1000 (Brennan, J., concurring); *id.* at 1004, 1006-07 (Blackmun, J., concurring); *id.* at 1007 (Stevens, J., concurring).
158. *Compare Nix*, 106 S. Ct. at 994, *with* 106 S. Ct. at 1003.
159. *Id.* at 1002, 1006.

dice deprived him of a fair trial. There is no discussion of attorney ethics with the exception of the observation that the Supreme Court is the "wrong audience" to decide what rules govern attorney conduct.[160] Thus, Blackmun left ethical questions to the "differing approaches" of the states,[161] and reserves the constitutional question of a criminal defendant's sixth amendment right for the Court.[162]

Having delegated the issues to their proper place, Blackmun pointed out what he sees as an inconsistency in the opinion of the Court. When applying the *Strickland* standard, he believed that the Court must first determine whether counsel's performance prejudiced the right of the defendant to a fair trial before determining whether counsel's performance was unethical.[163] The reasoning supporting this approach to the issue is twofold: first, it may be easier,[164] and second, and most important, "it avoids unnecessary federal interference in a State's regulation of its bar."[165] Blackmun's interpretation of the *Strickland* standard appeals to traditional notions of federalism.

In contrast, Blackmun believed that the Court erred by first determining "the perimeters of [the] range of reasonable professional assistance."[166] Blackmun's concern is that state and federal courts will consider the discussion of the standards of professional responsibility an implicit adoption by the Supreme Court.[167] He felt that the discussion of the professional standards was an unnecessary infringement of state authority which could have been avoided by resolving the federal issue of sixth amendment rights.

Should the precise issue of attorney ethics ever come before Justice Blackmun, he left clues on how he would probably approach it. In his concurring opinion, he clearly echoed several principles of the majority opinion. "All perjured relevant testimony is at war with justice . . . it tends to defeat the sole ultimate objective of a trial."[168] Further, the privilege every criminal defendant has to testify in his own defense " 'cannot be construed to include the right to commit perjury.' "[169]

160. *Id.* at 1006.
161. *Id.*
162. *Id.*
163. *Id.* at 1003.
164. *Id.* at 1003 (citing Strickland v. Washington, 466 U.S. at 697).
165. *Id.* at 1006.
166. *Id.* at 1003.
167. *Id.* at 1006.
168. *Id.* at 1004.
169. *Id.* (citing Harris v. New York, 401 U.S. at 225).

These two statements strongly suggest that Justice Blackmun belongs in the camp of the Truth Seekers, and when squarely confronted with the issue of whether the attorney's ethical obligation to the court is superior to the attorney's ethical obligation to preserve client confidences, he would side with the former.

Finally, assume for the moment that Justice Blackmun's concurring opinion *is* the opinion of the Court. Although he never discussed the professional standards of conduct and is critical of interfering with a "[s]tate's regulation of its bar,"[170] he did rule out that possibility altogether. In fact, by holding that Robinson's representation did not violate his client's constitutional rights to assistance of counsel,[171] it is arguable that he and all the Justices who joined his opinion, with the exception of Justice Brennan, tacitly adopted the standards of professional responsibility, at least as guidelines. Robinson modeled his response to his client's proposal of perjury after the *Model Rules*.[172] After reading Blackmun's opinion, a practicing attorney when faced with a client intending to commit perjury would be forced to follow Robinson's example to protect his ethical obligations while preserving his client's constitutional rights. In short, Blackmun's concurring opinion stands as a beacon to federalism while it tacitly says as much as the Court's[173] opinion.

Justice Blackmun was content with disposing of the issue in *Whiteside* by resolving the federal question and putting the underlying issues of attorney ethics off for another day. By restricting his opinion, he missed an important opportunity to resolve competing issues which have clearly troubled many courts.

Justice Stevens, in his own concurring opinion, stated that "because I do not understand [Justice Blackmun] to imply any adverse criticism of this lawyer's representation," he therefore fell in line with Justice Blackmun. Every lawyer will follow Robinson's model and point to Justice Steven's language, "it is now pellucidly clear that the client suffered no 'legally cognizable prejudice.' "[174]

Although Justice Brennan joins Justice Blackmun's concurring opinion, he carefully qualified his position in his concurring opinion. Brennan expressly stated that he did not tacitly adopt Robinson's con-

170. *Id.* at 1006.

171. *Id.* at 1006-07.

172. MODEL RULES, *supra* note 7, at Rule 3.3 comment (1983). "[T]he lawyer should seek to persuade the client to refrain from perjurious testimony . . . ." *Id.*

173. *Nix*, 106 S. Ct. at 1007.

174. *Id.*

duct as a role model. "[L]et there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law."[175] Brennan had clearly reserved his judgment on ethical conduct for another day. An attorney reading Justice Brennan's opinion on the matter, as it stands, would be left with a conclusion without any guidelines or rationale supporting the conclusion.

The *Strickland* standard presents a "chicken or the egg" type of choice. As Justice Blackmun pointed out in his concurring opinion, the Court applies the *Strickland* standard with an eye toward first determining if Robinson's representation was prejudicial. Does the Court first determine whether the defendant was denied a fair trial, or does the Court have to first decide if the attorney's representation was prejudicial to make an intelligent decision on whether the defendant was denied a fair trial? Chief Justice Burger, writing for the Court, apparently believed the latter was a more logical choice. "We must determine whether . . . Robinson's conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment."[176] Under *Strickland*, the wide range of professional responses depends on "[p]revailing norms of practice as reflected in American Bar Association Standards and the like . . . ."[177] The Court was cautious in *Strickland* and again in *Nix v. Whiteside*, to point out there are no mechanical rules and that the professional standards of conduct serve merely as guidelines.[178] Moreover, the Court's opinion expressly stated it "must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority . . . ."[179] With this qualification, the Court clearly stated the professional standards of conduct were not being constitutionalized and avoids infringing on state sovereignty. The court was not required to close its eyes to experience behind the professional standards of conduct.

To the chagrin of the Adversaries, the Court strongly supported the arguments of the Truth Seekers and resolved most of the competing ethical obligations toward that end. The premise of the Court's argument

175. *Id.* at 1000.
176. *Id.* at 994.
177. *Id.* at 994 (citing *Strickland*, 466 U.S. at 688).
178. *Id.* at 994.
179. *Id.*

was that the duty of the defense attorney to advocate his client's cause is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."[180] Assisting a client in presenting false evidence or otherwise violating the law has not and will not be condoned by the Court. To support the decision, the Court cited to the first Canons of Professional Ethics,[181] and the sections of the *Model Code*,[182] and the *Model Rules*[183] discussed above. The Court also noted the shift in the rules toward favoring disclosure of client perjury.[184] The Supreme Court has unequivocally stated that an attorney faced with a criminal defendant *intending* to commit perjury has a superior duty toward the court that requires disclosure.[185]

The Court then addressed how such disclosure affects the criminal defendant's sixth amendment constitutional rights.[186] This part of the Court's opinion responds to the Adversaries' contention that an attorney, in an adversarial system, must maintain all privileged information to protect the rights of his client. The Court again acknowledged the right of a defendant to testify in his own behalf,[187] but reiterated that this right does not include the right to testify falsely.[188] Thus, when an attorney threatens to disclose intended perjury and withdraw from the case, thereby giving his client a choice between no representation and truthful testimony, the attorney does not impermissibly impede the client's right to testify.[189] Likewise, the Court said that the sixth amendment right to assistance of counsel does not include the right to have counsel "cooperate with planned perjury."[190] A lawyer doing so would run the risk of prosecution for subornation of perjury and suspension or disbarment.[191] An attorney refusing to participate in the presentation of false testimony would not violate his client's sixth amendment right.[192] By deciding that a criminal defendant does not have a right to perjure himself nor a right to counsel who would cooperate with planned perjury, the Court refuted

180. *Id.*
181. *Id.* at 994-95.
182. *Id.* at 995-96.
183. *Id.*
184. *Id.* at 966 n.6.
185. *Id.* at 995-96.
186. *Id.* at 993, 997-99.
187. *Id.* at 993.
188. *Id.* at 998.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

the argument of the Adversaries that disclosure would jeopardize a criminal defendant's constitutional rights.

The decision of the Supreme Court in *Nix v. Whiteside* directly answered the question of whether Robinson's conduct violated his criminal defendant's sixth amendment and due process rights. The Court's opinion also appeared to resolve many of the dilemmas an attorney faces when a client *intends* to present false testimony. The facts of the case, however, did not warrant the Court's review of many tougher issues which come up from time to time in client perjury cases. The *Nix* decision can even be classified as one of the easier client perjury scenarios, because the client did not perjure himself on the stand and the case did not cover the extremely controversial issue of attorney withdrawal. Robinson merely threatened his client with withdrawal from the case.[193] The Supreme Court has yet to be confronted with the worst case scenario in which the attorney requests withdrawal because the indigent defendant, over his attorney's advice, gave false testimony but the judge denied the request because withdrawal would hamper the defendant's case.[194] In such a case, the attorney and the defendant would make strange partners in a strained fiduciary relationship. The Court understated the complexity by saying, "[w]ithdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy."[195]

V. CONCLUSION

In *Nix v. Whiteside,* the Supreme Court clearly stated that a criminal defendant does not have a right to testify falsely and that an attorney must disclose intended client perjury in criminal cases. Because the criminal defendant does not have a right to testify falsely, disclosure of intended perjury will not violate the defendant's sixth amendment and due process rights. Moreover, accepting that a criminal defendant does not have a right to testify falsely, the Adversaries cannot claim that confidentiality will protect the rights of a criminal defendant. The Supreme Court's strong statements that a trial is a truth-seeking process suggest that the failure to disclose intended client perjury is a violation of present American concepts of due process. The opinion does fall in line with the majority of cases and the trend in professional ethics. While the Court

193. MODEL RULES, *supra* note 7, at Rule 3.3 comment.
194. *Id.*
195. *Nix*, 106 S. Ct. at 996.

considered the trial a truth-seeking process, the Court limited its decision to the issue of intended client perjury. Scholars of legal ethics at least now have some insight as to how the Court may decide more complex scenarios. But for now, the dilemma of intended client perjury has been resolved in favor of the Truth Seekers. No doubt there will be a great outcry from the Adversaries in the future.

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