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THE CRIMINAL DEFENDANT WHO PROPOSES PERJURY: RETHINKING THE DEFENSE LAWYER'S DILEMMA

Norman Lefstein*

In a 1966 lecture, Professor Monroe H. Freedman was the first to advance the unorthodox view for which he has become well-known: A criminal defense lawyer must put his client on the stand to testify even though he knows that the client will commit perjury.1 Subsequently, Professor Freedman defended his views in an oft-quoted law review article2 and more recently refined his presentation in a book.3

The time is now ripe to reexamine the defense lawyer's dilemma when faced with a client who insists on testifying falsely. Recently, the American Bar Association began to update and revise its criminal justice standards, including its defense function standards (ABA Defense Function Standards).4 ABA Defense Function

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3. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 27-42 (1975) [hereinafter cited as FREEDMAN]. Substantially the same material from Professor Freedman's book is reprinted in Freedman, Perjury: The Lawyer's Trilemma, 1 Litigation 26 (1975).
4. For the ABA's defense function standards, see ABA, STANDARDS RELATING TO THE DEFENSE FUNCTION (Approved Draft 1971) [hereinafter cited as ABA DEFENSE FUNCTION STANDARDS]. The ABA has received approximately $160,000 from the Law Enforcement Assistance Administration to review its 18 volumes of criminal justice standards. ABA Press Release (July 2, 1977) (on file at the office of the Hofstra Law Review). The project is under the auspices of the ABA's Special Committee on the Administration of Criminal Justice. Id.
Standards § 7.7 proposes a solution for the defense lawyer’s handling of a client bent on perjury: The attorney should seek to withdraw; if that fails, the defendant should be asked to make a statement to the trier of fact, but his false testimony should not be argued to the jury. The ABA approach obviously differs from that of Professor Freedman and it, too, has been criticized.

Indeed, while a lively debate on the client-perjury issue has developed in the literature during the past decade, and while the number of court decisions on the problem has increased during this time, no single view has emerged predominant. Appellate decisions are in disagreement, and often fail to analyze the problem fully. In the course of this article, the various approaches for handling the defendant’s proposed perjury are discussed. Subsequently, I offer my own suggestions for the defense lawyer’s resolution of the perjury issue—suggestions which differ from Professor Freedman’s and the ABA Defense Function Standards.

DEFINING THE ISSUE

To understand the role of the defense attorney, it is helpful first to define the nature of the perjury issue. We are not concerned with the lawyer who learns after his client has testified that perjury was committed. Although the duty of the lawyer when this occurs has not always been clear, recent developments have greatly clarified the attorney’s obligation. Most importantly, the ABA Code of Professional Responsibility (the Code) was amended to provide that an attorney cannot reveal a fraud perpetrated by his client upon the court, when the source of the attorney’s information of the fraud “is protected as a privileged communication.”

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5. ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7. For the text of § 7.7, see note 39 infra.


7. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1976) [hereinafter cited as ABA CODE]. More fully, DR 7-102(B)(1) states:

A lawyer who receives information clearly establishing that:

His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. Id. (footnotes omitted). Id. DR 4-101(C) (footnotes omitted) specifies privileged information which a lawyer “may reveal”:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
vision of the Code, with a recent Formal Opinion of the ABA Committee on Professional Ethics, makes clear that when knowledge of the client’s past perjury derives from a “confidence” or “secret,” as it almost always will, the attorney may not divulge his client’s crime. In this situation, the policy favoring maintenance of attorney-client privileges takes precedence, particularly since the wrong already has been committed and the attorney played no role in it.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

For a discussion of DR 4-101(C)(3), see text accompanying notes 23 & 24 infra.

8. See ABA Comm. on Ethics and Professional Responsibility, Formal Opinions, No. 341 (1975) [hereinafter cited as Formal Opinions]. The definition of “confidences” and “secrets” is contained in ABA Code, supra note 7, DR 4-101(A): “‘Confidence’ refers to information protected by the attorney-client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” The amendment to DR 7-102(B)(1), ABA Formal Opinion No. 341, and the duty generally of attorneys to preserve confidences of clients relating to past crimes is discussed in Callan & David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332, 356-65 (1976). Counsel’s duty to protect confidences related to past crimes also has been stated in ABA Comm. on Ethics and Professional Responsibility, Informal Opinions, No. 1314 (1975) (emphasis added) [hereinafter cited as Informal Opinions]:

[The attorney], pursuant to the provisions of DR 7-102(B), has the primary duty to protect the confidentiality of any privileged communication from his client. Subject, however, to affording the client proper protection on the basis of any privileged communication, the lawyer does have the obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client. See DR 2-110(C). In other words, the confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client’s confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal.

9. The analysis in this article is based on the assumption that a lawyer confronted with a client’s intent to commit perjury is bound by the ABA Code of Professional Responsibility (the Code). However, in 1977 a special committee of the ABA was appointed to evaluate the professional standards and to make recommendations concerning a new Code of Professional Responsibility. If a new code were to authorize a lawyer to reveal the past frauds of his client, contrary to ABA Code, supra note 7, DR 7-102(B)(1), a different approach would be available to lawyers for handling the client-perjury problem. For a discussion of the desirability of permitting attorneys to preserve the confidences of clients related to past and continuing wrongs, see Callan & David, supra note 8.
We also are not concerned with the criminal case where the defense attorney strongly believes that his client is not being truthful and thus will probably commit perjury if he testifies during the trial. Defense attorneys will attest to the frequency of cases where there is substantial evidence that the client is lying, yet the client adamantly, although unconvincingly, insists that he is innocent. Sometimes the client will even alter the facts each time he tells the attorney what happened, suggesting thereby that truth will have little or nothing to do with his testimony at trial. Yet, in this situation, the attorney may allow the client to testify without fear of suborning perjury, for one is guilty of that crime only if he induces another to commit perjury.10 The ABA Defense Function Standards, moreover, adopt the position that the client may be permitted to testify as long as he insists upon his innocence.11 Such a rule is essential; otherwise, defense attorneys would constantly be judging the innocence of their clients, and then deciding whether to allow them to testify. If this occurred, the adversary system of criminal justice would no longer function as we now know it.12


[S]ubornation of perjury consists in procuring or instigating another to commit the crime of perjury. . . .

. . . .

It is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false; that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony.

70 C.J.S. Perjury § 79 (1951) (emphasis added) (footnotes omitted). For decisions consistent with this definition, see Petite v. United States, 262 F.2d 788, 796 (4th Cir. 1959), rev'd on other grounds, 361 U.S. 529 (1960); People v. Jones, 254 Cal. App. 2d 200, 217, 62 Cal. Rptr. 304, 316 (4th Dist. 1967), cert. denied, 390 U.S. 980 (1968); State v. Lucas, 244 N.C. 53, 54, 92 S.E.2d 401, 403 (1956). The defense attorney who strongly believes that the client is lying obviously cannot be said to have "procured" or "instigated" the false testimony. Similarly, the crime of subornation of perjury is not committed even where the defendant testifies falsely and the attorney is aware of the false testimony, particularly if the attorney sought to dissuade the client from lying on the witness stand.

11. ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7, Commentary: "The existence of this dilemma [where the client proposes to commit perjury] is predicated upon the defendant's admitting inculpatory facts to his lawyer which are corroborated by the lawyer's own investigation. So long as the defendant maintains his innocence, the lawyer's realistic appraisal that he is in fact guilty does not preclude a vigorous defense."

12. ABA CODE, supra note 7, DR 7-102(A)(4) (footnote omitted), provides that
The focus of this article, then, is on the defendant who tells his lawyer, unequivocally, that he is guilty, but who proposes that during the trial he deny his guilt and offer testimony which is fictitious. It is further assumed that the defense attorney has independent knowledge of the client’s guilt that corroborates what the client has told the attorney. Some years ago, when I was actively engaged in criminal defense work, I had just such a case. I was appointed by the court to represent a defendant, whom I shall call Mr. X, charged with the nighttime burglary of a barbershop. During my first interview with Mr. X, I explained the nature of the attorney-client privilege, assuring him that I could not be compelled to divulge what he told me. Almost immediately the defendant confessed that he had broken into the barbershop, that he was accustomed to having his hair cut there, and that he was arrested near the scene of the break-in hiding in some bushes. The defendant explained that he took cover in the bushes when he heard police sirens. I advised the defendant that I would “check out” the Government’s case against him and would be back in touch. From the police officer who arrested the defendant, I learned that an eyewitness saw the defendant both enter and leave the barbershop; the witness then called the police and led them to the defendant hidden in the bushes. According to the eyewitness, who made an on-the-scene identification, there was no doubt that the defendant was the person who entered the barbershop. I also learned that the barbershop owner knew the defendant as a frequent patron of his

"a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence.” A definition of “knowingly” is not contained in the Code; however, in criminal statutes the word is normally defined as including both actual knowledge and a belief in the “high probability” of the existence of certain facts. Thus, MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962) provides: “When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” For criminal cases which interpret “knowingly” similarly, see Leary v. United States, 395 U.S. 6, 46 (1969); United States v. Jewell, 532 F.2d 697, 702 (9th Cir.), cert. denied, 426 U.S. 951 (1976); United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972). While it could therefore be argued that an attorney violates DR 7-102(A)(4) when he uses the defendant’s testimony with strong reason to believe that it is false, such an interpretation would seriously disrupt attorney-client relations and the practice of criminal law. Probably for these reasons, there is apparently no specific authority for the proposition that the Code is, in fact, violated when counsel permits the defendant to testify to matters believed to be false.

13. See ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7(a). This article also discusses the closely related problem of the defendant who wishes to commit perjury but who does not admit that he is guilty, see note 84 infra and accompanying text. See also Annot., 64 A.L.R.3d 385 (1975).
establishment. In short, my investigation fully corroborated my client’s admission of guilt; though I had no reason to doubt my client during our first interview, I was positive of his guilt upon completing my investigation.

When I met with the client for our second interview, I explained that the case against him was strong and that a successful challenge to the eyewitness identification would be quite difficult. I noted, however, that since no fruits of the crime were discovered on his person and since his fingerprints were not found inside the barbershop, there were at least some arguments we could make. As I was about to explain that I thought it advisable to conduct plea negotiations with the prosecutor, the client interrupted to state that he would testify at the trial that he was with his girl friend during the evening of the burglary, and that he was walking home when he heard police sirens and hid in the bushes out of fear. He further told me that he would explain to the jury that because he had a prior record, which would be brought out on cross-examination, he believed it likely that the police would blame him for any criminal activity that might have occurred in the area. As the finishing touch to his story, the client handed me a sheet of paper with the name and telephone number of his girl friend, who was prepared to corroborate his alibi for the period just prior to the burglary.

Perhaps because of my relative youth and lack of experience in criminal defense, I was shocked by what my client proposed. Instinctively, I advised the client that I could not permit him to testify, since his testimony would be perjury, and that I would not call his girl friend as a witness for the same reason. Shortly thereafter, I left what had become an increasingly unpleasant interview, telling the defendant to think over what I had said. The defendant obviously did so; within a few days, I received a call from another attorney, who advised me that he had been retained by my client’s father to provide representation in the case. 14 Out of curiosity, I

14. I did not divulge to the new attorney what the client had told me. This was consistent with FORMAL OPINIONS, supra note 8, No. 268 (1945):

It is not infrequently the case that a lawyer who has been retained by a client accused of crime, having been told by the client facts which make it certain that the client is guilty, declines to represent the defendant, insomuch as a successful defense cannot be hoped for without suborning perjury under such circumstances. In such case, the lawyer is bound by the Canon not to disclose the information received from the client in confidence, though he ascertains that the client, having subsequently retained another lawyer, has, in his defense, stated the facts to be otherwise.
later attended part of the trial and listened to what I knew to be perjured testimony presented by my former client and his girl friend. “Justice” triumphed, however; the defendant was convicted.

PROFESSOR FREEDMAN’S VIEW

At the time I represented Mr. X, Professor Freedman had not yet written about what a lawyer should do when presented with a client who wishes to commit perjury. Had I known about and followed the course which Professor Freedman was later to urge, I might have continued to represent Mr. X and presented his perjured testimony.15 Faced with Mr. X’s desire to commit perjury, my “obligation,” according to Professor Freedman, was “to advise the client that the proposed testimony [was] unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client [made] the decision to go forward.”16 Primarily, this conclusion derives from what Professor Freedman calls the lawyer’s trilemma.17 In criminal defense representation, the attorney must learn all the facts from his client, he must keep them in strictest confidence,18 and he must always be candid in his dealings with the court.19 After examining these obligations and the alternatives to presenting perjured testimony, Professor Freedman concludes that the attorney cannot forego knowing

15. It would not have been proper, under any circumstances, to have allowed the girl friend to present perjured testimony. The duty of the criminal defense lawyer not to use false testimony of persons other than the defendant is well-established. See, e.g., Herbert v. United States, 340 A.2d 802, 804 (D.C. 1975); People v. Pike, 58 Cal. 2d 70, 96, 372 P.2d 656, 672, 22 Cal. Rptr. 664, 680 (1962). Although Professor Freedman concedes that there is an “important distinction” between collateral witnesses and the defendant when it comes to perjury, he appears to suggest that defense counsel should use the perjured testimony of members of the defendant’s immediate family:

Certainly a spouse or parent [who sought to commit perjury] would be acting under the same human compulsion as a defendant, and I find it difficult to imagine myself denouncing my client’s spouse or parent as a perjurer and, thereby, denouncing my client as well. I do not know, however, how much wider that circle of close identity might be drawn.

FREEDMAN, supra note 3, at 32.

16. FREEDMAN, supra note 3, at 31.

17. Id. at 27-28.

18. Id. Professor Freedman refers, for example, to the “‘sacred trust’ of confidentiality [which] must ‘upon all occasions be inviolable.’” Id. at 5 (citing Address by Chief Justice Burger, Opening Session, American Law Institute (May 18, 1971), reprinted in 52 F.R.D. 211, 212-14 (1971)). Elsewhere, Professor Freedman claims that the “lawyer must hold in strictest confidence the disclosures made by the client in the course of the professional relationship.” Id. at 27.

19. Id.
all of the facts, and that between confidentiality and candor to the court, the former is significantly more important.

The problem with Professor Freedman's trilemma is that it rests on the false premise that the confidentiality requirement applies to a client's statement that he intends to commit the crime of perjury. Historically, however, the attorney-client privilege has never extended to the client who seeks legal assistance in the commission of a future crime.\(^\text{20}\) The law is succinctly stated in a leading evidence treatise:

> Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. Advice given for those purposes would not be a professional service but participation in a conspiracy. Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud.\(^\text{21}\)

Thus, for example, in Sawyer v. Barczak,\(^\text{22}\) where a prospective state's witness told an attorney that he was prepared to commit perjury if it would lead to dismissal of criminal charges pending against him, the court held that the client's statements were not privileged and that the attorney should have been allowed to testify to what the client had said. The Code, moreover, states that a lawyer may reveal the "intention of his client to commit a crime and the information necessary to prevent the crime."\(^\text{23}\) A client's statements which reflect an intent to commit a crime are not characterized by the Code as either "confidences or secrets."\(^\text{24}\) The Code's drafters must have recognized that no privilege attaches to the client's statements concerning commission of future crime. Consequently, if a lawyer reveals the client's intent to commit perjury, he is not revealing protected information; the attorney-client

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20. It has been agreed from the beginning that the [attorney-client] privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise. This is for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client.

8 J. WIGMORE, EVIDENCE § 2298, at 572 (McNaughton rev. 1961).


22. 229 F.2d 805 (7th Cir. 1956).

23. ABA CODE, supra note 7, DR 4-101(C)(3) (footnotes omitted).

24. Compare ABA CODE, supra note 7, DR 4-101(C)(3) with id. DR 4-101(C)(1)-(2), (4).
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privilege never covered the client’s statements. This, of course, does not answer the question whether the client’s intent to commit perjury should be disclosed. It does suggest, however, that Professor Freedman is inaccurate in claiming that all disclosures of the client must be held in strictest confidence.\(^{25}\)

As a guide to the practicing attorney, there is another major difficulty in Professor Freedman’s analysis. The Code provides that “a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence.”\(^{26}\) To do so subjects the attorney to disciplinary sanction.\(^{27}\) In the case of Mr. X, for example, had I called my client to testify I would have “knowingly” used perjured testimony.\(^{28}\) Although Professor Freedman concedes the presence of the Code’s perjury prohibition, he offers no effective defense for an attorney accused of ignoring it. Essentially, he argues that because the attorney’s trilemma is not addressed in the Code, its clear admonitions against using perjury are not a problem. Therefore, the only satisfactory course is for an attorney to preserve his client’s confidences.\(^{29}\)

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25. Professor Freedman recognizes that there is a “major exception to the strict rule of confidentiality” for the client’s intent to commit a crime. Freedman, supra note 3, at 6. Elsewhere, however, Professor Freedman describes the duty of confidentiality in such broad terms as to suggest that a client’s intent to commit perjury is fully entitled to protection. See note 18 supra and accompanying text. For criticism of Professor Freedman’s view of the attorney-client privilege as overly broad, see Rotunda, Book Review, 89 Harv. L. Rev. 622 (1976). Professor Freedman also argues that for counsel to seek to withdraw from the case is tantamount to informing the court that the client has admitted his guilt to the lawyer. Freedman, supra note 3, at 34. For a discussion of this argument, see notes 82-86 infra and accompanying text.

26. ABA Code, supra note 7, DR 7-102(A)(4) (footnote omitted). The Code also declares that a lawyer shall not “[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false,” id. DR 7-102(A)(6), and shall not “[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent,” id. DR 7-102(A)(7). The Code has been substantially adopted in all states except California. See Callan & David, supra note 8, at 352.

27. See, e.g., In re Carroll, 244 S.W.2d 474 (Ky. 1951) (per curiam) (attorney disciplined for knowingly allowing client to testify falsely). The disciplinary rules of the Code are “mandatory in character” and “state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” ABA Code, supra note 7, Preliminary Statement.

28. For a discussion of the meaning of “knowingly,” see note 12 supra.

29. Professor Freedman’s only specific response to the Code’s prohibition against the use of perjury is contained in four sentences. Referring to what he concedes to be, “at first reading,” the apparently “unambiguous” obligation not to use perjured testimony, Professor Freedman replies:

The difficulty, however, is that the Code does not indicate how the lawyer is to go about fulfilling that obligation. What if the lawyer advises the client...
Aside from the law of confidentiality and the provisions of the Code, there is another important reason that Professor Freedman's position should be resisted. Ultimately, what Professor Freedman advocates is a significant extension and corruption of the defense attorney's role. In his view, the criminally accused is not only entitled to effective counsel, he is entitled to counsel who will provide active assistance in presenting perjured testimony and who will vigorously argue known perjured testimony to the jury. This is surely the antithesis of what the lawyer's role ideally should be.\(^{30}\)

To avoid assisting a client in presenting false testimony, it is sometimes suggested that the attorney should seek to withdraw from the case.\(^{31}\) Professor Freedman criticizes this alternative, arguing that if the motion is granted, the identical perjured testimony will be presented anyway, because the client will acquire a new attorney with whom he will not be candid; the new attorney will then present the perjured testimony without knowing that it is false.\(^{32}\) Although this scenario may be troublesome, it is preferable to permitting the original attorney knowingly to present the perjured evidence. While a fraud may be practiced on the court, at least the responsibility for the fraud will rest solely with the defen-

\(^{30}\) Consider the strong language in Introduction to ABA Defense Function Standards, supra note 4, at 142:

It has even been suggested, but universally rejected by the legal profession, that a lawyer may be excused for acquiescing in the use of known perjured testimony on the transparently spurious thesis that the principle of confidentiality requires this. While no honorable lawyer would accept this notion and every experienced advocate can see its basic fallacy as a matter of tactics apart from morality and law, the mere advocacy of such fraud demeans the profession and tends to drag it to the level of gangsters and their “mouth-piece” lawyers in the public eye. That this concept is universally repudiated by ethical lawyers does not fully repair the gross disservice done by the few unscrupulous enough to practice it.


\(^{31}\) See ABA Defense Function Standards, supra note 4, § 7.7(b). For the text of this provision, see note 39 infra.

\(^{32}\) Freedman, supra note 3, at 33. The first attorney, moreover, is not authorized to reveal the client's proposed perjury to the second attorney. See Formal Opinions, supra note 8, No. 268 (1945).
No attorney will have sacrificed his integrity by serving as an agent for a client by knowingly presenting false testimony. In contrast, Professor Freedman does not concede that avoiding participation of attorneys in the client's crime is an objective worth achieving.

No court decisions have been discovered which endorse Professor Freedman's view, but this absence of decisions might exist because no attorney who has followed Professor Freedman's recommendation has been discovered. In the mid-1960's, two writers did suggest that it would be permissible to allow the defendant to present perjured testimony, although one urged that the lawyer first seek to withdraw from the case, and the other suggested that the lawyer not argue the perjured testimony to the jury. The strongest endorsement of Professor Freedman's position has been made by the Supreme Judicial Court of Massachusetts Rules Committee, which recommended that the state's defense representation standards provide that, where a client rejects an attorney's advice not to commit perjury, "an attorney may examine him in
the usual way, and may argue the validity of this testimony to the jury.”

This position, clearly influenced by Professor Freedman’s writings, was urged upon the Rules Committee by both the Massachusetts and Boston Bar Associations. A final decision on the issue has not yet been rendered by the Supreme Judicial Court of Massachusetts.

THE ABA APPROACH

The ABA position concerning the defendant who wishes to commit perjury is articulated in section 7.7 of the ABA Defense Function Standards. First, the defense lawyer must seek to dissuade the client from testifying falsely. If this fails, the attorney must attempt to withdraw from the case, but the reason for seeking to withdraw should not be revealed to the court. If withdrawal is

36. Levine, Struggling with Ethical Standards in Massachusetts, 3 LITIGATION 43, 50 (1976).
37. See id.
39. ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7 provides:
   (a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer’s independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.
   (b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.
   (c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant’s known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.
40. Paragraph (b) of § 7.7, which deals with the duty of a lawyer to withdraw, is silent on whether the attorney should tell the court his reason for seeking to do so. Id. § 7.7(b). However, paragraph (c), which pertains to the lawyer’s duty if the motion to withdraw is denied, states that the defendant should be allowed to take the stand, but that a record of the circumstances should be made by counsel without the court being advised. Id. § 7.7(c). It follows, therefore, that counsel is not to tell the court his reason for wishing to withdraw; otherwise, there would be no point in stating that the court is not to be advised of the circumstances relating to the defendant’s taking the stand. For the text of § 7.7, see note 39 supra.
either unfeasible or not permitted by the court, the attorney should confine direct examination of his client to permitting the defendant to make a statement to the judge or jury. The lawyer, however, should not rely upon the false testimony in his closing argument. Section 7.7 also recommends that the lawyer record that the client is testifying against counsel’s advice.41

For the attorney who cannot avoid the perjury problem by withdrawing, the ABA position is a compromise. The defendant is permitted to testify, yet the lawyer avoids offering his personal support of the client’s lies. Accordingly, the ABA position is regarded as a means of circumventing the prohibitions in the Code pertaining to the use of “perjured testimony or false evidence”42 and “conduct that the lawyer knows to be illegal or fraudulent.”43 The ABA recommendation, which was adopted in 1971, is consistent with views Chief Justice (then Judge) Burger expressed in 1966.44

In discussing the ABA approach, Professor Freedman offers an intensely practical criticism: Suppose the prosecutor objects to the defendant delivering a narrative on the grounds that it will not be possible to know in advance if the defendant will make inadmissible statements.45 Trial lawyers ordinarily object when a witness is asked to tell all he knows about a case, because such a broad question fails “to provide an orderly means by which objections to improper evidence can be raised and ruled upon before the evidence is heard by the jury.”46 Thus, a trial judge might sustain the prosecutor’s objection to defense counsel’s general question to his client.47 Yet, neither section 7.7 nor the accompanying Commen-

41. The court is not to be advised of the record which is made by counsel. See note 40 supra. For the text of § 7.7(c), see note 39 supra. The Commentary to § 7.7(c) suggests that the “record” may be made, “for example, by having the defendant subscribe to a file notation, witnessed, if possible, by another lawyer.” ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7, Commentary.

42. ABA CODE, supra note 7, DR 7-102(A)(4) (footnote omitted).

43. Id. DR 7-102(A)(7).


45. FREEDMAN, supra note 3, at 37.


47. Normally, the decision to permit testimony in narrative form rather than by question and answer is said to be committed to the sound discretion of the trial court. Compare Faust v. State, 319 N.E.2d 146 (Ind. Ct. App. 1st Dist. 1974) (trial court held not to have committed error in allowing complaining witness to testify in narrative form) with Deams v. State, 265 S.W.2d 96 (Tex. Crim. App. 1953) (trial court held not to have committed error in denying defendant opportunity to testify in narrative form).
tary offers any solution for what the defense lawyer should then do. Presumably, the attorney could either examine the witness in the normal fashion or advise the court of the client's proposed perjury, a solution which is examined later.48

There appear to be only two reported decisions in which appellate courts have discussed the ABA's approach to the perjury problem,49 and they both illustrate the difficulty with section 7.7's recommendation that lawyers attempt to withdraw from a case under these circumstances. In State v. Lowery,50 counsel moved to withdraw during the direct examination of his client, apparently because the client, much to counsel's surprise, began to testify falsely. When the trial court asked counsel his reason for seeking to withdraw and counsel replied that he could not state the reason, the motion was denied.51 In Thornton v. United States,52 the defense attorney moved to withdraw prior to the start of trial "for moral ethical reasons."53 The trial court, however, pressed the attorney for greater specificity and the attorney, contrary to the ABA's recommendation, then revealed that the client had changed his "story" and was planning to give false testimony.54 The trial court, apparently believing that he might now be prejudiced against the defendant at sentencing, certified the case to a second judge. Defense counsel again moved to withdraw, but this time gave no reason for seeking to do so; accordingly, the second judge denied the motion.55 In affirming the defendant's conviction, the

48. See text accompanying notes 57-81 infra.
49. For cases in which § 7.7 of the ABA Defense Function Standards is mentioned, but in which proposed perjury of the client was not clearly at issue, see People v. McCalvin, 55 Ill. 2d 161, 302 N.E.2d 342 (1973); People v. Brown, 54 Ill. 2d 21, 294 N.E.2d 285 (1973).
51. Id. Technically, State v. Lowery, id., did not involve a situation where counsel should have sought to withdraw pursuant to § 7.7. Defense counsel in Lowery appears to have been unaware that the client intended to testify falsely, learning of the false testimony only while the client was speaking from the witness stand. Hence, the client already had committed the crime of perjury, without advance knowledge of counsel, and counsel therefore would seem to have been duty-bound to preserve the client's confidence regarding the crime just committed. See ABA Code, supra note 7, DR 7-102(B)(1). Moreover, the ABA Defense Function Standards do not envision counsel's withdrawal from the case "if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf ..." ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7(c).
53. Id. at 432 (footnote omitted).
54. Id.
55. Id. at 435.
appellate court ruled that the conduct of the second judge was reasonable, because the specific grounds for counsel’s motion to withdraw were never disclosed. 56

TELLING THE COURT OF THE PROPOSED PERJURY

A third possible approach to the client-perjury problem is simply to disclose the defendant’s intention to the court. Although section 7.7 does not suggest that a lawyer should reveal the client’s proposed perjury, the Commentary to the section implies that it may be proper to do so:

On one hand, some lawyers hold that the lawyer’s general obligation to protect the court from fraud in its processes and the exception to the attorney-client privilege for statements of intention to commit a crime may place the lawyer in the position of being required to disclose the fact of perjury. 57

The ABA Committee on Ethics and Professional Responsibility expresses important support for this position. In an Informal Opinion issued in 1975, the committee was asked to decide the duty of an attorney “where a defendant in a criminal case, whether it be in a traffic case or a felony case, insists upon taking the stand and giving perjured testimony.” 58 The committee replied that the lawyer has only two alternatives: He must either withdraw from the case before the client commits perjury or report the proposed perjury to the court. According to the committee, “the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence.” 59 Remarkably, section 7.7 of the ABA Defense

56. Id. at 435 n.9. The appellate court explained the propriety of the second trial court’s denial of counsel’s motion to withdraw, stating:

Having been given no explanation for trial counsel’s request to withdraw, the second trial judge saw no justification for granting it. Defense counsel indicated his lengthy association with the case and his extensive contact with appellant. He also informed the court that he was retained, rather than appointed, counsel. Forced to decide defense counsel’s motion on less than an adequate basis, the court’s denial of the motion was reasonable.

Id. The second trial court’s approach, affirmed by the appellate court in Thornton, indicates that the recommendation of § 7.7 that counsel seek to withdraw when the client wishes to present perjury is totally unworkable; the reason for counsel’s motion to withdraw is not supposed to be revealed to the court, see note 40 supra.

57. ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 7.7, Commentary.

58. INFORMAL OPINIONS, supra note 8, No. 1314 (1975).

59. Id. The few opinions of state bar ethics committees on client-perjury are consistent with this ABA ruling. Thus, the Florida bar grievance department has
Function Standards approved four years earlier by the ABA, is not even mentioned.

In two state appellate decisions, State v. Henderson and State v. Robinson, defense counsel requested leave to withdraw and, in doing so, advised the trial court that the defendant was planning to present perjured testimony. In both cases, the appellate courts commended defense counsel for having acted in a professionally responsible manner; the defendants, however, declined to testify after counsel advised the court that the testimony would be untrue.

Suppose that the defendants in Henderson and Robinson requested to testify despite what their attorneys had told the trial courts. The question whether a criminal defendant who proposes to commit perjury has an absolute right to testify remains. In Henderson and Robinson the appellate courts apparently assumed that the trial judges were required to allow false testimony to be given by the defendants. In Henderson the appellate court stated that “defendant was fully informed by counsel, as well as the court, of his right to take the stand and ‘tell his story,’ but defendant declined to do so.” Similarly, in Robinson the appellate court noted that the trial judge inquired of the defendant “if he desired to take the witness stand.”

Neither Professor Freedman nor the ABA Defense Function Standards discusses in detail whether a defendant has a right to testify falsely. Professor Freedman says only that “there is a point of view, which has been expressed to me by a number of experienced attorneys, that the criminal defendant has a ‘right to tell his story.’” In the ABA’s Defense Function Standards, the Comment stated that an attorney must seek to dissuade the defendant from committing perjury and, if this fails, withdraw from the case. See Quiz, What Is Your Ethics Rating?, 50 Fla. B.J. 157, 158 (1976). Further, the grievance department suggests that the attorney “must take steps to prevent [the perjury] or to inform the court of its occurrence.” Id. For criticism of the grievance department’s position, see Glazer, What Are Limits of Lawyer’s Professional Conduct in Defending a Client?, 50 Fla. B.J. 332 (1975). See also New Jersey Advisory Comm. on Professional Ethics, Opinions, No. 116, 90 N.J.L.J. 688 (1967).

tary to section 7.7 refers, without citation of authority, to the "defendant's absolute right . . . to testify in his own behalf . . . ."67 Further Commentary to section 7.7, however, speaks somewhat less certainly of the defendant's right to testify. Referring to the views of "experienced defense counsel," the Commentary states: "Our legal system, permitting the defendant to testify under oath, has not, in their view, completely foreclosed to him the opportunity to speak to the jury . . . ."68 Again, no citation of authority is provided.

As a general rule, the defendant in a criminal case is entitled to testify in his own behalf.69 When a defendant reveals to his lawyer his intention to give perjured testimony, however, he arguably may be precluded from testifying. Courts have held that when a defendant misbehaves on the witness stand, the right to testify may be deemed waived. Thus, in United States v. Ives,70 where the defendant's first trial ended in mistrial because of his misconduct and he insisted that he be allowed to testify in the second trial, the judge ruled that he could not do so because of his prior disruptive conduct.71 Twice the defendant took the stand. The first time he refused to confine his testimony to the issues and cursed the defense counsel and the judge; on the second occasion, the defendant again verbally abused the court and his counsel and gave unresponsive answers. The Court of Appeals for the Ninth Circuit affirmed the trial court's actions, noting that the conduct of the

67. ABA Defense Function Standards, supra note 4, § 7.7, Commentary.
68. Id. (emphasis added).
69. Although courts recognize that a defendant should be allowed to testify in his own defense, disagreement exists as to whether there is a "right" or "privilege" to do so. Compare, e.g., United States v. Bentvena, 319 F.2d 916, 943 (2d Cir.), cert. denied, 375 U.S. 940 (1963) (defendant has "privilege" to testify in his own behalf) with Poe v. United States, 233 F. Supp. 173, 176 (D.D.C. 1964), aff'd, 352 F.2d 639 (D.C. Cir. 1965) (defendant has "right" to testify in his own behalf). However, for a recent case holding that a defendant has a "right" to testify, see Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977). Courts sometimes fail to make clear whether the source of the defendant's entitlement to testify rests on the due process clause, the right to counsel, the self-incrimination privilege, or the compulsory process clause. See Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 119 (1974). Regardless of the source of defendant's "right" or "privilege" to testify, it is clear that the right is personal to the defendant. Thus, defense counsel cannot require that the defendant forego the opportunity to testify. See, e.g., People v. Robles, 2 Cal. 3d 205, 214-15, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970); Ingle v. State, 546 P.2d 598, 599 (Nev. 1976). This is consistent with the ABA Defense Function Standards, which provide that the decision whether to testify should be made by the accused. ABA Defense Function Standards, supra note 4, § 5.2(a).
70. 504 F.2d 935 (9th Cir. 1974).
71. Id. at 938.
defendant was sufficient to waive his opportunity to testify.\textsuperscript{72} The court of appeals analogized the right to testify with the right of the accused to attend the trial, which may also be waived due to misconduct.\textsuperscript{73}

Arguably, there is a basic difference between denying a defendant the right to testify because of proposed perjury and denial because of disruptive activity. In the latter situation, the defendant has unequivocally demonstrated that he must be controlled in the courtroom; otherwise, the trial cannot proceed in orderly fashion. Where proposed perjury is involved, the defendant has not yet misbehaved, and the court has only defense counsel's report of his client's intention. Even assuming that defense counsel's assessment of the client's intent is completely accurate, if the defendant were to change his mind on the way to the witness stand, the prediction of the client's proposed perjury would not be realized.

Nevertheless, decisions of the Supreme Court support the proposition that a defendant lacks the constitutional right to present perjured testimony; however, the decisions do not address the manner in which a defendant may be prevented from doing so. In \textit{Harris v. New York},\textsuperscript{74} the Court held that defendants could be impeached with statements obtained in violation of \textit{Miranda v. Arizona}.\textsuperscript{75} In reaching this decision, the Court in dictum offered the following view of defendants who testify: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately . . . ."\textsuperscript{76}

\textsuperscript{72} \textit{Id.} at 943-44.

\textsuperscript{73} \textit{Id.} at 941. \textit{See} \textit{Illinois v. Allen}, 397 U.S. 337 (1970). Similarly, the accused may be denied the right to conduct his own defense because of misconduct, \textit{Faretta v. California}, 422 U.S. 806, 834 (1975). In announcing the constitutional right to self-representation, the Court stated:

\textit{We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.}\textit{Id.} at 834 n.46 (citing \textit{Illinois v. Allen}, 397 U.S. 337 (1970)). \textit{See also} \textit{United States v. Dougherty}, 473 F.2d 1113, 1124 (D.C. Cir. 1972).

\textsuperscript{74} 401 U.S. 222 (1971).

\textsuperscript{75} 384 U.S. 436 (1966).

More recently, in *United States v. Wong*, the Supreme Court reaffirmed that when authorities mistakenly fail to warn a person of the privilege against self-incrimination, the suspect is not justified in offering perjured testimony. In *Wong* the defendant was summoned before a grand jury and told of her fifth amendment rights. Due to her limited command of English, however, she did not understand the prosecutor's warning and believed that she had to answer all questions. Not wishing to incriminate herself, she lied and was subsequently indicted for perjury. At a suppression hearing, the district court ordered the testimony suppressed. On appeal to the Supreme Court, after affirmance by the Ninth Circuit, the Government conceded that defendant had not understood her fifth amendment rights and hence, in legal effect, was unwarned of her privilege against self-incrimination. The defendant argued that since she was in effect forced by the Government to answer all questions, her choice was confined either to incriminating herself or lying under oath. The Supreme Court disagreed, stating that "the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testifies with a license to commit perjury.'" It would seem to follow from *Wong*, and from the cases on which it is based, that if a suspect unwarned of the privilege against self-incrimination has no right to present perjured testimony, such a right is similarly unavailable to the criminal defendant who is aware of his privilege to remain silent.

**VIOLATING THE ATTORNEY-CLIENT PRIVILEGE CONCERNING THE CRIME CHARGED**

Even if the defendant does not have an absolute right to present perjured testimony, there is a substantial problem with permitting the defense lawyer to tell the court of the client's proposed perjury. Assume the defense attorney says to the judge: "My client proposes to present perjurious testimony; I will not, therefore, call him to the witness stand to testify." The trial judge will almost

78. See id. at 175.
79. See id. at 175-76.
80. *Id.* (quoting Glickstein v. United States, 222 U.S. 139, 142 (1911)).
certainly assume that the client has confessed his guilt to the attorney and is contemplating false testimony to conceal it. Such an assumption by the trial court will mean that, as a practical matter, the defense lawyer will have breached his confidentiality obligation. Unlike the attorney's duty when his client intends to commit a crime, his duty to keep his client's confessions of past crimes confidential is absolute. The same problem inheres in the ABA's solution to a client's proposed perjury, as specified in section 7.7 of the ABA Defense Function Standards. If a lawyer unsuccessfully seeks to withdraw from his client's case, puts the client on the witness stand, and asks him to make a statement, and then does not argue the defendant's version to the jury, the trial judge will almost surely recognize that the defense attorney is implementing section 7.7 and that the defendant's testimony is false. Further, the judge will reason that the defendant has confessed guilt of the crime charged to his attorney, which is why the attorney is following section 7.7 of the ABA Defense Function Standards.

82. Thus, in People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), where the client told his lawyers of the location of the bodies of two women whom the client had murdered, and the attorneys personally verified the accuracy of the client's information, the attorneys still "were bound to . . . maintain what has been called a sacred trust of confidentiality." Id. at 190, 372 N.Y.S.2d at 802. No exception is contained in ABA Code, supra note 7, DR 4-101(C), for an attorney revealing a client's confidence or secret relating to a past crime. For the text of DR 4-101(C), see note 7 supra.

83. The recommendation contained in § 7.7 of the ABA Defense Function Standards may have been so new following its approval by the ABA in 1971 that trial judges might not have recognized the procedure. Now that the ABA's suggestion is more than six years old, however, it seems likely that trial courts everywhere are familiar with it. Indeed, when an attorney moves to withdraw from a criminal case without giving his reasons, the assumption usually is that he has withdrawn because the defendant wishes to commit perjury. For example, in Lessenberry v. Adkisson, 255 Ark. 285, 297, 499 S.W.2d 835, 841-42 (1973), the court observed:

It is apparent from the full record before us, that . . . Mr. Lessenberry [defense counsel] had learned from the defendant matters he was unwilling to reveal to the trial judge . . . . If Mr. Lessenberry was convinced of the defendant's guilt . . . . and if she was insisting that he prepare a fictitious defense in her behalf, he of course was correct in requesting that he be relieved as attorney of record . . . .

Similarly, in State v. Lowery, 111 Ariz. 26, 28, 523 P.2d 54, 56 (1974), the court stated:

The defendant contends on appeal that by moving to withdraw . . . . the attorney was indicating to the court that the defendant was lying . . . .

The record does not reflect the reasons why the defendant's attorney wished to withdraw, but we can surmise that he did not wish to assist the defendant in perjuring herself on the witness stand as the evidence strongly suggested she was doing when she denied under oath that she shot the victim.
It can be argued that the lawyer who tells the court of his client's proposed perjury or who follows the ABA's formula has revealed neither a client's confidence nor his guilt. Technically, this is true. The court has simply made assumptions which may in fact be unjustified. Conceivably, the client wishes to commit perjury to conceal embarrassing information. Indeed, the client may have insisted to his lawyer that he is totally innocent of the offense charged, but he does not feel that he can publicly admit where he was when the crime occurred. Experience suggests, however, that it is much more likely that the client's perjury—as in the case of Mr. X described earlier—will be aimed at concealing the client's guilt. Accordingly, the trial court's assumption that the client has fully confessed to the lawyer is apt to be accurate. Perhaps worse, the court will assume the client's guilt even if he is innocent of the crime charged and has never admitted his guilt to the lawyer.

Another problem may arise if the attorney informs the court of the client's proposed perjury, and the court then asks the lawyer how the intended testimony differs from the attorney's knowledge of the truth. If the client has confessed his guilt to the attorney, the attorney would have to tell the court that the question is not one which he should be required to answer. Should this occur, the court would almost certainly conclude that the client has confessed his guilt to the attorney, and counsel's duty to protect the client's confidences concerning past crimes will have been effectively breached.

84. In writing about the client-perjury problem, Professor Freedman has advanced the hypothetical of the defendant charged with robbery who, though innocent of the offense, was accurately identified as being a block from the robbery five minutes before it occurred. The defendant, according to the hypothetical, wishes to commit perjury because he fears the jury will convict him if he admits he was in the vicinity of the robbery so near the time that it transpired. See Freedman, supra note 3, at 30-31.

85. A similar development occurred in Thornton v. United States, 357 A.2d 429 (D.C.), cert. denied, 429 U.S. 1024 (1976). In Thornton the attorney moved to withdraw without disclosing his reasons. The trial court urged the attorney to be explicit about his reason for wanting to get out of the case. For further discussion of Thornton, see text accompanying notes 52-56 supra.

86. When the court asks a lawyer whether certain information is correct, and the lawyer's knowledge of the information is privileged, it has been suggested that counsel "ask the court to excuse him from answering the question . . . though this would doubtless put the court on further inquiry as to the truth." Formal Opinions, supra note 8, No. 287 (1953). The issue in Formal Opinion 287 was, inter alia, whether an attorney is obligated to tell the court that his client has a prior criminal record when, at sentencing, the court asks defense counsel about the existence of a record and counsel's knowledge of the record is protected by the attorney-client privilege. Id.
Finally, suppose that the trial court does assume that the client has admitted his guilt to the lawyer. Besides having a complaint about a violation of the attorney-client privilege, the issue whether defendant has a right to insist that a different judge try his case is unresolved. Although the question has never been litigated, in all likelihood he does not. While it may be preferable that a different judge try the case, a court in pretrial proceedings will often receive specific information about past offenses committed by a defendant without being disqualified from presiding at the defendant's trial. Moreover, where a court suspects that the defendant has committed perjury, it has no specific information, but rather is merely assuming that the defendant has admitted the offense to counsel. In fact, even where a judge learns of a defendant's express admissions of the crime charged, the judge often is permitted to preside at a subsequent bench trial. In *People v. Britt*, the judge in a bench trial was advised in a pretrial hearing of admissions the defendant had made to police; however, it was agreed that these statements would not be introduced by the prosecution. Thus, the defendant was held not to be entitled to a new trial.

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87. There are numerous instances in which a district judge will be informed of the past deeds of a defendant before trial. Facts can come to a judge's attention in pre-trial proceedings such as motions to suppress, reduction of bail, or for discovery. There is no rule that a trial judge must disqualify himself after presiding at these proceedings. United States v. Montecalvo, 533 F.2d 1110, 1113-14 (9th Cir. 1976) (Real, J., dissenting) (footnote omitted), vacated on rehearing, 545 F.2d 684 (9th Cir. 1976). The issue in *Montecalvo* was whether the trial judge was disqualified from presiding at the defendant's jury trial for bank robbery. Prior to the trial, at the request of the defense which contemplated that a guilty plea would be entered, the judge examined presentence materials concerning defendant's background. The plea was never entered, however, and a trial ensued. On rehearing, the Ninth Circuit Court of Appeals held that it had been proper for the trial court to have read the presentence materials, particularly since defense counsel had invited the court to do so. United States v. Montecalvo, 545 F.2d 684 (9th Cir. 1976). For a discussion of disqualification of judges for reading presentence materials prior to trial, see note 90 infra.


89. Id. Obviously, if a judge is not disqualified from acting as factfinder in a bench trial, he would not be precluded from presiding at a jury trial, where the jury serves as the trier of fact. For a discussion of cases similar to *Britt*, see Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 Harv. L. Rev. 407 (1965). Contrary to *Britt* and similar holdings, Chief Justice Burger has stated: "In a nonjury case the prior record of the accused should not be made known to the trier of fact except by way of traditional impeachment." *Argersinger v. Hamlin*, 407 U.S. 25, 42 n.* (1972) (Burger, C.J., concurring). *See also* People v. Ramsey, 385 Mich. 221, 187 N.W.2d 887 (1971) (conviction reversed where, during bench trial, judge "glanced" at transcript of preliminary hearing).
federal courts have sometimes held that a judge is not disqualified from presiding at a defendant's trial even though presentence materials on the defendant are examined in advance.\textsuperscript{90}

**AN ALTERNATIVE APPROACH: WARN THE CLIENT OF THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE**

The preceding analysis suggests that none of the three principal approaches to handling the client's proposed perjury is entirely satisfactory. Professor Freedman's suggestion of treating the perjurious client like any other witness means that the attorney assists the client in breaking the law. In addition, Professor Freedman's view requires that the lawyer violate the clear admonitions of DR 7-102(A)(4) and DR 7-102(A)(7) which prohibit the lawyer from using his client's perjured testimony and from assisting him in illegal conduct.\textsuperscript{91} The ABA's approach, as outlined in section 7.7 of the ABA Defense Function Standards, is also imperfect.\textsuperscript{92} Permission to withdraw from a criminal case is frequently denied,\textsuperscript{93} and the defendant may not be allowed by the court, over the prosecutor's objection, to make the suggested narrative statement.\textsuperscript{94} In addition, under both the ABA's approach and the third alternative—revealing the client's proposed perjury to the court—the

\textsuperscript{90} See United States v. Duhart, 496 F.2d 941, 945-46 (9th Cir. 1974); United States v. Small, 472 F.2d 818, 820-22 (3d Cir. 1972) (dictum); Webster v. United States, 330 F. Supp. 1080, 1086 (E.D. Va. 1971). Contra, United States v. Pruitt, 341 F.2d 700, 703 (4th Cir. 1965) (dictum). In Gregg v. United States, 394 U.S. 489 (1969), the Supreme Court in dictum suggested that district court judges should never examine a presentence report prior to presiding at a defendant's jury trial. Id. at 491. The Court explained that the purpose of rule 32 of the Federal Rules of Criminal Procedure, which then provided that the "report shall not be submitted to the court . . . unless the defendant has pleaded guilty . . . or has been found guilty," FED. R. CRIM. P. 32(c)(1) (amended 1974), was designed to prevent possible prejudice to the defendant by exposing him to unfavorable information about the defendant. Gregg v. United States, 394 U.S. 489, 491-92 (1969). However, rule 32 was amended effective December 31, 1975, Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, §§ 32-33, 89 Stat. 370, to provide that a presentence report may be submitted to the court at any time with the written consent of the defendant. The foregoing cases indicate that lower federal courts have carved exceptions to the broad prohibition suggested in Gregg. For example, in Duhart, the court held that the trial judge did not err when, prior to sentencing, he familiarized himself with a prison report relating to the defendant, since the document technically was not prepared as a presentence report pursuant to rule 32. See United States v. Duhart, 496 F.2d 941 (9th Cir. 1974).

\textsuperscript{91} See note 26 supra and accompanying text.

\textsuperscript{92} For the text of § 7.7, see note 39 supra.

\textsuperscript{93} See text accompanying notes 50-56 supra.

\textsuperscript{94} See text accompanying notes 45-47 supra.
lawyer's conduct is tantamount to revealing privileged information, because the court invariably will assume that the client has confessed guilt of the crime charged to his attorney.\textsuperscript{95}

Because of the difficulties inherent in these proposals, I believe a different approach is justified—one which will simultaneously reduce the likelihood of the problem arising and also clarify the lawyer's appropriate conduct if his client nevertheless proposes perjury. Accordingly, I suggest that at the beginning of their relationship, the defense attorney advise his client of the scope of the attorney-client privilege. For example, the attorney might inform his client:

Anything you tell me is privileged. That is, I cannot reveal what you tell me to anyone, including the judge. However, I can reveal information about a crime you are planning to commit, including the crime of perjury. Thus, if you were planning to lie on the witness stand in your forthcoming trial, I could reveal this fact to the court. Now, of course, I am not assuming that you are planning to do this, but I did think that, in fairness, I ought to explain to you how the attorney-client privilege works.

Such an approach is consistent with the recommendation of the Canadian Bar Association, which provides in its Code of Professional Conduct: “Admissions made by the accused to his lawyer may impose strict limitations on the conduct of the defense, and the accused should be made aware of this.”\textsuperscript{96} In other words, the lawyer who seeks candor from the client should be candid in return; there are limits on what is included within the attorney-client privilege, and the client should be told what these limits are.

This proposed admonition is not intended as an invitation to clients to lie to their lawyers or to conceal information. Nor is there any reason to believe that it would have that effect, except in the few cases where clients are intending to commit perjury and are prepared to admit that this was their intent prior to speaking to their attorneys. If the client was planning to lie to the lawyer prior to receiving the attorney's admonition concerning proposed perjury, he will proceed to do so. On the other hand, if the client was planning to be truthful with the lawyer, there is no reason to believe that the proposed admonition will discourage his honesty. Accordingly, I believe that attorneys should continue to impress upon

\textsuperscript{95} See text accompanying notes 82-86 supra.

\textsuperscript{96} CANADIAN BAR ASSOCIATION CODE OF PROFESSIONAL CONDUCT, ch. VIII, Commentary 9 (1974) (emphasis added).
their clients that the entire truth is needed if an effective defense is to be prepared.\textsuperscript{97}

In contrast, the ABA Defense Function Standards state: “The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and he should explain the obligation of confidentiality which makes privileged the accused’s disclosures relating to the case.”\textsuperscript{98} The standards do not suggest that the client should be made aware of any of the limitations attached to the attorney-client privilege.\textsuperscript{99} Thus, under the ABA approach, if the client admits inculpatory facts to the attorney and then insists upon testifying falsely, the attorney is obliged to follow the commands of section 7.7, thereby revealing to the court, for all practical purposes, that the accused is guilty of the offense charged. The defendant at this point is likely to feel deceived, since his attorney failed to keep his promise of confidentiality.

Alternatively, assume that the attorney seeks leave to withdraw pursuant to the ABA Defense Function Standards, and his motion is granted. Then, if the client still wishes to present perjured testimony, he will simply fail to be honest with his second attorney. The client will tell the lawyer his proposed testimony,

\textsuperscript{97} See 1 A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 79, at 2-48 (1967):

The client must be told very explicitly that counsel expects him to tell counsel the truth, the whole truth, and the exact truth; that failure to do so will hamstring presentation of the defense. If the client has done this thing, counsel has to know it. He will represent the client anyway (and should tell the client this), but he must know the truth. Admonition that counsel will learn the truth in court, together with the judge and jury, and that he cannot be prepared to meet it unless he knows it in advance, is helpful. Reminding a client that he, the defendant, will suffer the consequences of any wrong information helps to convince him of the necessity to be truthful.

\textsuperscript{98} ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 3.1(a).

\textsuperscript{99} See Commentary to § 3.1, dealing with the desirability of the attorney-client privilege:

Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. The result may be that the case is prepared by counsel without important evidence that might have been obtained, that valuable defenses are neglected and, perhaps most significantly, that the lawyer is not forewarned of evidence which will be presented by the prosecution. It is to encourage candor and full disclosure that the obligation of confidentiality which surrounds the lawyer-client relation has been erected. The Canons of the American Bar Association reflect the ancient doctrine that a lawyer must preserve all confidences which relate to the representation of the accused.

ABA DEFENSE FUNCTION STANDARDS, supra note 4, § 3.1, Commentary.
but he will not admit that it is false. As noted earlier, the client will be able to present false testimony, and no member of the bar will knowingly provide assistance to the criminal enterprise.\footnote{100} The ABA’s approach, therefore, is not really aimed at prohibiting perjured testimony, but is instead directed toward the laudable objective of disengaging lawyers from involvement with it. Essentially, then, the ABA’s approach recognizes that prevention of perjury by the client is impossible. Warning the client in advance that his intent to commit perjury is not privileged is predicated on the same premise, except that it is far more straightforward. The client who is adamant about presenting perjury will know the rules at the outset and, if he desires to be dishonest, his dishonesty presumably will be practiced on the first lawyer, thereby avoiding the difficulties incident to withdrawal and retention or assignment of new counsel.\footnote{101}

Professor Freedman rejects the proposal of the Canadian Bar Association, because he believes that the proposal may require the attorney to sacrifice obtaining complete knowledge from the client.\footnote{102} The cases where complete knowledge will be sacrificed, however, are precisely those where the client otherwise would have conceded his guilt to the lawyer and then would have insisted upon testifying falsely. Where this occurs, as we already have seen, the lawyer is thrust into an impossible dilemma. Rather than aiding in the client’s defense, the complete knowledge furnished to the lawyer greatly complicates the client’s continued representation. Indeed, the difficulty for the lawyer is so substantial that Professor Freedman argues that the only appropriate action is for counsel knowingly to aid the client in presenting perjured evidence. Ironically, where the client insists on perjury and Professor Freedman’s view is followed, the truth acquired from the client will no doubt enable counsel to be more effective in presenting and arguing the defendant’s false evidence. Fortified with precise knowledge of what really happened, counsel should be better able to cross-examine the prosecutor’s truthful witnesses. Conversely, under the approach recommended here, counsel who unwittingly presents the perjured testimony of a defendant may be less effective. Since the defendant’s testimony is completely false, however, there should be no great concern that defense counsel might have

\footnote{100. See text accompanying notes 31 & 32 supra.}
\footnote{101. See text accompanying notes 50-56 supra.}
\footnote{102. FREEDMAN, supra note 3, at 38.}
been a more compelling advocate had he known of his client's lies. 103

Choosing Professor Freedman's View, the ABA Approach, or Revealing Proposed Perjury to the Court

Suppose that the attorney advises the client that a plan to commit perjury is not protected as a confidential communication. Assume further that despite what the lawyer has told the client, the client admits that he is guilty of the offense but still insists that he wishes to present perjured testimony. If the client cannot be dissuaded from doing so, counsel must decide upon his actions.

My preference would be either to follow the ABA approach or to reveal the client's proposed perjury, depending upon which course I thought would be the least disadvantageous to the client. For example, if the client's proposed perjury was so incredible that I felt certain the jury would never believe it and the judge would become angry upon hearing it, I probably would tell the court about the client's proposed perjury. Conceivably, the court would then either discourage the client from testifying or deny him the opportunity to do so. As discussed previously, however, regardless of which approach is used, the court will assume that the client has admitted his guilt to the attorney. 104 Nevertheless, I believe either of these approaches is justified because the client will have been warned from the very beginning that his intent to commit perjury was unprotected by the attorney-client privilege. If the client is prejudiced by the attorney's conduct, the client has only himself to blame; the attorney should not have to assume responsibility for the client's criminal designs.

Ultimately, in deciding which of the three principal alternatives to follow, the attorney must decide whether it is preferable to violate the client's confidence, by implicit signaling to the court the client's guilt of the crime charged, or explicit ethical standards.

103. There is one undeniable drawback to warning the accused that his proposed perjury is not protected by the attorney-client privilege. Counsel may lose the opportunity to dissuade some defendants from testifying falsely, because they will not have admitted to counsel that they are guilty. I regard this as a minimal problem, however, compared with the vexing dilemma confronted by counsel where the client admits his guilt, wants to commit perjury, and cannot be dissuaded from doing so. Moreover, it seems likely, though scarcely subject to proof, that the defendant who acknowledges his guilt to counsel and then proposes to commit perjury has given the matter considerable thought. Therefore, it may be exceedingly difficult to dissuade him from committing perjury. Certainly this was true in the case of Mr. X discussed earlier. See text accompanying notes 13 & 14 supra.

104. See text accompanying notes 82-86 supra.
by knowingly using the client’s perjured testimony. The decision obviously involves difficult value judgments which remain unresolved under the Code of Professional Responsibility. The Code, like the law of evidence relating to attorney-client privileges, states both that there is no exception for revealing past crimes which the client has confided in the lawyer and that perjured testimony may not knowingly be used. \(^{105}\)

**CONCLUSION**

The recommendation of this article—that the attorney advise the defendant at the beginning of their relationship that the intent to testify falsely is not a privileged communication—anticipates the client-perjury problem before it arises. In contrast, neither Professor Freedman’s approach nor that of the ABA Defense Function Standards attempts to deal with the client’s proposed perjury until it is too late. When a client tells the lawyer that he intends to commit perjury after the lawyer has assured the client that all of his communications are confidential, or after the client believes that they are confidential, it is difficult to justify action which is tantamount to revealing to the court the client’s acknowledgment of guilt. While Professor Freedman’s approach preserves the client’s communications beyond that required by the law of evidence or the Code of Professional Responsibility, it also requires that the defense attorney serve as the client’s active agent in presenting perjured testimony. Therefore, it is preferable simply to inform the client, at the outset, of the specific scope of the attorney-client privilege. If subsequently the defense attorney, either implicitly or explicitly, reveals the defendant’s proposed perjury, at least the client will not have been deceived into thinking that everything told to the lawyer was confidential.

105. See notes 7-9, 26-29 *supra* and accompanying text.