Getting Honest About Client Perjury

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INTRODUCTION

Chief Justice Warren Burger and two other federal judges initiated disbarment proceedings against me in 1966. The charge was that, in a lecture to a group of

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1. The letter from the grievance committee initiating the proceedings referred to communications to the committee from "[s]everal judges." Letter from Ralph A. Curtin, Secretary to the U.S. District Court for the District of Columbia Committee on Admissions and Grievance, to author (Jan. 12, 1966) (on file with author). The judges proved to be Warren Burger, who, at the time, was a judge in the U.S. Court of Appeals for the D.C.
lawyers, I had expressed opinions that "appear to be in conflict with the Canons of Professional Ethics of the American Bar Association." The offensive opinions related to the criminal defense lawyer's conflicting ethical obligations in dealing with client perjury, based on requirements in the Canons of Professional Ethics.  

While the disbarment proceedings were pending, the lecture became an article: *The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions.* After four months of hearings and deliberations, the charges were dismissed. As shown below, however, the controversy continues four decades later, principally because of serious misunderstandings about the constitutional and policy issues involved.

Part I of this article relates the beginning of the controversy over client perjury in 1966. The discussion sets out the trilemma created by three ethical obligations that are imposed upon the criminal defense lawyer. The first ethical obligation is that the lawyer learn everything possible about a client's case. The second obligation is that the lawyer keep knowledge about the client's case confidential except to advance the client's interests. The third obligation is that the lawyer reveal the client's confidential information to the court if doing so should become necessary to expose what the lawyer knows to be perjurious testimony by the client.

In a lecture to a group of lawyers in a Criminal Trial Institute, and in a subsequent article, I favored the view that the lawyer who knows that the client intends to lie on the witness stand should make good faith efforts to dissuade the client from committing the perjury, but, if unsuccessful in those efforts, the lawyer should maintain confidentiality and should present the client's testimony...
at trial in the ordinary way.

Part II of this article explains that the view that I expressed in the lecture and in the article reflected the traditional resolution of the perjury trilemma by the American bar. Part II(A) notes that the ABA Canons of Professional Ethics (1908) imposed conflicting obligations of client confidentiality and of candor to the court.\(^7\) Resolving the conflict in formal opinions, the American Bar Association Standing Committee on Ethics and Professional Responsibility affirmed that a lawyer's duty to preserve a client's confidences takes precedence over candor to the court.\(^8\)

Part II(B) then discusses the ABA Model Code of Professional Responsibility (1969), which appeared to reverse the bar's traditional position by requiring a lawyer to reveal client fraud to the court.\(^9\) However, the ABA House of Delegates promptly approved the explanation that the obligation to reveal client perjury did not relate to defense counsel in criminal cases.\(^10\) Shortly thereafter, the Model Code was amended and interpreted in such a way as to maintain the traditional resolution of the conflicting obligations.\(^11\) Indeed, the ABA Committee on Professional Ethics declared that to require a lawyer to reveal client confidences to a court, even to rectify client perjury, would be "unthinkable."\(^12\)

Part II(C) then shows how a similar pattern has been followed under the ABA Model Rules of Professional Conduct (1983). Again, the rules appear to reject the traditional view by expressly requiring the lawyer to reveal client perjury to the court.\(^13\) However, the apparent rejection of the traditional view in Model Rule 3.3 has been rendered virtually meaningless because the disclosure obligation applies only if the lawyer "knows" that the client's testimony is perjurious.\(^14\) By giving the "knowing" requirement a highly restrictive meaning, the ABA and the courts have permitted lawyers to avoid concluding that a client is lying, despite the fact that the client has told the lawyer inconsistent versions of the truth, and despite the fact that the client's testimony is far-fetched or preposterous, unsupported by other evidence, and dramatically contradicted by credible evidence.

Thus, the bar and the courts have effectively maintained the practical result of the traditional view of the perjury trilemma. By disingenuously manipulating the meaning of "knowing," they have enabled lawyers to preserve client confidences

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7. 1908 CANONS 22 ("Candor and Fairness"); 1908 CANONS 15 ("How Far a Lawyer May Go in Supporting a Client's Cause"); 1908 CANONS 37 ("Confidences of a Client").
12. Id.
14. MODEL RULES R. 3.3(a)(3); MODEL RULES R. 3.3 cmt. [10]-[11].
and to continue to present clients' false testimony to courts in the ordinary manner.

Part III notes, however, that there are nevertheless some cases in which lawyers are taking seriously the apparent requirement to disclose client perjury. A survey conducted by computer and interviews, plus an extensive informal review over a period of four decades, indicate that almost all of those cases involve clients who are forced by poverty to rely upon court-appointed lawyers. Moreover, most of those clients appear also to be members of minority groups. Thus, there is evidence of a de facto denial of equal protection based in significant part on economic class and ethnicity.

Because of those cases, Part IV undertakes to show that when lawyers reveal client confidences because they feel compelled by Rule 3.3 to do so, their conduct violates the Fifth and Sixth Amendments to the Constitution. This is an issue that no court has yet ruled upon. However, analogous authorities strongly support the conclusion that a lawyer violates the Constitution by deliberately eliciting unwarned admissions from a client and then revealing those admissions to a court.

The Supreme Court has held that the Sixth Amendment forbids an agent of the state to reveal at trial admissions that have been elicited from a defendant who has not first been advised by his lawyer about his privilege against self-incrimination. Nevertheless, ethical rules require the lawyer to deliberately elicit incriminating information from the client without warning the client of the consequences in advance. In addition, the rules require the lawyer to reveal the client's incriminating confidences at trial if the client should testify falsely. Moreover, the lawyer acts as an officer of the court who is subject to state sanctions, including loss of a state-issued license to practice law, for failing to comply with the state's ethical requirements.

Ironically, therefore, the Sixth Amendment guarantees the defendant the right to have counsel advise him about his Fifth Amendment privilege before the client incriminates himself to a third-party agent of the state. However, there is no one to advise the defendant about his Fifth Amendment privilege before he is induced by his lawyer to incriminate himself. Accordingly, when a lawyer reveals at trial the incriminating client information that the lawyer has deliberately elicited from the client, the lawyer violates the client's Fifth and Sixth Amendment rights.

I. THE BEGINNING OF THE CLIENT PERJURY CONTROVERSY

The question of how to deal with client perjury arose in the 1960's in informal discussions among a small group of young criminal defense lawyers in Washington, D.C. These lawyers got together from time to time to discuss tactical problems like how to pick a jury or whether to defer an opening statement until
after the prosecution’s case-in-chief. One day, a member of the group said, with considerable embarrassment, “My client is going to testify tomorrow, and he’s going to lie, and I don’t know what I’m supposed to do about it.” To our surprise, we found that we all shared what we each considered to be a personal guilty secret. That is, each of us believed that he or she was unique in facing that and other serious ethical problems, and each assumed that he or she must have been doing something wrong or it would not have been happening. Certainly, such issues had never been recognized, much less discussed, either in our law school classes or in any professional conferences.

As we explored the issue of client perjury, we found that the American Bar Association’s Canons of Professional Ethics were internally contradictory. A lawyer was required to “endeavor to obtain full knowledge of his client’s cause before advising him.” As explained in an early ABA opinion: “[C]ounsel cannot properly perform their duties without knowing the truth.” In order to encourage clients to be candid with their lawyers, therefore, the Canons required lawyers to preserve their clients’ confidences. Nevertheless, the Canons also required lawyers to be candid with the court. Thus, the trilemma: to know everything possible, and to keep it in confidence, but to divulge it to the court if candor to the court required it.

After the Supreme Court’s decision in *Gideon v. Wainwright*, holding that a criminal defendant facing imprisonment is constitutionally entitled to legal representation at trial, there was considerable concern about how enough lawyers would be found to handle the high number of cases. Accordingly, I obtained a grant to establish a Criminal Trial Institute, in which practicing lawyers who were not involved in criminal defense would be trained in how to represent a criminal defendant.

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

The lecture was reported the next day in the Washington Post and, the day after that, the United States District Court Committee on Professional Admissions and Grievances sent me the letter saying that I was subject to disbarment proceedings because of the opinions that I had expressed in the lecture. After four months, which included a hearing and considerable public controversy, the charges were dropped.

One of the best things to come out of the episode was a letter to the Washington Post from Professor Anthony Amsterdam, which said in part:

Professor Freedman's views . . . were probably right legal judgments but, supposing for a moment that they were wrong, their wrongness hardly makes Professor Freedman censurable. If disbarment were the fate of every lawyer or judge in the District of Columbia who made a wrong legal judgment—or even several grossly wrong legal judgments—we would have very few lawyers left, and no judges at all.

Professor Amsterdam also commented to Time Magazine that the "vaporous platitudes called canons of ethics have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room."

Ironically, the controversy over the lecture and the article stimulated my interest and involvement in lawyers' ethics, a subject which, at that time, was not

24. Standards for Criminal Justice, The Defense Function, Standard 4-3.2(b) (Am. Bar Ass'n 1993). See also Standards for Criminal Justice, The Defense Function, Standard 3.2, cmt. (Am Bar Ass'n 1971) (warning that advising the client at the outset not to admit anything that might handicap the lawyer's freedom in calling witnesses or in otherwise making a defense is "most egregious" and is advocated only by "unscrupulous" lawyers); Standards for Criminal Justice, The Defense Function, Standard 3.2, cmt. (Am Bar Ass'n 1993) (describing such conduct as a "flagrant" impropriety).
even recognized as an acceptable "field of law" by the American Bar Association.27

II. THE ABA'S SOLUTIONS TO THE PERJURY TRILEMMA

A. THE CANONS OF PROFESSIONAL ETHICS (1908-1969) – PROTECTING CLIENTS' CONFI DENCES GIVEN PRIMACY OVER CANDOR TO THE COURT

At the time of the 1966 lecture and article, there was significant support for the resolution that I favored. For example, in its Formal Opinion 268 (1945), the ABA Standing Committee on Ethics and Professional Responsibility recognized the conflict within the Canons of Professional Ethics regarding client perjury. Resolving the conflict in favor of confidentiality, the committee stated: "While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court [Canon 22], this duty does not transcend that to preserve the client's confidences [Canon 37]."

Eight years later, Formal Opinion 287 (1953) dealt with two situations. In one a lawyer who had obtained a divorce for a client learned from the client that the client had committed perjury in the divorce proceedings. In the other, a judge was about to impose sentence upon the client based upon misinformation that the client had no previous criminal record, while the lawyer knew from the client that he did have a criminal record. The Committee determined that in both those cases, the lawyer’s obligation was to urge the client to disclose the truth, but to remain silent if the client did not do so.

Again, the Committee recognized a conflict between the duty to preserve the client’s confidences,28 and the duty to reveal perjury.29 In addition, the Committee acknowledged that the attorney is an "officer of the court." The Committee explained the question-begging nature of that phrase, however, in the following way:

We yield to none in our insistence on the lawyer’s loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.30

27. Eleven years later, in 1977, I succeeded in persuading a reluctant ABA Standing Committee on Law Lists that legal ethics and professional responsibility should be recognized as an acceptable "field of law." Thus, lawyers' ethics joined 155 previously recognized fields of law, including cemetery law and drainage and levee law. See Monroe Freedman, Crusading for Legal Ethics, LEGAL TIMES, July 10, 1995, at 25.
28. 1908 CANONS 37.
29. 1908 CANONS 22.
30. The Committee distinguished communications received from the client, and those received from other sources, holding that only the former would override a duty to reveal the truth. William B. Jones, later Chief Judge in the United States District Court for the District of Columbia, dissented on that point, maintaining that
That is, precisely because the lawyer is an officer of the court, he is bound by the court's own principles of justice to maintain his client's confidences, even in the face of the client's perjury.

B. THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969-1983) - DISCLOSING CLIENT PERJURY CONTINUES TO BE "UNTHINKABLE"

The Model Code, as originally promulgated in 1969, appeared to revive the ambiguities regarding confidentiality that had existed under the Canons prior to Formal Opinions 268 and 287. The Model Code recognizes that full knowledge of the facts by the lawyer is "essential to proper representation," and that such knowledge is facilitated by the "observance of the ethical obligation of the lawyer to hold inviolate the confidences and secrets of his client." Nevertheless, the original version of DR 7-102(B)(1) of the Model Code also appeared to require the lawyer to reveal a fraud by the client upon a tribunal or a third party, just as some provisions of the Canons had appeared to do prior to Opinions 268 and 287.

DR 7-102(B)(1) had two operative clauses in the event of client fraud. The first required that the lawyer "promptly call upon the client to rectify the [fraud]." The second clause—the "and if" clause—provided: "and if his client refuses or is unable to do so, [the lawyer] shall reveal the fraud to the affected person or tribunal." That appeared to reverse the policy under the 1908 Canons, and to make candor to the court superior to client confidentiality in both criminal and civil cases.

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

Then, in 1974, the ABA added a new clause, following the "and if" clause of DR 7-102(B)(1). As a result of that amendment, the attorney was required to reveal the client's fraud on a court or a third party, "except when the information [was] protected as a privileged communication."

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31. MODEL CODE EC 4-1.
32. 1908 CANONS 22 ("Candor and fairness"); 1908 CANONS 15 ("How far a lawyer may go in supporting a client's cause").
33. MODEL CODE DR 7-102(B)(1).
34. At the same time, Model Code EC 8-5 said that the lawyer should reveal any knowledge of "[f]raudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal...unless constrained by his obligation to preserve the confidences and secrets of his client." MODEL CODE EC 8-5 (emphasis added).
35. STANDARDS RELATING TO THE PROSECUTION AND DEFENSE FUNCTION, Supplement 18 (Am. Bar Ass'n 1971).
On a plain-meaning reading, the phrase "privileged communication" appeared to mean only "confidences," a term of art that referred only to information that is protected by the lawyer-client evidentiary privilege.\(^{36}\) If construed broadly, however, the phrase "privileged communication" could have included "secrets." The definition of "secrets" included all information gained in the representation, and went so far as to protect information that would be embarrassing to the client.\(^{37}\) Read that way, the "except" clause (forbidding disclosure) would have swallowed up the "and if" clause (which appeared to require disclosure). That is, the ABA's amendment to DR 7-102(B)(1) could have been understood to nullify the clause that says, "and if his client refuses or is unable to do so, [the lawyer] shall reveal the fraud to the affected person or tribunal." Interpreted in such a way, DR 7-102(B)(1) would have completely restored the primacy of confidentiality over candor to the court.

That is what happened. In Formal Opinion 341 (1975), the ABA Committee on Professional Ethics considered whether the phrase "privileged communication" in the new "except" clause referred only to clients' "confidences" or, more broadly, to clients' "secrets" as well. The committee determined that the "except" clause includes secrets, which means that a lawyer is forbidden to reveal a client's fraud on a tribunal or third party if doing so would be "embarrassing" to the client.\(^{38}\) As Professor Geoffrey Hazard has wryly remarked, "fraud is always embarrassing," and the ABA's amendment to DR 7-102(B)(1) therefore "eviscerated the duty to report fraud."\(^{39}\)

Opinion 341 condemned the apparent requirement of unamended DR 7-102(B)(1), that a lawyer disclose client fraud on the court or third parties, as "unthinkable" and dismissed it as the result of an oversight in drafting. Instead, Opinion 341 construed DR 7-102(B)(1) to "reinstate the essence of Opinion 287," and held that client confidentiality is "so important that it should take precedence in all but the most serious cases." Acknowledging that "the conflicting duties to reveal fraud and to preserve confidences [had] existed side-by-side for some time," Opinion 341 added that "it is clear that there has long been an accommodation in favor of preserving confidences either through practice or interpretation." On the basis of "tradition . . . backed by substantial policy considerations," therefore, Opinion 341 reaffirmed the traditional model in which client confidentiality takes precedence over candor to the court.

\(^{36}\) MODEL CODE DR 4-101(a) distinguished between "confidences" and "secrets." "Confidences" referred narrowly to information protected by the attorney-client privilege, that is, information that cannot be used as evidence in a judicial proceeding. The elements of the privilege vary somewhat from state to state, but basically they require that the information be in a communication between a client and lawyer that is made in confidence for the purpose of obtaining or providing legal assistance.

\(^{37}\) MODEL CODE DR 4-101(a).

\(^{38}\) MODEL CODE DR 4-101(a).

C. THE MODEL RULES OF PROFESSIONAL CONDUCT (1983) – THE APPARENT CHANGE IN POLICY IN RULE 3.3 HAS BEEN VIRTUALLY NULLIFIED BY INTERPRETATION OF “KNOWING”

The ABA’s Model Rules of Professional Conduct appear to reject those substantial policy considerations and to reverse the long-standing tradition of upholding client confidentiality in cases of client perjury. If so, it would indeed be “a major policy change” from earlier ethical obligations regarding client perjury. The change, however, is more apparent than real.

Under Model Rule 3.3(a)(3), a lawyer is forbidden to offer evidence that the lawyer knows to be false. Also, under the same provision, if the lawyer offers material evidence that the lawyer later learns to be false, the lawyer is required to “take reasonable remedial measures.” As explained in the comment to Rule 3.3, “remedial measures” include the obligation to inform the court of the client’s perjury.

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

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

The Restatement takes its definition of “knowing” from the Model Rules. Using the phrases “actual knowledge” and “firm factual basis,” the Restatement limits “firm factual basis” to facts actually “known to the lawyer” through personal observation and statements by the client that the testimony or other

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41. See Model Rules R. 3.3, Comment on Remedial Measures:

If perjured testimony or false evidence has been offered, the advocates’s proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court . . . .

42. Model Rules R. 3.3(a).
43. The way in which standards of “knowing” have been manipulated in rules of lawyers’ ethics was first recognized and analyzed in Monroe H. Freedman, Lawyers’ Ethics in an Adversary System (1975) (“What Does a Lawyer Really ‘Know’: The Epistemology of Legal Ethics”).
Both the Model Rules and the Restatement say also that "knowledge may be inferred from circumstances." However, that inference can be drawn only if the lawyer ignores what is "plainly apparent" and engages in "conscious ignorance." Moreover, despite the reference to "conscious ignorance," the lawyer may avoid "knowing" information that could be discovered through reasonable inquiry.

In *Nix v. Whiteside* the Supreme Court held that the Sixth Amendment right to effective assistance of counsel was not violated when a lawyer successfully dissuaded his client from committing perjury. Whiteside had told his lawyer shortly before trial that he had seen "something metallic" in the victim's hand before Whiteside had stabbed the victim to death. When the lawyer pointed out that this was not consistent with previous accounts, and expressed disbelief, Whiteside said, "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." In response, the lawyer told Whiteside that testimony about "something metallic" would be perjury, and that if Whiteside gave that testimony, the lawyer would report the perjury to the court. As a result, the client omitted that reference from his testimony.

The decision in *Nix v. Whiteside* is frequently misunderstood to have settled all constitutional questions regarding a lawyer's obligations relating to client perjury. In fact, *Nix* was limited to a single important constitutional issue. Whiteside's unappealing contention was that in dissuading the perjury, his lawyer violated Whiteside's right to effective assistance of counsel and prejudiced his case. The Court, therefore, held only that when defense counsel dissuaded Whiteside from giving perjurious testimony by saying he would reveal the perjury to the court, the lawyer's conduct "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment." However, as the Court noted: "Robinson divulged no client communications until he was compelled to do so in response to Whiteside's post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury."

Professors Geoffrey Hazard and William Hodes also emphasize that Robinson “merely threatened” to reveal Whiteside's perjury, but “did not blow the

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45. *Id.*; See also *id.* § 94 cmt. g.
46. MODEL RULES R. 1.0(f).
47. RESTATEMENT, *supra* note 44, at Reporter's Note cmt. c.
48. *Id.*
50. *Id.* at 161.
51. *Id.* at 166.
52. *Id.* at 166.

One commentator described the defense lawyer in *Nix* as having gone "bonkers" in his "brutal" overreaction to his client's statements. Another characterized the notion that a criminal defense lawyer might be required to divulge a client's perjury as "startling," "unworkable," and out-of-touch with the dynamics of the lawyer-client relationship. A third commentator on the ABA/ALI videotape said that a lawyer has an obligation to reveal client perjury only if the lawyer has "absolutely no doubt whatsoever" that the client will commit a "serious" fraud on the court. He added that the false statement in *Nix* about having seen "something metallic" fell short of serious fraud.

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

The Eighth Circuit has similarly insisted upon a direct client admission of perjury to establish "knowing" or "actual knowledge." The court held that an attorney must use "extreme caution" in deciding that a client intends to commit perjury, and that nothing but "a clear expression of intent" will justify the attorney's disclosure to the judge. The Second Circuit has also adopted a
“clearly established” or “actual knowledge” standard. In doing so, the court approved of a definition providing that “[i]nformation is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.” The court observed that under any standard less than actual knowledge, courts would be “inundated” with lawyers’ reports of perjury.

At another point in its opinion, the Second Circuit went further, indicating that an admission alone will not be sufficient to justify disclosure by a lawyer. After explaining that knowledge by the lawyer means “actual knowledge,” the court went on to say that the lawyer should disclose “only that information which [1] the attorney reasonably knows to be a fact and which, [2] when combined with other facts in his knowledge, would [3] clearly establish the existence of a fraud on the tribunal.” Thus, even the client’s admission might not suffice unless it is corroborated by “other facts” that “clearly establish” the perjury.

The severe restriction of what a lawyer “knows” for purposes of Model Rule 3.3 was recently summarized by the Wisconsin Supreme Court in State v. McDowell. Absent “the most extraordinary circumstances,” the court held, a defense lawyer’s knowledge must be based on “the client’s expressed admission of intent to testify untruthfully,” and this intent must be made “unambiguously and directly . . . to the attorney.”

Nix itself forecast this development. Nix’s majority opinion characterized the case as one in which the defendant’s “intent to commit perjury [was] communicated to counsel.” Moreover, four concurring justices cautioned that except in “the rarest of cases” attorneys who “adopt ‘the role of the judge or jury to determine the facts’ . . . pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.” Also, Justice Stevens observed that:

A lawyer’s certainty that a change in his client’s recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked.

That is, even if the client tells the lawyer inconsistent stories, the lawyer does not “know” that the client is lying.

61. Id. at 62 (emphasis added).
62. Id. at 63.
63. Id.
64. State v. McDowell, 681 N.W.2d 500 (Wis. 2004).
65. Id. at 514.
67. Id. at 189 (quoting United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977)).
68. Id. at 190-91 (Stevens, J., concurring).
Similarly, the Fourth Circuit has held that counsel must assist in presenting the defendant's testimony despite the lawyer's strong belief that the client is going to lie. This is so even though the lawyer's belief is based on the fact that the client's story appears "[f]arfetched" and is "dramatically outweighed by other evidence."69 The court expressly relied upon the concurrence in Nix that "[e]xcept in the rarest of cases, attorneys who adopt the role of the judge or jury to determine the facts pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment."70

Moreover, the two leading advocates of requiring lawyers to reveal client perjury have rethought their policy justifications and have repudiated their earlier conclusions. One is Marvin Frankel, who wrote a series of articles71 and a book72 proposing far-reaching changes in the ethic of confidentiality. Then, as a member of the Kutak Commission, which drafted the Model Rules, Frankel was the principal proponent of a broad disclosure rule. Revisiting those views several years later, however, Frankel wrote, "The more I see of life and the practice of law, the more justifiable I find the stance that we really ought not to be called upon to 'know' when someone's story is false."73

The other former advocate of requiring lawyers to reveal client perjury is Professor Geoffrey C. Hazard, Jr., the Reporter who wrote and defended Model Rule 3.3.74 Reconsidering the trilemma more recently, however, Hazard has recognized that "[s]tatements cast in terms of 'complete loyalty' and 'complete candor' must be recognized as hortatory, hypocrisy, or simply nonsense."75 Further, based on his wide professional associations, Hazard has found that "many judges show strong sympathy for an advocate whose client wants to commit perjury in a criminal case."76 For his own part, Hazard has concluded that "requiring a criminal defense lawyer to 'blow the whistle' on client perjury is futile or counterproductive."77

A federal judge recently confirmed Hazard's observation, writing that "[a]ll judges" face "many occasions" when they are "sure" a defendant or a witness in a

70. Id. (citing Nix v. Whiteside, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring)).
76. Id. at 1052.
77. Id. at 1060.
criminal case has lied on the stand.78 Making no distinction between the defendant and other witnesses, the judge added that there are times when a witness' testimony is so "preposterous" that the judges "wonder how lawyers can permit their clients or other witnesses to testify to the alleged facts, or to make arguments based on the perjured testimony."79 Nevertheless, she concluded, "[i]t would be very difficult, and involve complicated and perhaps impermissible intrusions into the attorney-client privilege . . . to attempt to make a factual finding about what the lawyer believed."80

On the basis of these authorities, a defense lawyer might well refrain from concluding that her client's testimony is perjurious, despite the fact that the client has told the lawyer inconsistent versions of the truth, and despite the fact that the client's testimony is preposterous, unsupported by any other evidence, and contradicted by credible evidence.

In that event, if the lawyer's decision should later be questioned, the same standard of review would presumably be used in reviewing the lawyer's judgment as the Supreme Court uses to determine whether there has been ineffective assistance of counsel—that is, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."81 Thus, it is reasonably certain that a lawyer who chooses to honor her client's confidences will not be found to have violated Model Rule 3.3 by offering evidence that she "knows" to be false.

As a practical matter, therefore, the disingenuous use of the "knowing" standard produces the same result under Model Rule 3.3 as the traditional model that I favor. That is, the defense lawyer will present the client's testimony, true or false, in the ordinary way. The difference is that under the traditional view, the defense lawyer recognizes that frequently she does know the truth, uses that knowledge to make good faith efforts to dissuade the client from committing perjury, but, if she is unsuccessful, presents the client's testimony in the ordinary way. Under Model Rule 3.3, however, the ordinary practice is for the lawyer to indulge the notion that she does not "know" that the testimony is perjurious, and to present the client's perjury in the ordinary way. The end result, of course, is the same.82

79. Id.
80. Id.; see also Norman Lefstein, Client Perjury in Criminal Cases: Still in Search of an Answer, 1 GEO. J. LEGAL ETHICS 521, 536-37 (1988) ("[T]he defendant's right to testify cannot be denied by the unreviewed conclusion of counsel . . . . Thus, the defendant is entitled, at the least, to an "on-the-record judicial hearing.".
81. Nix v. Whiteside, 475 U.S. 157, 164 (1986) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)); see also text accompanying note 50. The conclusion seems justified that courts will apply the same strong presumption in both situations because in each of them the courts are in the position of second-guessing a decision made by a lawyer under the immediate and severe pressures of trial representation.
82. One difference between the two practices, of course, is that the lawyer who indulges the notion that she does not "know" that the client's testimony is perjurious is not going to make good faith efforts to dissuade the
A highly publicized illustration of Model Rule 3.3 in action is in the criminal cases relating to the Enron scandal, in which both Kenneth Lay and Jeffrey Skilling denied having committed any fraud or other wrongdoing. Although twelve strangers on each of the juries in those cases were able to conclude, beyond a reasonable doubt, that both defendants were testifying falsely, their own lawyers failed to reach that conclusion—and surely those lawyers will not be subjected to professional discipline for those failures. On the contrary, the defense lawyers were doing exactly what the ABA and the courts expect them to do—to advocate zealously on behalf of their clients without assuming the role of the judge and jury.  

In sum, in view of the traditional way in which the ABA has dealt with the issue of client perjury as well as the practical effect of Model Rule 3.3, it is wrong to characterize my position as "a fundamental change in the rules of criminal law and ethics." On the contrary, it is quite conventional in every respect except for the disingenuous promulgation and interpretation of Model Rule 3.3.

III. MODEL RULE 3.3 UNFAIRLY PREJUDICES DEFENDANTS WHO ARE POOR AND MEMBERS OF MINORITY GROUPS

One might conclude that the issue of client perjury no longer warrants discussion because, as a practical matter, virtually all authorities agree on the end result—that is, that the lawyer should present the client's perjury in the ordinary way.

Nevertheless, there remains a critical policy issue under Model Rule 3.3, because there are still some cases in which lawyers conclude that their clients are lying and then betray their clients' confidences. Unfortunately, those lawyers are almost always court-appointed attorneys representing indigent criminal defendants, most of whom are members of minority groups. This has produced a race- and class-based double standard, creating a de facto denial of equal

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83. The fact that lawyers are not disciplined for failing to determine that their clients have committed perjury, even when a jury has unanimously made that judgment beyond a reasonable doubt, indicates that the "actual knowledge" standard of the Model Rules is even more stringent than "beyond a reasonable doubt." See also the comment quoted, supra note 54, from the ABA/ALI videotape that a lawyer should reveal client perjury only if the lawyer has "absolutely no doubt whatsoever" that the client will commit a serious fraud on the court.

84. See supra Part II.B.


protection of the laws.  

That conclusion is based on two sources. The first is a survey conducted by Professor Jay Silver.  

The way in which indigent criminal defendants are prejudiced when their lawyers adopt the “remedial measures” of Model Rule 3.3 is illustrated in the New York case of People v. DePallo.  

There is a legal fiction that judges are not improperly influenced by being told incriminating information about the defendant by defense counsel. Occasionally,
however, the prejudicial effect is revealed. For example, here is how one judge justified an enhanced sentence on the basis of defense counsel’s prejudicial disclosures about her client:

How do I know that [you committed perjury]? It’s hardly presumptuous on my part when your own attorney had to come to me in camera and inform me that she didn’t want to stay on your case anymore as a matter of ethics because you perjured yourself and she knew you were perjuring yourself.94

Most judges, of course, know enough to refrain from making such admissions on the record.95

The third prejudicial thing that defense counsel did in DePallo was to require the defendant to testify in narrative form. This method for dealing with the trilemma first appeared in Section 7.7 of the 1971 version of the ABA Standards Relating to the Defense Function. Under the narrative solution, rather than examining the defendant in the normal question-and-answer way, the lawyer identifies the witness as the defendant, tells him to tell his story to the jury, and then turns his back on the defendant and sits down. (Sometimes this is referred to, oxymoronically, as “passive representation.”)96

Finally, the defense lawyer in DePallo complied with the ultimate requirement of the narrative method by omitting in closing argument any reference to what the lawyer had learned from the client to be false testimony.

This “remedial measure” of the narrative method is worse than revealing the information to the judge alone, because the defense lawyer, by distancing herself from the client’s testimony, and then by ignoring that testimony in closing...

95. But see Holmes v. United States, 370 F.2d 209, (D.C. Cir. 1966), in which an appellate judge expressly relied upon incriminating information that had been put into the record by the defendant’s own lawyer. In Holmes, a majority voted to remand the case to determine whether the defendant had been denied certain due process rights. However, the dissenting judge said:

Finding the Holmes’ testimony at variance from the opening statement made by his trial attorney, the latter in the absence of the jury addressed the court: “For purposes of the record, Your Honor, about half of what the defendant said on the stand was a complete surprise to me.” [Defense counsel] added that in the course of “numerous interviews” the appellant had “consistently told me” a different story .... From the foregoing, some idea can be gleaned as to why I do not join my colleagues in thinking there even possibly could have been “prejudice.”

370 F.2d at 212 (Danaher, J., dissenting) (emphasis added).
96. I originally argued that the narrative solution would never work, because prosecutors would object to the presentation of the defendant’s testimony in narrative form. MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 37 (1975). The objection is virtually always sustained, because it deprives the adversary of the opportunity to object when a question is asked, rather than moving to strike the testimony after the jury has already heard it. Of course, I was wrong. Prosecutors rarely object to a defense lawyer telling a defendant to testify in narrative, precisely because it helps to assure a conviction by prejudicing the defendant with the jury.
argument, effectively tells the jury that her client is guilty. Moreover, the narrative method provides dramatic material for television and movie treatment, making it public knowledge that a defendant who testifies in narrative is lying.

The narrative solution has never been approved by the ABA, which deleted section 7.7 from the Standards in 1979. Then, in 1983, a comment in the Model Rules expressly rejected it, explaining that the narrative "compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel." Even Chief Justice Burger, who had been the narrative solution’s principal supporter, noted its repudiation in Nix v. Whiteside. Nevertheless, the narrative solution still has its advocates, and it has been adopted as part of Rule 3.3 in Massachusetts and in the District of Columbia and in some court opinions.

A further problem with DePallo is that the communications to the judge were made without the defendant present, thereby denying him the opportunity to contradict his lawyer’s allegations. The court stated that the defendant had properly been excluded from the session in chambers, on the patently specious ground that defense counsel’s incriminating statements to the judge had been "simply procedural" and related only to "counsel’s professional ethical obligations"—as if the substance of the lawyer’s disclosure were not the defendant’s alleged admission of guilt. Moreover, the court presumed that the defendant could have had no “meaningful input” regarding the accusations against him by his lawyer.

In addition, there is no indication in DePallo that the defendant was ever put on

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97. See, e.g., People v. Gomez, 761 N.Y.S.2d 156 (App. Div. 1st Dept. 2003), where the defendant testified to an alibi, but his lawyer contradicted the defendant’s testimony by arguing an intoxication defense. The defendant’s inevitable conviction was upheld.
98. The popular television show The Practice (ABC television broadcast), has dramatized the narrative method in an episode involving client perjury.
101. See, e.g., Lefstein, supra note 80, at 525.
102. In the District of Columbia, the Court of Appeals adopted the narrative solution despite both the Jordan Committee—which drafted the District’s version of the Model Rules—and the D.C. Bar’s Board of Governors favoring “a rule similar to that advocated by Professor Freedman.” D.C. Bar Legal Ethics Comm., Op. 234.
103. See, e.g., People v. DePallo, 754 N.E.2d 751, 729 (N.Y. 2001); State v. McDowell, 681 N.W.2d 500 (Wis. 2004); People v. Horne, 2007 WL 1098684 (Cal. App. 6th Dist.) (relying on Standard 7.7 as having been "formerly prescribed" by the ABA [at *17], apparently without realizing that the 7.7 solution has never been prescribed by the ABA. See supra text accompanying note 54).
notice that his lawyer would omit his testimony in closing argument. If the
defendant had been told this critical information, he might have elected to
proceed pro se, rather than go forward with a “champion” who intended to omit
his defense in closing argument.\textsuperscript{106}

Despite the defense lawyer’s sabotage of his client’s case in \textit{DePallo}, the New
York Court of Appeals unanimously affirmed DePallo’s conviction, holding that
defense counsel’s multiple betrayals of his client throughout the trial had been
“professionally responsible and acceptable.”\textsuperscript{107} It is difficult to imagine this kind
of thing happening in a white-collar criminal case, or in any criminal case in
which the lawyer has been retained. However, that is the reality of how justice is
administered for indigent criminal defendants. As Professor Deborah Rhode has
said in a related context, “rich clients get richer while the poor get moral
oversight.”\textsuperscript{108}

\textbf{IV. Model Rule 3.3 Violates the Privilege Against
Self-Incrimination and the Right to Counsel}

An essential part of a defense lawyer’s job in providing effective assistance of
counsel is to advise the accused about the privilege against self-incrimination and
whether it should be invoked in a particular situation.\textsuperscript{109} The obvious reason is
that “[a] layman may not be aware of the precise scope, the nuances, and
boundaries of his Fifth Amendment privilege,” and the assertion of that right
therefore “often depends upon legal advice from someone who is trained and
skilled in the subject matter.”\textsuperscript{110} Thus, as reiterated by the Supreme Court, the
Fifth Amendment protects an accused from being made “the deluded instrument
of his own conviction.”\textsuperscript{111}

Accordingly, there is a crucial relationship between the Sixth Amendment right

Ironically, on the same page of the opinion in \textit{Nix}, the Court noted the repudiation of the narrative solution.
\textsuperscript{108} Deborah L. Rhode, \textit{Why the ABA Bothers: A Functional Perspective on Professional Codes}, 59 Tex. L.
\textsuperscript{109} “Our Constitution... strikes the balance in favor of the right of the accused to be advised by his lawyer
of his privilege against self-incrimination.” \textit{Escobedo v. Illinois}, 378 U.S. at 488 (citing Note, \textit{An Historical
Argument for the Right to Counsel During Police Interrogation}, 73 Yale L.J. 1000, 1048-51 (1964)).
Meyers}, 419 U.S. 449, 466 (1975)). As Justice Robert Jackson more pungently expressed it: “[A]ny lawyer
worth his salt will tell the suspect in no uncertain terms to make no statement to police under any
(1961)) (quoting \textit{William Hawkins, Pleas of the Crown} (8th ed. 1824)); see also \textit{Bram v. United States}, 168
States}, 526 U.S. 314, 325 (1999) (the defendant should not be enlisted as “an instrument in his or her own
condemnation.”).
to counsel and the Fifth Amendment privilege against self-incrimination. It is the lawyer's cautionary counseling of the client that gives meaningful effect to the privilege. Thus, the Sixth and Fifth Amendments work in tandem to forbid a lawyer from eliciting incriminating information from a client who has not been warned of the consequences and then revealing the elicited information to the court.

The way in which the right to counsel and the privilege against self-incrimination are inextricably interrelated was made clear in Massiah v. United States. In Massiah, the defendant was indicted, retained a lawyer, and was released on bail. While Massiah was free on bail, his friend and co-defendant, Colson, agreed to cooperate with the government. Colson allowed an agent to install a transmitter in his car, and then had a lengthy conversation with Massiah in the car while the agent listened in. In the course of that conversation, Massiah made several incriminating statements that were used against him at trial.

The Supreme Court held that Massiah's self-incriminating statements had to be suppressed, because they had been "deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help." The Court went on to hold that the Constitution must protect the defendant's right to counsel in that extrajudicial setting, because otherwise the defendant might be denied "effective representation by counsel at the only stage when legal aid and advice would help him." Accordingly, Massiah's Fifth and Sixth Amendment rights were jointly violated "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Moreover, the fact that the damaging testimony was not elicited from Massiah in a police station, but when he was free on bail, meant that Massiah was "more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." In short, the Supreme Court has recognized that a

112. The defendant's Sixth and Fifth Amendment "right . . . to be advised by his lawyer of his privilege against self-incrimination" was neither argued to the Court nor discussed in Nix v. Whiteside.
113. "Cases in this court, to say the least, have never placed a premium on ignorance of constitutional rights." Escobedo v. Illinois, 378 U.S. 478, 499 (1964) (White, J., dissenting).
115. Id. at 204 (quoting Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring)). Spano had involved a confession in a state court. Chief Justice Warren's opinion for the Court, requiring exclusion of the confession as involuntary, was based on the totality of the circumstances under the due process clause of the Fourteenth Amendment. Although Massiah was a federal prosecution, the holding applies as well to state prosecutions.
116. Massiah, 377 U.S. at 201 (quoting 360 U.S. at 326 (Douglas, J., concurring)).
117. Massiah, 377 U.S. at 206.
118. Id. (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting), rev'd, 377 U.S. 201). The present analysis does not rely on the Fourth Amendment "false friend" cases. However, the language of those cases is consistent with the Fifth and Sixth Amendment analysis. See, e.g., Hoffa v. United
pretended friend creates a more serious constitutional problem than a known agent of one's adversary. As the Court has said, "An open foe may prove a curse / But a pretended friend is worse." 119

Massiah was followed by United States v. Henry. 120 There, a government informer who had been placed in the cell with Henry established a relationship of trust and confidence with him. As a result, Henry revealed incriminating information to the informer. Chief Justice Burger wrote the opinion for the Court, vacating Henry's conviction because it had been based in part on the admissions elicited through a false relationship of trust and confidence.

The Court decided Henry under the Sixth Amendment right to counsel, but Henry's relevance to the Fifth Amendment aspect of client perjury is plain. The Chief Justice's statement of the issue, and the emphasis throughout the opinion, was on the "admission at trial of incriminating statements made by [the defendant] to his cellmate." 121 As Justice Powell expressed it, the government, through the cellmate, had engaged in "the functional equivalent of interrogation." 122

In addition, Justice Rehnquist, dissenting in Henry, linked the Fifth and Sixth Amendments together, noting that they reflect the Framers' intent to establish an accusatory rather than an inquisitorial system of justice." 123 Rehnquist added that "the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney," 124 and "[a]ny dealings that an accused may have with his attorney are of course confidential, and anything the accused says to his attorney is beyond the reach of the prosecution." 125

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States, 385 U.S. 293 (1966). When a pretended friend, who was acting as a government informant, obtained incriminatory statements from Hoffa in a conversation in Hoffa's hotel room, there was no violation of the Fourth Amendment because the risk that a friend will betray a confidence is "the kind of risk we necessarily assume whenever we speak." 385 U.S. at 303 (quoting Lopez v. United States, 373 U.S. 427, 465 (1963)). Hoffa was reaffirmed in United States v. White, 401 U.S. 745 (1971), which established that "a person confiding in another takes the risk that the confidence may be misplaced and that the confidant may memorize or record the statements and repeat them at trial." United States v. White, 405 F.2d 838, 846 (C.A. Ill. 1969).

When a client speaks to a lawyer, of course, he does not assume the risk inherent in ordinary conversation with a friend; rather, the client has a reasonable expectation that the lawyer will protect his confidences, and does not assume the risk either that the lawyer will reveal confidences without the client's consent or that there are exceptions to confidentiality that have not been explained to him. See, e.g., Model Rules R. 1.6, cmt. [2] ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."); Model Rules R. 1.4 ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

120. 447 U.S. 264 (1980).
121. Id. at 265 (emphasis added).
122. Id. at 277 (Powell, J., concurring).
123. Id. at 295 (Rehnquist, J., dissenting).
124. Id.
125. Id. 293 n.4.
Moreover, both the majority and dissenting Justices recognized that a statement can be "involuntary" for Sixth Amendment purposes if it has been "deliberately elicited" by a covert government agent in the absence of counsel. The exclusionary rule of Massiah, the Court said, is expressly designed to counter "deliberat[e] interference with an indicted suspect's right to counsel." The Court also held that because Henry had not known that his cellmate intended to relate his admissions to the government, "the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply," and Henry "cannot be held to have waived his right to the assistance of counsel." Again, therefore, the Supreme Court gave particular constitutional significance to admissions made to a pretended friend.

Henry also demonstrates that the future crime exception to the lawyer-client evidentiary privilege is not relevant to the present analysis of client perjury. The defendant's constitutional privilege against self-incrimination, safeguarded by his constitutional right to counsel, is not dependent on his lawyer-client evidentiary privilege, so exceptions to the evidentiary privilege are irrelevant. In Henry, the defendant had no lawyer-client privilege (or any other evidentiary privilege) with his cellmate. Nevertheless, the incriminating statements that the defendant had made to the cellmate were excluded under the Sixth Amendment because he was entitled to have his lawyer available to warn him when he was making the self-incriminating statements to his cellmate. Thus, what is important for constitutional purposes is not whether there is an evidentiary privilege regarding the lawyer-client communications, but whether unwarned admissions have been elicited from the defendant by an agent of the state who then uses those admissions against him in court.

Accordingly, even if the future crime exception to the lawyer-client privilege would apply to false testimony regarding the past crime which is the subject of the representation, that would not affect the present constitutional analysis of the Fifth and Sixth Amendments.

The recognition in United States v. Henry of the interrelationship between the Sixth and Fifth Amendments was again applied in Estelle v. Smith. In that case, a psychiatrist examined defendant Smith to determine his competence to stand trial. Subsequently, based on what he had learned in the competency examination, the psychiatrist testified in the penalty phase of the trial that Smith was a future danger to society.

126. See id. at 269 (Burger, C.J. for the Court), 281, 2192 (Blackmun, J., dissenting).
127. Id. at 282 n.6.
128. Id. at 273.
129. For further discussion, see FREEMAN & SMITH, supra note 4, at 176-177, 186-188.
130. But see id.
132. Id. at 459-60.
The trial judge had ordered the State's attorney to arrange the psychiatric examination regarding Smith's competence to stand trial, but apparently had neither ordered Smith to cooperate with the psychiatrist nor advised him that he did not have to do so. Also, defense counsel were not notified in advance that the examination would encompass the issue of future dangerousness, and so did not advise Smith about his Fifth Amendment privilege.

Again writing the opinion for the Court, Chief Justice Burger reversed, holding that the psychiatrist's testimony could not be used against the defendant in the sentencing phase because "the psychiatric examination on which [the psychiatrist] testified at the penalty phase proceeded in violation of [Smith's] Sixth Amendment right to the assistance of counsel." The Court also held that a waiver of the assistance of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege . . . ."

*Estelle v. Smith* is particularly important to the present analysis because the defense lawyer who elicits a client's incriminating information does not do so initially for purposes of prosecution. Similarly, the purpose of the psychiatrist's examination in *Estelle* was not initially prosecutorial. Rather, the trial judge, sua sponte, had ordered the psychiatric evaluation of Smith for the neutral purpose of determining his competency to stand trial. Indeed, as the Court recognized, the doctor's diagnosis might well have benefitted the defendant by helping him to escape the death penalty. Only at the sentencing hearing did the psychiatrist's "role change[,]" and only then did he become essentially "an agent of the state recounting unwarned statements made in a post-arrest custodial setting." Accordingly, the defendant's Fifth and Sixth Amendment rights had been violated, and Smith's sentence was vacated.

The Supreme Court recently reiterated the vitality of *Massiah* and *Henry* in *Fellers v. United States* even as it noted a difference between the Fifth and Sixth Amendment standards for exclusion of self-incriminatory statements. Under the Fifth Amendment alone, exclusion depends upon whether there is in-custody interrogation. However, "an accused is denied 'the basic protections' of the

133. See id. at 456-457.
134. Id. n.15. Indeed, it appears that defense counsel were not even informed in advance that any psychiatric examination would take place. Id. n.15.
135. Id.
136. Id. n.16.
137. Id. at 465. See also id. at 476 (Rehnquist, J., concurring) ("Unlike the police officers in *Miranda*, Dr. Grigson was not questioning respondent in order to ascertain his guilt or innocence.").
138. Id. at 465.
139. Id. at 472.
140. Id. at 467. In a similar case, *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court applied the harmless error doctrine to the Sixth Amendment right, but found that the psychiatrist's testimony had not been harmless.
142. Id. at 524.
Sixth Amendment 'when there [is] used against him at his trial evidence of his own incriminating words which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel.'\footnote{143} The Court added that it has "consistently applied this deliberate-elicitation standard in subsequent Sixth Amendment cases"\footnote{144} "even when there is no interrogation and no Fifth Amendment applicability."\footnote{145}

Moreover, as Massiah, Henry, and Estelle make clear, the "basic protection[]" that is specifically at issue in these Sixth Amendment cases is the lawyer's advice to the client regarding the Fifth Amendment privilege against self-incrimination. Thus, the privilege against self-incrimination takes on a broader constitutional significance once the accused has a lawyer.

Surely a defendant's own lawyer cannot do what the pretended friend in Massiah, the psychiatrist in Estelle, or the cellmate in Henry could not do—that is, establish a relationship of trust and confidence and then "become an agent of the State recounting unwarned statements." In fact, the role of the lawyer is a more serious one in this regard than that of a cellmate. The Supreme Court has never described trust and confidence between cellmates as "imperative," but it has used that word in describing the relationship of trust and confidence between lawyer and client.\footnote{146} Moreover, as Chief Justice Rehnquist noted in Henry, "the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney."\footnote{147} There is no such protection for communications between the accused and his pretended friend, his cellmate, or his court-appointed psychiatrist.

If, then, the lawyer's responsibility is to provide the basic protection of warning her client about the risks of incriminating himself to other persons who might later reveal his confidences, who has the responsibility of warning the defendant about the risk of confiding incriminating information to his lawyer?

The difficulty is that the lawyer is forbidden to engage in "intentional ignorance" by giving the client a "lawyer-client Miranda warning." That is, the lawyer is forbidden to "intimate to the client in any way" that the client should withhold information "so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts."\footnote{148} This is an elaboration on Model Rule 1.6, comment [1], which explains that a purpose of

\footnote{143} Id. at 523(citing Massiah v. United States, 377 U.S. 201, 206 (1964)).
\footnote{144} Id. at 524 (citing United States v. Henry, 447 U.S. 267, 270, (1980)).
\footnote{145} Id. (citing Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980)).
\footnote{146} Trammel v. United States, 445 U.S. 40, 51 (1980).
\footnote{147} Henry, 447 U.S. at 295.
\footnote{148} STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-3.2(b) (Am. Bar Ass'n 1993). The purpose of the Standards is to elaborate on the Model Rules of Professional Conduct by providing a "consensus view of all segments of the criminal justice community about what good, professional practice is and should be." STANDARDS FOR CRIMINAL JUSTICE, Introduction (Am. Bar Ass'n 1993). Thus, Standard 4-3.2 is an elaboration on Model Rule 1.1 ("Competence") and Model Rule 1.6 ("Confidentiality of Information").
lawyer-client confidentiality is that the client is "thereby encouraged ... to communicate fully and frankly with the lawyer even as to ... legally damaging subject matter." Beyond that, the lawyer must impress upon the client "the imperative need [that the lawyer] know all aspects of the case."149

In addition, under Model Rule 3.3(a)(3), the lawyer is forbidden to "offer evidence that the lawyer knows to be false," and is required to "take reasonable remedial measures, including if necessary, disclosure to the tribunal" with respect to evidence that the lawyer has offered and that she comes to know is false. Of course, in those jurisdictions in which the lawyer employs the narrative method as a remedial measure, the lawyer effectively discloses the client's confidences to the jury (the finder of fact) as well as to the judge (the sentencer).

This means that the lawyer, in preparing for trial, is required to deliberately elicit incriminating information from the client without first warning the client that, if the client later testifies falsely, the lawyer will reveal the client's incriminating confidences at trial.150

Therefore, just like the pretended friend in Massiah, the cellmate in Henry, and the psychiatrist in Estelle, the lawyer elicits unwarned admissions from the defendant and then becomes "an agent of the state recounting unwarned admissions" at trial. Indeed, the lawyer is more clearly an "agent of the state" than the other three, because only the lawyer is threatened with punishment by the state for failing to report the defendant's damaging admissions. Ironically, the Sixth Amendment "guarantees the accused... the right to rely on counsel as a...

149. STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-3.2 cmt. (Am. Bar Ass'n 1993). Model Rule 1.4(a)(5) is not material to this discussion because it says that the lawyer "shall consult with the client about the limitations" on confidentiality only after the lawyer "knows that the client expects assistance not permitted by the Rules." MODEL RULES R. 1.4(a)(5). Even setting aside the "knowing" problem, the rule is clear that this cannot happen until it is already too late for the lawyer to give fair warning to the client. That is, before the lawyer informs the client of the risk that his confidences will be revealed, the client must have given the lawyer knowledge of an intention to commit perjury.

When the Massachusetts Supreme Judicial Court adopted its version of Model Rule 3.3, the Court invited me to address it in a formal hearing. Making the constitutional argument, I suggested that the Rule say expressly in the comment that anything the lawyer learns before the warning should not be relied upon in making a decision to reveal the client's perjury. The Court clearly understood the argument, but chose not to address the issue in promulgating the rules. On the Court at the time was Charles Fried, author of The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976).

150. Even under the due process "totality of the circumstances" test, government agents are forbidden to use this kind of trickery. State v. Nash, 421 N.W.2d 41, 43-44 (Neb. 1988) (defendant's reasonable understanding that admissions would be confidential made them involuntary); State v. McDermott, 554 A.2d 1302 (N.H. 1989) (confession was not "voluntary," but "coerced," because it was given under the promise of confidentiality, and "to allow the government to revoke its promise after obtaining incriminating information obtained in reliance on that promise would be to sanction governmental deception in a manner violating due process."); People v. Easley, 592 N.E.2d 1036, 1051 (Ill. 1992) (violation of due process where fellow inmate obtained admissions by saying information was for defendant's lawyer); United States v. Goldstein, 611 F. Supp. 626, 632 (N.D. Ill. 1985) (implied assurance that defendant's statements would not be used against him in a criminal prosecution made admissions involuntary); United States v. Wolf, 601 F. Supp. 435, 441-43 (N.D. Ill. 1984) (defendant's statements were involuntary because they were made to Canadian agents in reliance upon promise not to give them to IRS).
‘medium’ between him and the State,” warning the defendant about potential self-incrimination, but there is no one to serve as a medium between the accused and his counsel. On the contrary, the defendant is denied “effective representation by counsel [i.e., a warning to the defendant about the potential loss of his Fifth Amendment privilege] at the only stage when legal aid and advice would help him.”

It has been contended, however, that the lawyer for an accused is not a state agent for purposes of cases like Massiah, Henry, and Estelle. The support cited for that contention is Polk County v. Dodd, which involved a wholly different issue—whether a public defender acts “under color of state law” for purposes of 42 U.S.C. sec. 1983.

The Court held in Polk that a 1983 action would not lie because our system of criminal justice “posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’” Accordingly, a public defender does not act “under color of state law.” Thereafter, in West v. Atkins the Court explained Polk by saying: “[T]he public defender does not act under color of state law for purposes of § 1983 because he ‘is not acting on behalf of the State; he is the State’s adversary.’”

Polk is therefore irrelevant to the present issue. First, in Polk the Court was interpreting a statute that allows civil actions to those who claim to be aggrieved by state action. As a practical matter, if disappointed criminal defendants were permitted to sue public defenders in civil actions, the courts would undoubtedly be inundated by 1983 actions against unsuccessful defenders.

More important, when a defense lawyer in a criminal case is required by the state to deliberately elicit unwarned statements and to report them to the court, the lawyer is surely not “advancing ‘the undivided interests of his client,’” as posited in Polk. Rather, he is making the defendant “the deluded instrument of his own conviction.” Nor can it be said that the defense lawyer is acting as “the

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153. Gillers, supra note 5, at 836.
154. Id. at n.77 (citing Dodson, 454 U.S. at 325 (1981)).
157. Id. at 50 (citing Polk County, 454 U.S. at 322, n.13). Indeed, the Court has unanimously held that it is “indispensable” that defense counsel act “independently of the Government and . . . oppose it in adversary litigation.” Ferri v. Ackerman, 444 U.S. 193, 204 (1979); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 n.18 (1982).
State's adversary" when he is betraying his client's trust by "recounting unwarned statements." On the contrary, he is "acting on behalf of the State or in concert with it," and he is doing so, moreover, in obedience to the command of the state and subject to state sanctions for any disobedience.

It has also been suggested that the defense lawyer can properly reveal the client's perjury because statements elicited by agents of the state and revealed by them to the prosecutor can be used by the prosecutor for impeachment. This is a non-sequitur. The fact that a prosecutor might be able to use such information for impeachment purposes, does not mean that defense counsel can be the agent of the state who is required to do the revealing or the advocate who is required to do the impeaching. As stated by Chief Justice Rehnquist, "[a]ny dealings that an accused may have with his attorney are of course confidential, and anything the accused says to his attorney is beyond the reach of the prosecution."

None of this means that a defendant has a "right to lie" with impunity. One immediate penalty is that the defendant's sentence may be enhanced if the judge concludes that he has committed perjury in his defense. Another penalty is that the defendant who testifies falsely can thereafter be prosecuted for perjury. However, the penalties for perjury do not include a waiver of the defendant's Sixth and Fifth Amendment rights to be warned by his lawyer of the potentially harmful consequences before he unwittingly makes incriminating statements to his lawyer. That can be done only by a knowing and voluntary relinquishment of a known right, which is not possible when the defendant is unaware of the consequences at the time he incriminates himself.

Nor is denial of the right to counsel in presenting his testimony a penalty for a defendant's perjury. In New Jersey v. Portash defendant Portash had been granted use immunity for earlier grand jury testimony. When he was subse-
quently prosecuted based on other evidence, the trial court ruled *in limine* that if Portash testified to an alibi that contradicted his grand jury testimony, the prosecution would be able to use the grand jury testimony to impeach him. Accordingly, Portash did not testify at his trial. He was convicted.

On appeal, the Supreme Court assumed that Portash’s immunized grand jury testimony had been truthful and that his trial testimony would have been perjurious. Nevertheless, the Court held that Portash had a constitutional right to present his alibi without being impeached with his grand jury testimony. Portash’s conviction was therefore reversed by the Supreme Court in order to allow him to present the alibi on retrial. Moreover, there was no suggestion that Portash’s lawyer had acted improperly in attempting to present the perjurious alibi; on the contrary, the appeal could not even have been taken if the lawyer had not assisted Portash in that effort.

Furthermore, the decision in *Portash* was based on the Fifth Amendment alone. The case is that much stronger when the incriminating evidence has been obtained in violation of the Sixth Amendment—that is, when it has been deliberately elicited from the defendant by his own lawyer, acting as an agent of the state, and forbidden to warn him in advance of the consequences. In that event, the evidence cannot be used against the defendant at trial with respect to either guilt or sentencing.

V. CONCLUSION

In formal opinions under its 1908 Canons of Professional Ethics, the ABA recognized that a lawyer’s duty to disclose fraud on the court is subordinate to the obligation to preserve a client’s confidences. The ABA explained that because the lawyer is an officer of the court, she is required to maintain her client’s confidences even in cases of client perjury. Thereafter, in a formal opinion interpreting its *Model Rules of Professional Responsibility*, the ABA expressly relied on tradition as well as substantial policy considerations in stating that for a

170. See id at 452-53.

171. See also United States v. Midgett, 342 F.3d 321 (4th Cir. 2003). In response to appointed defense counsel’s motion for leave to withdraw on ethical grounds, the trial judge told the defendant that if he chose to take the stand and present what his lawyer and the judge believed to be perjury, the lawyer’s motion would be granted. The Fourth Circuit reversed, explaining: “The defendant was told to waive either his right to counsel or his right to testify, because neither his counsel nor the court was satisfied that his testimony would be truthful. In so doing, the court leveled an ultimatum upon Midgett which, of necessity, deprived him of his constitutional right to testify on his own behalf.” Id. at 327 (quoting United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 120-121 (3d Cir. 1977) (“A defendant in a criminal proceeding is entitled to certain rights .... He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.”) The Fourth Circuit added: “[T]he court impermissibly forced the defendant to choose between two constitutionally protected rights: the right to testify on his own behalf and the right to counsel.” Id.

172. See supra, notes 109-152 and accompanying text (discussing *Massiah*, *Henry*, and *Estelle v. Smith*, none of which have been considered in the context of the perjury trilemma by any court).
lawyer to disclose her client's fraud on the court was "unthinkable."\[^{173}\]

The traditional view that was recognized in those formal opinions appeared to have been reversed in 1983, when the ABA adopted Model Rule 3.3 requiring lawyers to take remedial action in cases of known perjury. In some jurisdictions, remedial action has meant that a trial lawyer must distance herself from her client by requiring the client to testify in narrative and then to omit any reference to the client's false testimony in closing argument. The result of the narrative method is that the lawyer effectively communicates to the jury as well as to the judge that the lawyer believes that the client is guilty.

However, the appearance that Model Rule 3.3 brought about a major policy change from the traditional view has been rendered practically meaningless by the requirement that a lawyer have "actual knowledge" before taking any remedial action. The result is that a defense lawyer may refrain from concluding that her client's testimony is perjurious, despite the fact that the client has told the lawyer inconsistent versions of the truth, and despite the fact that the client's testimony is far-fetched or preposterous, unsupported by other evidence, and dramatically contradicted by credible evidence. Through the disingenuous use of the "knowing" requirement, therefore, the courts and the ABA have effectively maintained the result of the traditional view.

Nevertheless, there remains a critical policy issue under Model Rule 3.3 because there are still some occasions when lawyers conclude that their clients are lying and then betray their clients' confidences. Unfortunately, those lawyers are almost always court-appointed attorneys representing criminal defendants who are poor and members of minority groups. This has produced a race- and class-based double standard, resulting in a de facto denial of equal protection of the laws.

It is therefore important to consider the point that Model Rule 3.3 violates the Fifth and Sixth Amendments to the Constitution. This is an issue that no court has yet ruled upon. However, analogous authorities strongly support the conclusion that a lawyer violates the Constitution by deliberately eliciting unwarned admissions from a client and then revealing those admissions to a court.

The Supreme Court has held that the Sixth Amendment forbids an agent of the state to reveal at trial admissions that have been elicited from a defendant who has not first been advised by his lawyer about his privilege against self-incrimination. Nevertheless, ethical rules require the lawyer to deliberately elicit incriminating information from the client without warning the client of the consequences in advance. In addition, the ethical rules require the lawyer to reveal the client's incriminating confidences at trial if the client should testify falsely. Thus, the lawyer, as an officer of the court, acts under state compulsion, subject to state sanctions including loss of a state-issued license to practice law, if

the lawyer should fail to comply with the state's ethical requirements.

Ironically, therefore, the Sixth Amendment guarantees the defendant the right to have counsel advise him about his Fifth Amendment privilege before the client incriminates himself to a third-party agent of the state. However, there is no one to advise the defendant about his Fifth Amendment privilege before he is induced by his lawyer to incriminate himself. Accordingly, the client is unable to make an informed and voluntary waiver of a known right before giving the lawyer incriminating information. Therefore, when a lawyer later reveals at trial the incriminating information that the lawyer has deliberately elicited from the client, the lawyer violates the client's Fifth and Sixth Amendment rights.

Linking the Fifth and Sixth Amendments together, Chief Justice Rehnquist noted that they reflect the Framers' intent to establish an accusatory rather than an inquisitorial system of justice. He added that the Sixth Amendment protects the confidentiality of communications between the accused and his attorney, and that anything the accused says to his attorney is beyond the reach of the prosecution. It is particularly ironic, therefore, that Model Rule 3.3 turns the criminal defense lawyer into the functional equivalent of the prosecutor of her own client, charged with disclosing her client's incriminating confidences at trial.