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CLIENT CONFIDENCES AND CLIENT PERJURY: SOME UNANSWERED QUESTIONS

MONROE H. FREEDMAN†

Due process requires, at a minimum, that each litigant have an opportunity to be heard.¹ Implicit in this fundamental rule of fairness is that being heard matters.

In appellate litigation, being heard ordinarily means that each advocate will have the opportunity to present arguments to the court, in writing and orally. One of the most valuable aspects of the oral presentation is that judges typically ask questions of counsel. These questions give the advocate insight into what aspects of the case concern one or more members of the court, and they provide the opportunity to respond directly to those concerns. Since the court in any case might be closely divided, the crucial swing vote could well hinge upon the answer to a single question.

Of course, a question may be hostile and intended to embarrass counsel or even to provoke an argument with another member of the court.² Even then, however, counsel's answer to the question might help to persuade an undecided member of the court and alter the balance.

After a case has been decided on a close vote, it can be useful to consider how different answers to the judges' questions might affect a later case. Also, if judges display an interest in particular issues during oral argument, but then leave those issues unresolved in their opinions, there is reason to infer that the issues have been left to decide in a later case, perhaps with different alignments among the judges.

*Nix v. Whiteside*³ is such a case. The purpose of this Article is to examine three major but unanswered issues in *Whiteside*. During the *Whiteside* argument, the Justices raised two of these issues: (1) what

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¹ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process is the opportunity to be heard." (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

² During Justice Frankfurter's last years on the Supreme Court, between 1958 and 1962, I attended arguments before the Court with some frequency. One of the attractions was to observe Justices Frankfurter and Black quarreling fiercely with each other by putting pointed questions to hapless advocates caught between the two combatting titans.

³ 475 U.S. 157 (1986).

standard of knowing must a lawyer meet before acting on the conclusion that the client's testimony will be perjurious; and (2) what should a lawyer do in a case of actual or anticipated client perjury. Despite the Justices' obvious interest in these issues, no satisfactory answers were provided during oral argument or in the Justices' opinions.

In addition, *Whiteside* is of interest because a third issue that could have been determinative was not even argued to the Court: whether the fifth amendment privilege against self-incrimination is implicated when a lawyer divulges or threatens to divulge incriminating lawyer-client confidences to the court. Accordingly, the following analysis of the argument before the Court will also consider how the fifth amendment might have been used to advantage by Whiteside's lawyer and how it still might be used in any subsequent litigation involving the problem of client perjury.

I. THE APPROPRIATE STANDARD OF KNOWING

Whiteside involved a drug-related killing in Iowa. Defendant Whiteside claimed self-defense. At trial he testified to his belief that the victim had been coming at him with a gun, although he did not testify that he had actually seen a gun.⁴ After his conviction, Whiteside moved for a new trial, maintaining that his attorney, Robinson, had improperly coerced him from testifying that he had seen something metallic (but not specifically a gun) in the victim's hand.⁵

Whiteside originally told Robinson that he had seen a gun in the victim's hand.⁶ Subsequently, when pressed by Robinson, Whiteside said that he had not seen a gun, but that he had been sure that the victim was holding one.⁷ At that point, Whiteside had not mentioned seeing something metallic. On a third occasion, Whiteside told Robinson that he had in fact seen something metallic in the victim's hand.⁸ When challenged by his lawyer, Whiteside said, "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead."⁹

Robinson inferred that any such testimony, whether about a gun

⁴ See Petition for a Writ of Certiorari app. F at A55-56, *Whiteside v. Scurr*, 750 F.2d 713 (8th Cir. 1984) (No. 83-1015) [hereinafter Pet. app. F] (containing portions of defendant Whiteside's trial testimony).

⁵ Cf. *id.* at A70-72 (containing portions of defendant Whiteside's testimony at hearing on Supplemental Motion for New Trial).

⁶ See *id.* at A65-66.

⁷ See *id.* at A78-79 (portion of Attorney Gary L. Robinson's testimony at hearing on Supplemental Motion for New Trial).

⁸ See *id.* at A85.

⁹ *Id.*

or about something metallic, would be perjurious.¹⁰ He therefore threatened that if Whiteside testified about having seen something metallic, Robinson would "advise the Court of what [Whiteside] was doing" (i.e., committing perjury), and that he "probably would be allowed to attempt to impeach that particular testimony."¹¹ Robinson also said that he would "ask the Court for permission to withdraw,"¹² which would have left Whiteside with no lawyer.¹³

Had Whiteside testified that he had seen something metallic in the victim's hand, the jury would not have been able to reject his statement without finding it false beyond a reasonable doubt. No court found, however, that Robinson's conclusion that his client was lying met a reasonable doubt standard. The Iowa Supreme Court found that Robinson was "convinced with good cause to believe" that Whiteside's testimony would be false.¹⁴ The Eighth Circuit concluded implicitly that Robinson had a "firm factual basis for believing" that Whiteside's testimony would be false.¹⁵ Therefore, if the jury had heard Whiteside's testimony about having seen something metallic in the victim's hand, it might have agreed with Robinson. Nevertheless, the jury might have felt bound to accept Whiteside's testimony if not persuaded beyond a reasonable doubt that the testimony was false.¹⁶

¹⁰ See *id.* (Robinson stating that he could not allow Whiteside to testify regarding the presence of a gun "because that would be perjury").

¹¹ *Id.*

¹² *Id.* at A88.

¹³ Following a previous change of lawyers at Whiteside's insistence, the trial judge told Whiteside that his chances of getting another change of attorneys were about zero. See *id.* at A53 (hearing on defendant's Request for Appointment of Attorney Thomas Koehler).

¹⁴ *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978).

¹⁵ *Whiteside v. Scurr*, 750 F.2d 713, 714 (8th Cir. 1984). The court entered an order denying rehearing en banc of the Eighth Circuit's favorable disposition of Whiteside's petition for habeas corpus. The court's holding that even a lawyer with a "firm factual basis for believing that his or her client is about to commit perjury" may not disclose confidential communications to the trier of fact, combined with the court's order, implies that the court accepted Robinson as having a "firm factual basis" for his belief. *Id.*

¹⁶ The first analysis of the importance of the "knowing" standard in rules of lawyers' ethics is in M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 51-58 (1975). That book states that the *Model Code of Professional Responsibility* uses a subjective standard of knowing in half a dozen instances and four different objective standards with no apparent reason underlying the variations. See M. FREEDMAN, *supra*, at 56-57.

Five years later, the 1980 Discussion Draft of the *Model Rules of Professional Conduct* used at least nine different standards of knowing, ranging from when the lawyer is "convinced beyond a reasonable doubt" to when the lawyer has "information indicating" certain facts to be so. In addition, the varying standards in the *Model Rules* were demonstrably inconsistent in their applicability. This inconsistency was noted in *The American Lawyer's Code of Conduct*, which offered appropriate corrections. See COMMISSION ON PROFESSIONAL RESPONSIBILITY, *THE ROSCOE POUND-AMERICAN*

The standard of knowing was clearly of concern to members of the Supreme Court. The first questions of the oral argument were addressed to Brent Appel, then Deputy Attorney General of Iowa, by Justice O'Connor. She asked: "What standard do you think should be employed to determine when the facts are sufficient to impose such a professional obligation on the lawyer? . . . Does the lawyer have to be convinced beyond a reasonable doubt, or just have a mere suspicion, or what?"¹⁷ When Mr. Appel waffled in answering her question, Justice O'Connor pressed by asking what level of "certainty" the lawyer must have before acting on the conclusion that the client's testimony will be perjurious.¹⁸ Mr. Appel then responded:

I think, once again, a lawyer has to know—and under the Model Penal Code definition, for instance, of what "know" is, it means a high probability. I would even accept for argument purposes reasonable—*without reasonable doubt*. But let me carry this a step further, because *I think I see where you're heading*.

A lawyer before he or she issues anti-perjury admonitions probably should know beyond reasonable doubt that his client is preparing to commit perjury. I think the facts clearly bear that out in this case.¹⁹

The same question was raised with Whiteside's lawyer. Counsel had opened his argument with an effort to narrow the issue before the Court. The holding of the Eighth Circuit was a limited one, he emphasized, in two respects: (1) if the attorney merely "believes" that the client is going to give false testimony, then (2) the attorney "cannot disclose or threaten to disclose" the attorney's belief.²⁰

TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT 8-9 (Public Discussion Draft 1980).

¹⁷ Record at 9, *Nix v. Whiteside*, 475 U.S. 157 (1986) (No. 84-1321) (hereinafter Record). Although the transcript does not indicate which Justice is asking the question, I identified each Justice in my notes during the proceedings.

¹⁸ See *id.*

¹⁹ *Id.* at 9-10 (emphasis added). Mr. Appel understood Justice O'Connor, as did I, to be indicating that she favors a reasonable doubt standard. See Discussion with Brent Appel, *University of Pennsylvania Law Review Symposium, Limitations on the Effectiveness of Criminal Defense Counsel* (Mar. 1, 1988) (on file with the *University of Pennsylvania Law Review*). This interpretation would explain why he immediately abandoned the position taken in his brief that a reasonable doubt standard would be bad policy and contrary to the "prevailing view" of a "firm factual basis." The brief also attempted to equate "beyond a reasonable doubt" with a "compelling support" test, an effort that was also wisely abandoned on oral argument. See Petitioner's Reply Brief at 3, *Nix v. Whiteside*, 475 U.S. 157 (1986) (No. 84-1321).

²⁰ Record, *supra* note 17, at 27. This was not the line of argument suggested to Whiteside's counsel by three experienced advocates and me in a lengthy preparation

Justice White immediately interposed a question that challenged both points. In the view of the Eighth Circuit, Justice White asserted, it would make no difference how strong the evidence was regarding whether the client intended to lie on the stand. Even if "*no one would doubt* that the client planned to commit perjury," the lawyer "may not threaten him with *anything*" to dissuade the perjury.²¹

Whiteside's counsel made a brief attempt to hold to his position, but Justice White attacked again.²² Justice White insisted that "no matter what *the degree of certainty*" the lawyer has that the client is going to commit perjury, the holding of the Eighth Circuit would forbid the lawyer to inform the court.²³ Counsel promptly capitulated. "That is the holding of the Court of Appeals," he acknowledged, and Justice White hammered it in with: "Yes. Yes, exactly. . . . [T]hat's the way it comes to us."²⁴ Abandoning his opening argument entirely, counsel meekly responded, "That's correct."²⁵

Whiteside's counsel, however, should have held to his original position. The Eighth Circuit in fact held as counsel had said (or close to it) on both points:

*We hold only that a lawyer who has a firm factual basis for believing that his or her client is about to commit perjury, because of confidential communications the client has made to the lawyer, may not disclose the content of those confidential communications to the trier of fact The lawyer who discloses confidential communications or who threatens to do so has departed from the role of an advocate and has become an adversary to the interests of his or her client. Such a client has lost the effective assistance of counsel, a right to which even those defendants who may later be accused of perjury are entitled.*²⁶

Thus, the Eighth Circuit referred only to a disclosure of or a threat to disclose confidential communications. Contrary to Justice White's assertion, it did not say that the lawyer "may not threaten him

session the day before the argument.

²¹ *Id.* at 28 (emphasis added). No emphasis appears in the Official Transcript; however, my notes of the argument indicate that Justice White stressed the word "anything" with his voice.

²² A former clerk to Justice White once commented to me that the Justice considers basketball and oral argument to be contact sports.

²³ Record, *supra* note 17, at 28 (emphasis added).

²⁴ *Id.* at 28-29.

²⁵ *Id.* at 29.

²⁶ *Whiteside v. Scurr*, 750 F.2d 713, 714 (8th Cir. 1984) (emphasis added).

with *anything*" in an effort to discourage perjury.²⁷ More important, with regard to the issue of knowing, the Eighth Circuit assumed that the lawyer had only "a firm factual basis for believing";²⁸ it did not treat the case as one in which "no one would doubt" that the client was planning perjury.²⁹

Perhaps if counsel had maintained his initial position that Whiteside was entitled to a new trial because his lawyer had applied an inadequate standard of knowing, Justice White ultimately would have faced the issue and agreed. That is strongly suggested by the final exchange between Justice White and Mr. Appel in the oral argument:

QUESTION: But wouldn't you think this was a relatively rare case, where the defendant just says, I'm going to commit perjury, and it's so clear? Because you would concede that the lawyer may not—if there's a real doubt about the truth [of] the thing—

MR. APPEL: Sure.

QUESTION: —you wouldn't be here at all.

MR. APPEL: It's a relatively rare case But where it's [mere] conjecture, mere speculation—that is of course not this case—

QUESTION: Or even if the lawyer is himself completely convinced that the story his client is telling is false.

MR. APPEL: We don't have a disagreement.³⁰

That exchange followed a statement by Mr. Appel addressed to Justice O'Connor, the author of *Strickland v. Washington*.³¹ The judgment of what the lawyer knows regarding client perjury, Mr. Appel said, is "for the lawyer to make, much as any other tactical decision an attorney comes upon in the course of representation."³² That observation, of course, works both ways. If, as in *Whiteside*, the trial lawyer concludes that the client is lying, the lawyer's decision will fall within

²⁷ See *supra* note 21 and accompanying text. For example, the lawyer might threaten the client by stating that the judge will increase the sentence if the judge concludes that the defendant has lied. See *United States v. Grayson*, 438 U.S. 41, 53-55 (1978).

²⁸ *Whiteside v. Scurr*, 750 F.2d at 714.

²⁹ Record, *supra* note 17, at 28.

³⁰ Record, *supra* note 17, at 58. My notes from the argument interpret this last question to mean that even if the lawyer is completely convinced of the falseness of the story, she should still go ahead and present the testimony unless she "knows" that it is false. Mr. Appel told me during the Symposium that his understanding of Justice White's comment is the same as mine.

³¹ 466 U.S. 668 (1984).

³² Record, *supra* note 17, at 57.

"the wide range of professionally competent assistance" allowed by *Strickland*.³³ If, on the other hand, the trial lawyer makes the judgment that the client's story is not false beyond a reasonable doubt, that decision, too, will receive the deference accorded by *Strickland* to the trial lawyer's decisions.

Neither Justice O'Connor nor any other Justice questioned Mr. Appel's interpretation of *Strickland* as applied to a lawyer's discretionary judgment when faced with a possible perjury. Instead, Justice White emphasized that *Whiteside* presented "a relatively rare case," and that even a lawyer "completely convinced that the story his client is telling is false" could nevertheless choose to go forward.³⁴

Chief Justice Burger wrote the majority opinion for himself and four members of the Court, including Justices O'Connor and White. Interestingly, that opinion does not address the question that concerned both those Justices so much during oral argument. Rather, the Chief Justice refers glancingly to "an intent to commit perjury, communicated to counsel"³⁵ Although that may overstate what *Whiteside* actually said to Robinson, it provides the factual basis upon which the majority opinion is premised.³⁶ It also may indicate the standard that a majority of the Court might require if the issue should return to the Court in a different factual context.

Justice Blackmun, writing for himself and three colleagues, also does not directly address the knowing issue. The attorney's certainty that the proposed testimony is false is part of the "complex interaction of factors, which is likely to vary from case to case, [and which] makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court."³⁷ However, "[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

³³ *Strickland*, 466 U.S. at 690; see also Record, *supra* note 17, at 57 (Justice O'Connor stating that a reviewing court's assessment of a "lawyer's conduct should use the deferential standards that are in *Washington v. Strickland*").

³⁴ Record, *supra* note 17, at 57.

³⁵ *Whiteside*, 475 U.S. at 163.

³⁶ "As we view this case, it appears perfectly clear that respondent intended to commit perjury, [and] that his lawyer knew it" *Id.* at 190 (Stevens, J., concurring). Justice Stevens added:

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. 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.

Id. at 190-91 (Stevens, J., concurring).

³⁷ *Id.* at 189 (Blackmun, J., concurring).

their clients of the zealous and loyal advocacy required by the Sixth Amendment."³⁸ Thus, the key question remains unanswered: what standard of knowing is required before a lawyer may threaten to reveal a client confidence to prevent the client from committing perjury?

II. THE APPROPRIATE RESPONSE TO CLIENT PERJURY AND THE IMPACT OF THE FIFTH AMENDMENT

Another unanswered question, both at oral argument and in the opinion of the Court, is whether Whiteside was prejudiced by the violation of his fifth amendment privilege against self-incrimination when his lawyer threatened to volunteer the defendant's confidential communications to the court. Again, it was Justice White, a potential swing vote, who put the question most pointedly:

QUESTION: One of the elements of an inadequate assistance of counsel is there's got to be some prejudice.

. . . .

Now, the argument for the defendant has to be that his being deprived of perjured testimony is prejudice.

. . . .

I'd say all you [Mr. Appel] have to do is convince us that that isn't so and you win your case, don't you?³⁹

An appropriate response on Whiteside's behalf would have been:

Justice White, the answer to your question about prejudice is given in your own opinion for the Court in *Fisher v. United States*.⁴⁰ In that case, you held that when documents could not be obtained from a defendant by subpoena because of the fifth amendment privilege, those same documents could not be obtained from the defendant's lawyer, because of the lawyer-client privilege.

Your reasoning was that "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed

³⁸ *Id.* (Blackmun, J., concurring) (quoting *Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977)).

³⁹ Record, *supra* note 17, at 12.

⁴⁰ 425 U.S. 391 (1976).

legal advice.”⁴¹

In this case, Whiteside was prejudiced because, as this Court unanimously held in *Upjohn v. United States*,⁴² it was “essential to proper representation” that Whiteside be able to confide in his lawyer.⁴³ Having done so in order to protect his sixth amendment right to proper representation, he then found himself threatened by his own lawyer with violation of his fifth amendment privilege against self-incrimination.

That is not only prejudicial to Whiteside, but adoption of such a rule would be prejudicial to the proper administration of justice, for the reasons you explained in *Fisher*.

Unfortunately, that argument was never made in *Nix v. Whiteside* because Whiteside’s counsel chose not to raise the fifth amendment or even to cite *Fisher* in the brief. Had he done so, Justice White, at least, might have seen the case differently. Thus, the fifth amendment is still a possible basis for overturning a conviction in a future variation on *Whiteside*.

Another relevant fifth amendment case omitted from Whiteside’s brief is *Estelle v. Smith*,⁴⁴ which involved a psychiatrist’s examination of a defendant’s competency to stand trial. The defendant was not advised of his privilege against self-incrimination, nor was his lawyer informed of the examination. Although the psychiatrist did not testify at trial, at the post-trial sentencing hearing he did give his opinion that the defendant was dangerous. Writing for the Court, Chief Justice Burger noted that, during the psychiatric evaluation, the defendant “assuredly . . . was ‘not in the presence of [a person] acting solely in his interest.’”⁴⁵ Rather, the psychiatrist’s apparent neutrality changed, and he became at the sentencing trial essentially “an agent of the State recounting unwarned statements made in a postarrest custodial setting.”⁴⁶ Accordingly, the defendant’s fifth and sixth amendment rights had been violated, and the sentence was vacated.

The parallel to *Whiteside* is plain. Robinson threatened to do exactly what the psychiatrist in *Estelle* had done: become an “agent of the state” and testify against the defendant using unwarned statements⁴⁷

⁴¹ *Id.* at 403.

⁴² 449 U.S. 383 (1981).

⁴³ *Id.* at 389-91 (1981) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980)).

⁴⁴ 451 U.S. 454 (1981).

⁴⁵ *Id.* at 467 (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)).

⁴⁶ *Id.*

⁴⁷ Robinson did not forewarn Whiteside that he would reveal confidences to the judge and jury if Whiteside were to commit perjury. According to Robinson’s testimony

that the defendant had reason to believe were being made to a person who was, at least, neutral.

Another uncited case is *United States v. Henry*.⁴⁸ In that case, a government informer who had been placed in the same cell with Henry established a relationship of trust and confidence with him. As a result, Henry revealed incriminating information to the informer. Again, Chief Justice Burger wrote the opinion for the Court, holding that because Henry's conviction was based in part on the admissions elicited through a false relationship of trust and confidence, Henry's sixth amendment right to counsel had been violated.⁴⁹

It is difficult to understand how Whiteside's lawyer can properly do, or threaten to do, what the cellmate may not: establish a relationship of trust and confidence, then disclose to the court the incriminating communications that result. In fact, the situation involving the lawyer appears more egregious than that involving the 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.⁵⁰

How might the Court have harmonized such cases had they been argued? Chief Justice Burger, of course, has a well-earned reputation for utter fearlessness when confronted with the hobgoblin of intellectual honesty.⁵¹ However, might not Justice White, Justice Powell, or Justice O'Connor have been given pause by such prior authorities?

To argue the fifth amendment in conjunction with the lawyer-client privilege, pursuant to *Fisher*, would inevitably raise the question of

at the hearing on the new trial motion, "the only time it came up" was after Whiteside had already made the statements that Robinson found to be incriminating. Pet. app. F, *supra* note 4, at A88 (containing a portion of Attorney Gary L. Robinson's testimony at hearing on Supplemental Motion for New Trial).

⁴⁸ 447 U.S. 264 (1980).

⁴⁹ See *id.* at 274.

⁵⁰ See *Trammel v. United States*, 445 U.S. 40, 51 (1980) (stating that the attorney-client privilege is "rooted in the imperative need for confidence and trust").

⁵¹ See, e.g., Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1198-1201 (1971) (analyzing Chief Justice Burger's opinion in *Harris v. New York*, 401 U.S. 222 (1971)). *Harris*, in turn, was an important precedent in *Nix v. Whiteside*. See *Whiteside*, 475 U.S. at 173 (stating that "*Harris* and other cases make it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence").

Chief Justice Burger's opinion in *Whiteside* has already come under such criticism. See, e.g., Lefstein, *Reflections on the Client Perjury Dilemma and Nix v. Whiteside*, CRIM. JUST., Summer, 1986, at 27, 28 (accusing the majority opinion in *Whiteside* of "a shocking misstatement of the law pertaining to client perjury"). Other errors in Chief Justice Burger's opinion in *Whiteside* are discussed in Freedman, *The Aftermath of Nix v. Whiteside: Slamming the Lid on Pandora's Box*, 23 CRIM. L. BULL. 25, 26-27 (1987).

whether perjury should be treated, like other "future crimes," as a permitted exception to confidentiality.⁵² The communication is not protected, for example, if the client tells the lawyer that the client is going to shoot a government witness.

Relinquishing the fifth amendment, however, did not avoid questions about whether perjury is "[f]undamentally any different" from shooting a witness.⁵³ Predictably, such questions came up repeatedly during oral argument, usually in the context of the false issue of whether there is a constitutional "right" to commit perjury. Chief Justice Burger was the first to make the point that the facts of *Whiteside* are indistinguishable from a case in which a client expresses an intention to kill a witness and the lawyer "talks him out of [it]."⁵⁴ Mr. Appel readily agreed.⁵⁵

Justice Stevens was troubled by this issue. He asked *Whiteside's* lawyer, not rhetorically, but in the obvious hope of obtaining an answer, for a satisfactory distinction between the two situations. Would it be unethical, Justice Stevens asked, if the lawyer threatened both to inform the judge and to withdraw from the case if the client followed through with an expressed intention to kill a witness?⁵⁶ After a non-responsive answer, Justice Stevens restated the question and, gently, asked again, "[W]hy is it different?"⁵⁷ The advocate's colloquy with the Court went downhill precipitously:

[COUNSEL FOR WHITESIDE]: Well, okay. It's still different from the situation with the witness because having the client—having the attorney-client privilege remain inviolate and having the attorney still give his guiding hand to the client is part of the traditional adversarial system. Nothing in terms of bribing jurors or threatening witnesses has ever been recognized as part of the adversarial system in this country or in any other country that I know of, and that is an important—

QUESTION [BY JUSTICE REHNQUIST]: Well, has perjury ever been recognized as part of the adversary system?

[COUNSEL]: No, it hasn't . . . [T]here is certainly

⁵² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1987).

⁵³ Chief Justice Burger asked this question during oral argument. See Record, *supra* note 17, at 18.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ See *id.* at 29.

⁵⁷ *Id.* at 30.

not a constitutional right to perjure oneself⁵⁸

On another occasion, when similarly superficial or self-defeating answers were given, Justice Rehnquist took the opportunity to express the exasperation of the Court:

You're simply—that may satisfy you as an answer. It's just utterly unconvincing to me as why the three [murder of a witness, bribery of a juror, and perjury by the defendant] shouldn't be treated the same way for conflict of interest purposes.⁵⁹

Ultimately, the equation of perjury and other crimes became part of the majority opinion:

The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence [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, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury.⁶⁰

However, perjury is significantly different from killing a witness or bribing a juror. This is illustrated by the comment of a United States Attorney speaking on a panel on lawyers' ethics. What should the defense lawyer do, a member of the audience asked, when a client proposes to commit perjury? "Do me a favor," the United States Attorney responded. "Let him try it."⁶¹

That response is not surprising. Dean Wigmore has called cross-examination "the greatest legal engine ever invented for the discovery of truth."⁶² That is, the adversary system assumes perjury and is designed, in part, to deal with it. By contrast, bribing a juror corrupts the adversary system at its core, and prevents the system from function-

⁵⁸ *Id.* at 30-31.

⁵⁹ *Id.* at 44.

⁶⁰ *Whiteside*, 475 U.S. at 174.

⁶¹ Remarks by S. Martoche at the Seminar on "Ethics in an Adversary System" (Feb. 11, 1984) (The Seminar was presented in Buffalo, New York by the Erie County Bar Association and chaired by M. Mahoney.).

⁶² 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1367 (Chadbourn rev. ed. 1974).

ing. If the question put to the ethics panel had been, "What should the defense lawyer do when a client proposes to kill a witness or bribe a juror?" the United States Attorney would not have replied, "Do me a favor. Let him try it."

Moreover, bribery is clandestine, usually not suspected when committed, and difficult to detect. Perjury, by contrast, takes place in the goldfish bowl of the courtroom, before a skeptical judge and jury, and is subject to immediate impeachment. Also, when perjury is detected by the court, the defendant faces the likelihood of an increased sentence.⁶³

Nevertheless, there may be a reason to require a lawyer to divulge a client's intent to commit perjury; however, that reason cannot be Chief Justice Burger's rationale that perjury and bribing a juror are "essentially the same." Echoing Justice Rehnquist's words: "[T]hat may satisfy you as an answer. It's just utterly unconvincing to me"⁶⁴

I mentioned earlier the false issue of whether there is a "right" to testify perjurally. Clearly there is not. A defendant must testify truthfully or suffer the consequences.⁶⁵ The consequences, however, are not forfeiture of the right to counsel or of confidentiality of communications with counsel. Rather, the defendant faces "the risk of confrontation with prior inconsistent utterances," which is the "traditional truth-testing device[] of the adversary system."⁶⁶ Also, the defendant's sentence can be increased,⁶⁷ and the defendant can be prosecuted for perjury.

The real issue is whether the search for truth sometimes must be subordinated to other values, such as the privilege against self-incrimination. In *New Jersey v. Portash*,⁶⁸ for example, Portash had been granted use immunity⁶⁹ for grand jury testimony. When he was subse-

⁶³ See *United States v. Grayson*, 438 U.S. 41, 52 (1978) (holding that a judge may consider the falsity of defendant's testimony in sentencing).

Further, as *Whiteside* illustrates, the lawyer ordinarily learns about the defendant's intended perjury as a result of a series of interviews with the client about the very offense that has been charged. That is, the lawyer's knowledge of the client's perjury is usually the direct outcome of lawyer-client communications about the crime that has been charged. Thus, knowledge of the "future crime" of perjury is inextricably interwoven with the crime that is the subject of the representation. A client's announcement of an intent to kill a witness, on the other hand, is a fact that stands separate and apart from communications about the crime that is the subject of the representation, such as what *Whiteside* did or did not see in the victim's hand just before he stabbed him.

⁶⁴ Record, *supra* note 17, at 44.

⁶⁵ See *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

⁶⁶ *Id.*

⁶⁷ See *Grayson*, 438 U.S. at 52.

⁶⁸ 440 U.S. 450 (1979). *Portash* was cited in *Whiteside*'s brief, but was not used in oral argument until it was too late and out of context. See Record, *supra* note 17, at 46.

⁶⁹ Use immunity is immunity from the use of compelled testimony against an un-

quently prosecuted he presented an alibi that was inconsistent with his grand jury testimony, and the prosecution therefore sought to impeach him.⁷⁰ The Supreme Court held that Portash had a constitutional right to present his alibi without being impeached with his inconsistent grand jury testimony.⁷¹

In *Portash*, the Court's decision was not intended to give the defendant a right or license to commit perjury. The Court did hold, however, that forfeiture of Portash's fifth amendment privilege was not one of the consequences of his perjury.⁷² Moreover, there was no suggestion that Portash's lawyer had acted improperly in presenting what the Court assumed to have been a perjurious alibi.⁷³ Although "arriving at the truth is a fundamental goal of our legal system,"⁷⁴ it must sometimes be subordinate to constitutional rights.⁷⁵ Thus, the prejudice to Whiteside—a prejudice of constitutional status—was in the threat to deprive him of the privilege against self-incrimination.

Another observer at the oral argument, Lyle Denniston, correctly identified "[t]he most damaging exchanges."⁷⁶ Near the end of the oral argument, Justice Powell spoke for the first time. "[I]t would help me," he said in a quiet voice, "if you would summarize exactly what you think the lawyer should have done in this case."⁷⁷ What comes through in the transcript, as well as in Denniston's recounting of the exchange, is that Whiteside's counsel tried to avoid giving the necessary answer until he was "[b]acked into a corner" by Justice Powell's gentle but persistent inquiries.⁷⁸ "The answer to my question," the Justice finally said dryly, "is the lawyer should have permitted the defendant to testify and kept his mouth shut."⁷⁹

One lesson of that "most damaging" colloquy is that an advocate cannot maintain a position that the advocate is reluctant to present to the court in a forthright manner. Rather than deal with the issue belatedly and in an evasive manner, Whiteside's advocate should have set forth a coherent answer to Justice Powell's question long before it was

willing witness. See *Kastigar v. United States*, 406 U.S. 441, 443 (1972).

⁷⁰ See *Portash*, 440 U.S. at 453-54.

⁷¹ See *id.* at 459.

⁷² See *id.*

⁷³ See *id.* at 452-53.

⁷⁴ *United States v. Havens*, 446 U.S. 620, 626 (1980).

⁷⁵ See, e.g., *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (recognizing that the fifth amendment rests on values of respect for the individual and his privacy that may conflict with the pursuit of truth in the trial setting).

⁷⁶ Denniston, *Tackling the Attorney-Client Conundrum*, AM. LAW., Jan.-Feb. 1986, at 131, 131.

⁷⁷ *Id.* (quoting Record, *supra* note 17, at 51).

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting Record, *supra* note 17, at 53).

asked. As Whiteside's advocate ultimately presented it, however, his own argument appeared to be an embarrassment to him. Further, he never set forth a full and coherent answer to the fundamental question of the case: what should a defense lawyer do regarding possible client perjury?

Whiteside's lawyer should have answered: At the outset of the lawyer-client relationship, pursuant to the ABA Standards, the lawyer should establish a relationship of trust and confidence with the client. To do so, the lawyer should emphasize two points: first, it is essential that the lawyer know everything about the charges against the client, and second, the lawyer will hold that information in strict confidence.⁸⁰

If the client accepts the lawyer's pledge of confidentiality and the lawyer thereby learns that the client is going to commit perjury, the lawyer should take advantage of the knowledge—knowledge that the lawyer rarely would have without the pledge of confidentiality—to dissuade the client from testifying falsely. Dissuasion might well include threats of adverse tactical and legal consequences, including a longer sentence, but it should not include threats to betray the lawyer's pledge of confidentiality.

If the client nevertheless insists upon going forward with the false testimony, the lawyer should withdraw from the case if that can be done without significant harm to the client. If the lawyer finds it necessary to remain in the case, the lawyer should continue efforts to dissuade the client. Such ongoing efforts have often proved successful.

In the rare case in which the client persists, the lawyer must present the client's testimony in the ordinary way and remain true to the lawyer's pledge of confidentiality. If lawyers were to follow any other course, it would soon become common knowledge that clients cannot trust their lawyers with confidential information. The result would not be less perjury, but more, because lawyers would cease to have either the knowledge or the trust that enables them to dissuade clients from wrongful conduct in general and from perjury in particular.

After *Nix v. Whiteside* was decided by the Court, the ABA Standing Committee on Ethics and Professional Responsibility attempted to apply *Whiteside* in a Formal Opinion.⁸¹ According to the Committee, a lawyer should take the following steps when a client states an intention

⁸⁰ See 1 PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 4-3.1(a) (1974).

⁸¹ See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

to testify falsely, but has not yet done so:

[T]he Committee does not believe that the mandatory disclosure requirement of this Model Rule provision [3.3(a)(2)] is necessarily triggered when a client states an intention to testify falsely, but has not yet done so. Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in *Nix v. Whiteside*. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner. If the client does in fact testify falsely, the lawyer's obligation to make disclosure to the court is covered by Rule 3.3(a)(2) and (4).⁸²

That is, the lawyer can assume that the client will be dissuaded by the threat of disclosure and will forego the perjury. If, however, the client should then surprise the lawyer with false testimony, the lawyer would be obligated to carry out the threat and inform the court.

Interestingly, that was precisely the hypothetical case that Justice White posed to Mr. Appel during the argument. This was the exchange:

QUESTION [JUSTICE WHITE]: [A]fter the lawyer said he would withdraw and so on, did the client then say, I won't do that?

MR. APPEL: No, he said—well, the lawyer left it: Think about that, think about the admonitions.

QUESTION: All right. Well, but then he, without any further communication, he put him on the stand?

MR. APPEL: No. He came back and they went through questions and answers again. The record is not clear as to what occurred on those subsequent meetings.

QUESTION: But suppose this. Suppose the client then had gotten on the stand and in the course of his examination he said he saw something in his hand. Well, the lawyer could have cured it all, if he thought he was going to commit perjury, by getting out of the case or at least trying to get out.

⁸² *Id.* at 21, 23-24. Opinion 87-353 is intended to apply only in jurisdictions that have adopted the Model Rules of Professional Conduct. *See id.* at 21. With respect to the question of client perjury under the Model Code of Professional Conduct, the opinion adopts the position that I have taken. *See* M. FREEDMAN, *supra* note 16, at 27-41.

But if he gets surprised, may he then say, may I approach the bench, and say to the judge that this fellow's lying?

MR. APPEL: *Yes.*

QUESTION: *You think he could do that?!*⁸³

The incredulity in Justice White's voice is not conveyed adequately by the transcript.⁸⁴ After a similar exchange, however, Mr. Appel caught it, and avoided pursuing the issue by observing that "that is not the situation that we're facing."⁸⁵ To which Justice White replied, "No, no."⁸⁶

Others may draw different inferences from what Justice White said and how he said it. My own inference is that there are not likely to be five members of the Supreme Court who would permit the lawyer to disclose the client's perjury after the fact. Thus, if a lawyer assumes that the client will heed the lawyer's admonitions, but then is surprised at trial, the lawyer will not be permitted, as proposed in Formal Opinion 87-353, to disclose the client's perjury at that point.⁸⁷ In any event, Justice Brennan's observation already has proved prophetic: "Lawyers, judges, bar associations, students, and others should understand that the problem [of the lawyer's response to client perjury] has not now been 'decided.'"⁸⁸

⁸³ Record, *supra* note 17, at 19-20 (emphasis added).

⁸⁴ Justice White's incredulity may have arisen from his view of the role of defense counsel in our adversary system. According to Justice White, while law enforcement officers

must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime[.]. . . defense counsel has no comparable obligation to ascertain or present the truth. . . . Defense counsel need present nothing even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case.

United State v. Wade, 388 U.S. 218, 256-57 (1976) (White, J., concurring in part and dissenting in part) (emphasis added) (citing, among other sources, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966)).

⁸⁵ Record, *supra* note 17, at 21.

⁸⁶ *Id.*

⁸⁷ Justice Stevens observed in his opinion that the Court has not yet "confront[ed] the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe." *Whiteside*, 475 U.S. at 191 (Stevens, J., concurring).

⁸⁸ *Id.* at 177 (Brennan, J., concurring); see also *id.* at 188 (Blackmun, J., concurring) (distinguishing the issue in the case, whether the defendant was deprived of his sixth amendment right to counsel, from any issue concerning the ethical propriety of counsel's actions).

CONCLUSION

*Nix v. Whiteside*⁸⁹ presented extremely difficult facts to argue for Whiteside. As Brent Appel repeatedly hammered home in his brief and oral argument, Whiteside took the stand and testified to self-defense, telling the truth, the whole truth, and nothing but the truth. Moreover, Whiteside's lawyer never disclosed Whiteside's confidential communications to anyone. Whiteside's only complaint was that he was not permitted to embellish his story with what was assumed to be a lie, and what was also understood to be tactically unsound.⁹⁰ Under *Strickland v. Washington*,⁹¹ Whiteside had to show prejudice, and prejudice is not self-evident on the face of the *Whiteside* case.

Nevertheless, Whiteside's advocate wrongly conceded at the outset of his argument that the standard of knowing was not an issue. He also wrongly conceded that the circuit court would not permit a lawyer to threaten the client with "anything," when in fact the circuit court expressly limited its holding to a disclosure of or a threat to disclose lawyer-client confidences.

In addition, Whiteside's lawyer did not argue the fifth amendment privilege against self-incrimination, and omitted citation of highly material cases like *Fisher v. United States*,⁹² *Estelle v. Smith*,⁹³ and *United States v. Henry*.⁹⁴ One of the most important questions that remains unanswered by *Whiteside*, therefore, is whether Whiteside's conviction could have survived attack under the fifth amendment.

Whiteside's lawyer also failed to offer any rational distinction between perjury and crimes like murder of a witness and bribery of a juror. Further, he conceded that there is "no right to commit perjury" in a context in which he appeared to be acknowledging that there had therefore been no prejudice.

Finally, Whiteside's lawyer never presented a coherent answer to Justice Powell's question, which was the underlying question of *Nix v. Whiteside*: What should the defense lawyer do about client perjury? Ironically, as the concurring opinions make clear, that, too, remains one of the unanswered questions in *Nix v. Whiteside*.

⁸⁹ 475 U.S. 157 (1986).

⁹⁰ See *id.* at 184-85 (Blackmun, J., concurring).

⁹¹ 466 U.S. 668 (1984).

⁹² 425 U.S. 391 (1976).

⁹³ 451 U.S. 454 (1981).

⁹⁴ 447 U.S. 264 (1980).