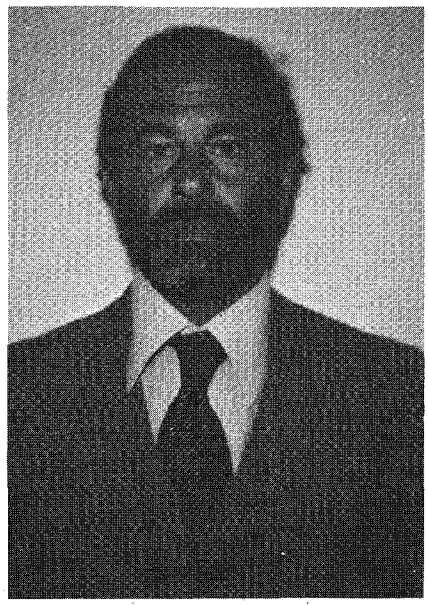
10-1987

Reflections on Client Perjury

Bennett L. Gershman
Elisabeth Haub School of Law at Pace University, bgershman@law.pace.edu

BENNETT L. GERSHMAN*
White Plains

Reflections on Client Perjury



Most experienced prosecutors, judges, and defense attorneys would probably agree that perjury in the criminal justice system occurs often. Although the frequency of perjury has never empirically been demonstrated, it is not surprising that with so much at stake, prosecution and defense witnesses would be tempted to fabricate testimony to meet the exigencies of the case. Detecting and dealing with perjurious testimony, however, is another matter. Implicated are complex legal and ethical problems for both prosecutors and defense attorneys.[1] The judiciary's response to these problems, moreover, has largely been formalistic, without enunciating sufficiently clear standards to guide future behavior.

For example, prosecutorial tolerance, and even active subornation of perjury, usually is analyzed objectively for its impact on the factfinder's evaluation of the evidence, rather than focusing subjectively on the prosecutor's willfulness or bad faith.[2] Clearly, for purposes of remedying prosecutor misconduct in the future, such a response is wholly unsatisfactory. That issue, however, is a subject for another essay. The present discussion concerns the extent to which a criminal defense attorney legally and ethically may cooperate with his or her client in concealing the truth.

Plainly, in protecting his client's interests, defense counsel's commitment to truth can vary greatly. At one extreme, of course, are acts deliberately designed to conceal the truth, such as secreting evidence, fabricating defenses, and suborning perjury.[3] Such conduct can never be

* Adjunct Professor of Law, Pace University.

[1] *See* G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978); J. BURKOFF, CRIMINAL DEFENSE ETHICS - LAW AND LIABILITY (1986); B. GERSHMAN, PROSECUTORIAL MISCONDUCT (1985).

[2] United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).

[3] *See, e.g.*, Clutchette v. Rusken, 770 F.2d 1469 (9th Cir. 1985); In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976); In re Ryder, 263 F.Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 360 (4th Cir. 1967); Thornton v. United States, 357 A.2d 429 (D.C. App.), *cert. denied*, 429 U.S. 1024 (1976); In re Branch, 449 P.2d 174, 74 Cal. Rptr. 238 (1969); In re Rosenberg, 276 App. Div. 268, 93 N.Y.S.2d 893 (1950).

justified or condoned. At the other extreme are options which legitimately permit suppression of the truth. These include, for instance, advising a client to refuse to testify or comply with a subpoena ordering the production of records, pursuant to a valid claim of privilege.[4] Between these ethical and legal extremes, however, are more nebulous situations, such as "advising" a client of the legal consequences of possessing certain documents, or suggesting the availability of "hypothetical" defenses, knowing full well that the client will engage in conduct or tailor his story to mesh with that advice.[5] Given the adversary system, in which "winning" can overshadow the quest for truth,[6] extremely complex questions arise: Is a criminal defense lawyer required to play the dual roles of loyal "champion" of his client, and "gatekeeper" of the temple of justice? Are these roles really compatible? If so, what are the rules of the game?

Consider in this connection perhaps the most difficult question of all: How far, if ever, can a criminal defense lawyer cooperate in his or her client's decision to commit perjury? Courts,[7] commentators,[8] and bar committees[9] have grappled with this question for years without offering clear or consistent guidelines. Any principled response, however, must take into account some very hard questions. Under what circumstances, for instance, does the lawyer ever really "know" that his client's proposed testimony is false? Is it sufficient if the lawyer simply disbelieves his client's story, or that of his client's witnesses?[9a] Does it make any difference if the attorney learns of the plan during the trial, as opposed to prior to the trial? What actions can the lawyer properly take when he believes that his client intends to commit perjury? Is the prevention of perjury more important than loyal and aggressive representation? Can the lawyer simply remain silent, and passively permit the perjury to occur? Can he threaten to impeach his client's testimony? Withdraw from the case? Report his client's actions to the judge?

Last Term, in *Nix* v. *Whiteside*,[10] the Supreme Court for the first time addressed several of these questions. The Court unanimously agreed, under the facts of the case, that the lawyer's refusal to assist his client's plan to commit perjury did not deprive the defendant of his Sixth Amendment right to the effective assistance of counsel, nor of his right to testify in his own defense.[11] A majority of the Court essayed the ethical questions as well, and in *obiter dicta*, concluded that "under no circumstances may a lawyer either advocate or passively tolerate a client's giving false testimony."[12] The majority went further, however, and formulated specific rules of permissible and impermissible attorney behavior.

The facts were uncomplicated. Whiteside was tried in an Iowa state court for stabbing to death a friend, Love, following an argument over drugs. One of the principal issues was whether the killing was in self-defense. During pretrial preparation, Whiteside consistently told his court-appointed counsel that he had not actually seen a gun in the deceased's hand. About a week before trial, however, he changed his story, stating that he had seen

---

[4] Fisher v. United States, 425 U.S. 391 (1976); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[5] *See* ABA MODEL CODE DR 7-102(A)(7)("in his representation of a client, a lawyer shall not . . . counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent"); ABA MODEL RULE 1.2(d)("a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"). The Commentary to MODEL RULE 1.2(d) states: "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

[6] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 Wash. U. L. Q. 279, 292.

[7] Nix v. Whiteside, 106 S. Ct. 988 (1986) (lawyer must withdraw or disclose intended perjury); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) (withdrawal request predicated on client perjury in middle of bench trial denied client fair trial); United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977) (attorney's disclosure to judge of client's intended perjury has chilling effect on effective representation).

[8] Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121 (1985); Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332 (1976); Freedman, *Professional Responsibility of the Criminal Defense Lawyer; The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

[9] ABA MODEL RULES 1.2(d), 3.3(c); ABA MODEL CODE, DR 7-102(A)(4), DR 7-102(A)(7); ABA STANDARDS FOR CRIMINAL JUSTICE, 4-7.7 (2d ed. 1980); AMERICAN TRIAL LAWYER'S ASSOCIATION CODE, Rule 1.2 (1980). The ATLA Code contains no specific rule on client perjury since the entire matter is subsumed under Rule 1.2 relating to strict attorney confidentiality regarding client perjury.

[9a] A threshold question in considering client perjury is the extent to which a lawyer must be convinced that his client intends to commit perjury. It is rare when the lawyer really "knows" that his client intends to commit perjury. *See Nix* v. *Whiteside*, 106 S. Ct. 988 (1986). Clearly, a lawyer must have a firm factual basis for believing that his client intends to commit perjury. A hunch, or speculation, is insufficient to trigger an ethical duty. *See United States ex rel. Wilcox* v. *Johnson*, 555 F.2d 115 (3d Cir. 1977). Under the Model Rules, a lawyer may refuse to offer evidence that the lawyer "reasonably believes" is false. Model Rule 3.3(c). Some commentators recommend a more rigorous standard of attorney belief. *See* Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121, 149 (1985) (recommending standard of belief "beyond a reasonable doubt"); ABA Formal Opinion 314 (1965) (lawyer should disclose client confidences if lawyer is convinced "beyond a reasonable doubt" that a crime will be committed).

[10] 106 S. Ct. 988 (1986).

[11] The Supreme Court has never explicitly held, but has consistently assumed, that a criminal defendant has a due process right to testify in his own behalf. *Id.* at 993. *See* Jones v. Barnes, 463 U.S. 745 (1983); Brooks v. Tennessee, 406 U.S. 605 (1972); Harris v. New York, 401 U.S. 222 (1971).

[12] 106 S. Ct. at 996. The extent to which a lawyer may stand mute, and permit his client to testify in a free narrative fashion, is one of the most controversial issues relating to client perjury. *See* note 19, *infra*.

"something metallic" in Love's hand, and that "If I don't say I saw a gun I'm dead." Whiteside's attorney warned him that if he so testified, he would advise the court of the defendant's proposed perjury, seek to withdraw from the case, and attempt to impeach his client's testimony. Whiteside testified, stating that he "knew" Love had a gun but had not actually seen a gun in Love's hand. After the jury returned a murder verdict, Whiteside moved for a new trial, contending that his lawyer's admonition not to state that he saw "something metallic" denied him a fair trial. After a hearing, the trial court denied the motion and the Iowa Supreme Court affirmed, holding that an attorney's duty to his client does not extend to assisting the commission of perjury.

Whiteside then petitioned the federal district court for a writ of habeas corpus, alleging that his counsel's actions denied him effective assistance of counsel and the right to present his defense. The district court denied the writ but the Eighth Circuit Court of Appeals reversed.[13] The court found that although a criminal defendant's privilege to testify does not include a right to commit perjury, counsel's admonition that he would inform the court of the planned perjury constituted a threat to violate an attorney's duty to preserve client confidences and as such, breached the standards of effective representation laid down in *Strickland* v. *Washington*.[14]

The Supreme Court reversed, and reinstated the conviction. Every Justice agreed that Whiteside had not been denied effective representation under the *Strickland* test, which requires a defendant to show that counsel committed such serious professional errors as to undermine confidence in the outcome of the trial.[15] An attorney's duty to his client, five Justices wrote for the majority, is limited to legitimate conduct, and does not include assisting his client in presenting false evidence.

Although not required to, the majority discussed what it believed were appropriate ethical responses for lawyers faced with client perjury. The attorney initially should attempt to dissuade his client from his unlawful plan.[16] If that course is unsuccessful, the attorney is obligated to reveal his client's con-

duct to the court,[17] and even seek to withdraw from the case.[18] Under no circumstances, the majority emphasized, should the lawyer either assist, or even passively permit, his client giving false testimony.[19] Moreover, counsel's threat to reveal Whiteside's perjury and withdraw

---

[13] Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984).

[14] 466 U.S. 668 (1984).

[15] 466 U.S. at 667-668. The Court in *Strickland* emphasized that a claim of ineffectiveness has two components. First, a defendant must show that counsel's performance was "deficient" in that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, the defendant must show that he was prejudiced, in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

[16] "It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." 106 S. Ct. at 996. *See* ABA Informal Opinion 1314 (1975); ABA MODEL RULE 3.3, Comment (1983).

[17] The Court stated: "Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury, they *require* such disclosure," 106 S. Ct. at 995 (emphasis in original). This is not altogether correct. The Model Rules appear to require disclosure only after the client has given false testimony. *See* ABA MODEL RULE 3.3, Comment (1983). Moreover, the Model Code appears to allow, but does not require, an attorney to reveal his client's intention to commit perjury. *See* ABA MODEL CODE, DR 4-101(C)(3). Nor is the Court's reliance on DR 7-102(B)(1) correct, since that provision concerns a lawyer's obligation when faced with a client who has already committed perjury. The courts are equally unclear. *Compare* State v. Henderson, 468 P.2d 136 (Kan. 1970); State v. Robinson, 224 S.E.2d 174 (N.C. 1976); People v. Salquerro, 433 N.Y.S.2d 711 (1980), *with* United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); Butler v. United States, 414 A.2d 844 (D.C. App. 1980). Moreover, disclosure may impinge on the attorney-client confidential relationship, *see* ABA MODEL CODE DR 4-101, as well as the defendant's right to a fair trial. United States ex rel. Wilcox v. Johnson, *supra*.

[18] ABA Informal Opinion 1314 (1975); ABA MODEL RULE 3.3, Comment (1983). Several courts require the attorney to withdraw upon learning of a client's intention to commit perjury. *See* Newcomb v. State, 651 P.2d 1176 (Alaska App. 1982); In re Palmer, 252 S.E.2d 784 (N.C. 1979); People v. Blye, 223 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965). A withdrawal motion probably will be denied if counsel refuses to disclose to the court the basis for the motion. *See* United States v. Henkel, 799 F.2d 369 (7th Cir. 1986); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Salquerro, 433 N.Y.S.2d 711 (1980). *See also* Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Obligation to the Court and His Client*, 59 Den. L. J. 75 (1981).

[19] Prior to *Whiteside*, the approach most widely accepted by the courts was the free narrative, whereby an attorney who believed that his client would testify falsely would first inform the court that he advised his client not to testify, and then remain mute while the defendant gave his testimony, without conducting any examination, or arguing the testimony to the jury. *See* Burger, *Standards of Conduct: A Judge's Viewpoint*, 5 Am. Crim. L. Q. 11, 13 (1966); ABA STANDARDS FOR CRIMINAL JUSTICE, 4-7.7 (2d Ed. 1980). *See also* United States v. Campbell, 616 F.2d 1151 (9th Cir. 1980); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978); Butler v. United States, 414 A.2d 844 (D.C. App. 1980); Sanborn v. State, 474 So.2d 309 (Fla. App. 1985); State v. Fosnight, 679 P.2d 174 (Kan. 1984); In re Goodwin, 305 S.E.2d 578 (S.C. 1983); People v. Salquerro, 433 N.Y.S.2d 711 (1980).

from the case were indistinguishable, according to the majority, from disclosing client misconduct such as tampering with witnesses or jurors.[20] "In short, the 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. No system of justice worthy of the name can tolerate a lesser standard."[21]

Four Justices concurred in the result, but would have limited their consideration to the constitutional questions involved, and resisted the invitation to enter this "thorny" and "controversial" area, and formulate rigid rules of professional conduct for attorneys. Under the *Strickland* test, however, since Whiteside had no constitutional right to his counsel's assistance in committing perjury, nor counsel's silence about the plan, no violation occurred. That is not to say, emphasized the concurring Justices, that a Sixth Amendment violation could not be shown in other related circumstances. This might depend on the level of the attorney's certainty about the proposed perjury; the stage of the proceedings at which the attorney discovers the plan; or the methods used by the attorney to try to dissuade his client. The concurring Justices cautioned, however, that attorneys who adopt "the role of the judge or jury to determine the facts pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment."[22]

Nix is a troubling decision. As a jurisprudential matter, the case is a peculiar blend of constitutional doctrine and legal morals. The holding is fairly narrow; the *dicta* is extremely broad. Essentially the Court emphasized, as it has on many previous occasions, that perjury is obnoxious to the justice system,[23] and announced for the first time that a lawyer's refusal to cooperate in his client's plan to lie does not under the circumstances render the lawyer ineffective under the Sixth Amendment. This was predictable. Wholly unpredictable, however, was the Court's willingness to enter the ethical twilight zone of attorney-client interaction, and promulgate a code of attorney behavior in the context of client perjury.

Several points are notable. First, this excursion into defense lawyer ethics stands in sharp contrast to the Court's historic unwillingness to impose ethical rules for prosecutors or other government officials. The Court recently wrote: "Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials."[24] Similarly, the Court observed: "The Due Process Clause is not a code of ethics for prosecutors."[25] And in one recent case in which a prosecutor engaged in outrageous misconduct,[26] the Court, after issuing a few paragraphs of mild reproach, concluded: "[Defendant's} trial was not perfect — few are — but neither was it fundamentally unfair."[27] In that case — *Darden* v. *Wainwright* — the prosecutor characterized the defendant as an "animal;" told the jury that the only guarantee against his future crimes would be to execute him; that he should have "a leash on him;" and should have "his face blown away by a shotgun." It became the function of the four dissenting Justices to outline painfully the numerous ethical rules which the prosecutor violated. And ironically, in cases involving prosecutorial subornation of perjury and suppression of evidence, the Court has carefully avoided ethical condemnations, stating: "Nor do we believe the constitutional obligation is measured by the moral culpability, or willfulness, of the prosecutor."[28] Unevenhanded ethical jurisprudence promotes cynicism and disrespect, and can even encourage further government misconduct.[29] Aggravating the concerns over such disparate treatment, of course, is the overriding legal and ethical precept that it is the prosecutor's obligation, rather than that of defense counsel, "not that it shall win a case, but that justice shall be done."[30]

Moreover, *Nix* v. *Whiteside*, as with other decisions involving the role of counsel for indigent defendants, continues a trend which threatens to undermine the fierce and dedicated representation to which such defendants are constitutionally entitled. Just as it is virtually inconceivable, for example, that a privately retained lawyer would ever file on appeal an "*Anders* brief" alleging no meritorious issue,[31] it is equally inconceivable that a privately retained lawyer would threaten to impeach his client's proposed testimony, or report his conduct to the judge. It is hardly surprising that virtually all of the decisions dealing

---

[20] Preventing a client from tampering with witnesses or jurors arguably stands on an entirely different footing than threatening to expose a client's own false testimony. Testimony by a defendant is inextricably connected with constitutional considerations; no such considerations apply to the corruption of witnesses or jurors.

[21] 106 S. Ct. at 998.

[22] 106 S. Ct. at 1006.

[23] Harris v. New York, 401 U.S. 222 (1971); Bryson v. United States, 396 U.S. 64 (1969; United States v. Knox, 396 U.S. 77 (1969); United States v. Norris, 300 U.S. 564 (1937).

[24] Moran v. Burbine, 106 S. Ct. 1135, 1143 (1986).

[25] Mabry v. Johnson, 467 U.S. 504, 511 (1986).

[26] Darden v. Wainwright, 106 S. Ct. 2464 (1986).

[27] *Id.* at 2473.

[28] United States v. Agurs, 427 U.S. 97, 110 (1976).

[29] *See* Gershman, *Why Prosecutors Misbehave*, 22 Crim. L. Bull. 131 (1986).

[30] Berger v. United States, 295 U.S. 78, 88 (1935).

[31] Anders v. California, 386 U.S. 738 (1967). *See also* Jones v. Barnes, 463 U.S. 745 (1983) (indigent defendant has no constitutional right to compel appointed counsel to argue on appeal all nonfrivolous points).

with client perjury involve attorneys who are either public defenders, or court appointed. This is not to suggest that a poor defendant has any greater right to commit perjury than a wealthy one, or that retained lawyers necessarily would tolerate client perjury more readily than lawyers paid by the state.[32] Nor is it altogether clear that public defenders view the issue of client perjury differently than retained counsel. However, any attorney who feels that he has to justify to the court the correctness or effectiveness of his representation, or is inclined to play the role of jury or judge, may, as the concurring opinion in *Nix* warned, deprive his client of the zealous advocacy guaranteed by the Constitution.

Finally, to the extent that *Nix* authorizes defense counsel to engage in conduct which effectively drives his client off the witness stand, it constitutes an insensitive and unwarranted intrusion into a defendant's right to testify in his own behalf.[33] Crucial to notions of civilized justice are concerns for a defendant's individual freedom and dignity. Such concerns ought to be respected, even at the risk of false testimony.[34] Surely the abolition of common law rules of witness disqualification did not imply that defendants thereafter would give only truthful testimony. Thus, shocking as it may seem to some, a defendant probably should be allowed to lie, even though he has no right to lie. The jury, not defense counsel, should be the safeguard against perjury. As Justices Brennan and Marshall observed: "The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."[35] To be sure, a lawyer should not cooperate in his client's perjury, assist him in any manner, or use such testimony in argument to the jury. This is a far cry, however, from the conduct of the lawyer in *Nix*. He was functioning not as a defense counsel, but as a surrogate prosecutor. Simultaneous commitments to one's client, and to the cause of abstract justice, are incompatible. To the extent that bar codes and court decisions mandate such behavior, they demand from attorneys the impossible. If the defendant wishes to lie, the lawyer should sit back and let his client say what he wants to say. From a tactical standpoint, this may be the worst possible scenario for a defendant. But that is his choice.[36] Nothing in *Nix* v. *Whiteside* prevents state bar associations from enacting ethical rules consistent with this approach.[37]

---

[32] To be sure, privately retained counsel may raise the issue from a sincere belief in the ethical considerations. On the other hand, such counsel may raise the issue for tactical reasons, such as seeking a continuance, or engineering a mistrial. *See, e.g.*, Lowery v. Cardwell, 575 F.2d 727, 731 n. 6 (9th Cir. 1978); McKissick v. United States, 379 F.2d 754 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968).

[33] *See* note 11, *supra*.

[34] G. HAZARD, note 1 *supra* at 127-135.

[35] Jones v. Barnes, 463 U.S. 745, 763 (1983).

[36] Arguably, a lawyer standing mute and refraining from direct or redirect examination, and then failing to support the defendant's testimony in closing argument, conveys to the jury a pretty clear signal as to defense counsel's view of the evidence.

[37] The Court stated: "When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." 106 S. Ct. at 994. Justice Brennan similarly observed: "[T]he Court *cannot* tell the states or the lawyers in the states how to behave in their courts, unless or until federal rights are violated." *Id.* at 1000 (concurring opinion) (emphasis in original).

Thus far, eleven states have adopted the ABA Model Rules. New York continues to follow the ABA Model Code. On November 2, 1985, the House of Delegates of the New York State Bar Association rejected a resolution to recommend an amended version of the Model Rules.