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Responding to Client Perjury under the New Pennsylvania Rules of Professional Conduct: The Lawyer's Continuing Dilemma

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RESPONDING TO CLIENT PERJURY UNDER THE NEW PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT: THE LAWYER'S CONTINUING DILEMMA

DORIS DEL TOSTO BROGAN

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I. INTRODUCTION

DEALING with client perjury presents one of the most difficult ethical problems a lawyer might face. The courts, organized bar and commentators have never agreed on the appropriate response to client perjury and the issue continues to generate heated debate. The new Model Rules of Professional Conduct

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2. MODEL RULES OF PROFESSIONAL CONDUCT (1983). The American Bar Association (ABA) House of Delegates adopted the Model Rules of Professional responsibility (Model Rules) on August 2, 1983, to replace the Model Code of Professional Responsibility (Model Code). The Model Code has been in force since its original proposal in 1969. MODEL CODE OF PROFESSIONAL RESPONSIBILITY preface (1980); McKay, In Support of the Proposed Model Rules of Professional Conduct, 26 VILL. L. REV. 1137, 1140 (1981). The drafting process of the Model Rules was long and filled with controversy. It began in 1977 when the ABA appointed the Commission on Evaluation of Professional Standards, or the Kutak Commission, as it became known. See McKay, supra, at 1142-43. Numerous drafts proposing different formats as well as different substantive provisions were circulated over a period of five years until the final version was approved by the ABA in 1983. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1982); MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1984).
(Model Rules) proposed by the American Bar Association (ABA) change what was understood to be the organized bar's position on the problem. With Pennsylvania's recent adoption (Pennsylvania Rules) of its own version of the ABA's proposed Model Rules, a version which departs substantially from the ABA proposal in the perjury context, consideration of the client perjury problem in light of Pennsylvania's approach seems appropriate.

As a general matter, lawyers are obligated to preserve client confidences under both the rules governing professional conduct and the law of attorney-client privilege. Pennsylvania Rule of Professional Conduct 1.6, which expresses this confidentiality obligation, makes an exception to the requirement by permitting disclosure of confidential "information if necessary to comply with the duties stated in rule 3.3." This provision relates directly to the lawyer's response to client perjury since rule 3.3, under the heading "Candor to the Tribunal," provides: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false." Rule 3.3 implements one aspect of rule 1.2(d) which states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or
While the goal seems a good one, and the rules appear straightforward, there is no simple solution to the lawyer's problem when faced with client perjury.

A lawyer owes a duty of undiminished, undivided loyalty to his client. At the same time the lawyer, as an officer of the court, has a duty to the legal system. While in most instances these obligations complement one another, in situations of client perjury, they may come into sharp conflict. This conflict creates an extraordinary tension which may be further complicated by the lawyer's own conscience.

A lawyer may face the question of client perjury either before or after the fact. When the issue arises will affect the analysis and responses.

II. Advance Knowledge of Client's Intent to Commit Perjury

A lawyer may know in advance that her client intends to commit perjury. This brings into play rule 1.2(d) and its prohibition against a lawyer knowingly assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. Perjury certainly would qualify. Further, it brings in rule 3.3(a)(4) which prohibits a lawyer from offering evidence she knows to be false, and rule 3.3(c), which allows a lawyer to refuse to offer evidence she reasonably believes is false.

A. When Does a Lawyer "Know"?

When a lawyer has advance knowledge of a client's intention to commit perjury, the initial question is on what basis the lawyer reached this conclusion. The lawyer's level of certainty will affect whether he "knows," or merely sus-

pects that his client intends to perjure himself. This will have an impact on the lawyer's course of action.

In the easiest case, the client announces, or virtually announces, to the lawyer that she intends to perjure herself. In *Nix v. Whiteside*, Whiteside was charged with murdering Love in Love’s apartment. Whiteside told his court appointed counsel that he had stabbed Love as Love was “pulling a pistol from underneath the pillow on the bed.” Counsel questioned Whiteside further and the defendant indicated that he had not actually seen a gun, but that he was convinced Love had one. None of Whiteside’s companions saw a gun, nor did the police search turn one up, although Love had a reputation for carrying a gun. Counsel explained to Whiteside that he did not have to prove the actual existence of a gun to establish his claim of self-defense, but only that Whiteside reasonably believed Love had a gun.

However, approximately a week before trial, during counsel’s preparation of Whiteside’s direct testimony, Whiteside said he had seen something “metallic” in Love’s hand. When pressed by counsel about this apparent inconsistency, Whiteside responded: “[I]n Howard Cook’s case there was a gun. If I don’t say I saw a gun, I’m dead.”

Whiteside never said “I have to lie to get off,” but he virtually said it. His statement, “If I don’t say I saw a gun, I’m dead,” implied that Whiteside was lying about seeing a metallic object and was not simply departing from his previously consistent statements that he had not actually seen a gun. From this, his counsel could conclude with certainty that he was proposing perjury.

In *Commonwealth v. Alderman*, the Pennsylvania Superior Court discussed the level of certainty required before a lawyer must take action with respect to a client’s perjury. In that case the defendant was on trial for burglary, assault and possession of an instrument of crime relating to a shooting and burglary incident. The defendant himself had been wounded. According to counsel, the defendant had told counsel prior to trial that he had been at the scene of the crime in order to collect a debt. With

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15. *Id.* at 160.
16. *Id.*
17. *Id.* at 161.
18. *Id.*
20. This case was decided when the old Code of Professional Responsibility was in force, but the court’s rationale is persuasive nonetheless.
respect to what happened, the defendant said: "It was a kind of self-defense kind of thing." Counsel also testified that the defendant’s mother had told him that the defendant had gone to the house to collect a debt and had been involved in the crime with which he was charged. During the trial, the client, for the first time, claimed that he had not been at the scene of the crime and that he had received the incriminating injuries by accidentally shooting himself with his father’s gun.

Commenting on the level of certainty required before a lawyer must act, the superior court stated:

Every change in a defendant’s story should not be viewed by counsel as a fabrication. Here, however, there could have been no reasonable doubt but that appellant’s newly discovered alibi was a fabrication. The change in appellant’s story could not be explained as an error of memory, and nothing suggested that appellant was trying to shield someone—nor does appellant now offer either of these explanations.

At the opposite end of the spectrum from Nix and Alderman, are situations in which a lawyer simply forms a personal opinion that his client is lying. This may be based on his resolution of conflicting evidence or his own opinion of the guilt or innocence of the defendant. Does this lawyer “know” his client intends to commit perjury? Does he “reasonably believe” it?

In United States ex rel. Wilcox v. Johnson, the defendant’s lawyer requested permission to withdraw in the midst of trial because she believed her client intended to perjure himself on the stand. Subsequently, the defendant challenged his conviction in a federal habeas corpus proceeding, alleging ineffective assistance of counsel. In granting the defendant’s petition, the court found

22. Id. at 266-67, 437 A.2d at 37-38.
23. Id. at 269, 437 A.2d at 39.
24. 555 F.2d 115 (3d Cir. 1977).
25. Id. at 119. The court granted the petition for a variety of reasons not limited to the disclosure. The trial judge informed the defendant “that if he insisted on testifying, ‘counsel would be permitted to withdraw,’ and defendant would have to represent himself for the remainder of the trial.” Id. at 117. The United States Court of Appeals for the Third Circuit concluded that this ruling impermissibly forced the defendant to choose between his right to testify and his right to counsel. Id. at 122. The court found that the circumstances interfered with Wilcox’s right to testify on his own behalf and his right to effective assistance of counsel. Id. at 120-21. Further, the court was concerned with the problem of disclosure by counsel to the trial judge. Id. at 122.
that his trial lawyer, in seeking to withdraw the way she did, had effectively disclosed to the trial court her belief that her client intended to perjure himself.

However, at the habeas corpus hearing, when asked to explain her reasons, trial counsel could not recall the basis on which she decided the defendant intended to lie under oath, nor could she produce file notes which supported that conclusion. She referred to her familiarity with the defendant from having represented him in previous unrelated criminal cases. On appeal, the United States Court of Appeals for the Third Circuit criticized the basis of counsel’s conclusion and stated that before disclosure to the court of a client’s intent to commit perjury, an attorney must have a “firm factual basis” for his belief,26 and that “private conjectures about the guilt or innocence of his client” were insufficient.27

The language of the Model Rules provides some guidance as to the level of certainty required before a lawyer must act. As noted above, rule 3.3 states that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. The Pennsylvania Rules define “knowingly” and “knows” as “denot[ing] actual knowledge of the fact in question,” but add that “knowledge may be inferred from circumstances.”28 This, however, does not answer the question of how sure a lawyer must be before the rule comes into play.

One commentator, dealing with the old Code of Professional Responsibility, has suggested that a lawyer should not act in a way which that commentator characterized as turning on his client, unless he is convinced at least beyond a reasonable doubt that the client will perjure himself.29 At a minimum, before she takes any steps which might threaten to rend the delicate fabric of the attor-

26. Id. at 122.
27. Id. Again, at the time of the Wilcox decision, attorneys in Pennsylvania were not governed by the Model Rules, but by the previous Code of Professional Responsibility. The court, however, never specifically cited the Code for its analysis, and its conclusion regarding the basis for an attorney’s belief that her client will commit perjury as a reflection of its balancing of the duty to maintain confidence versus the duty to maintain the integrity of the tribunal is persuasive.
29. Brazil, supra note 11, at 608-09. Professor Brazil was analyzing the Missouri version of the old Model Code’s Disciplinary Rule 7-102(B), which required disclosure of a client’s past perjury and did not provide an exception to disclosure if it would involve revealing a privileged communication. Id. at 604 n.6. The version of the rule recommended by the ABA included an exception for privileged communications. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1980).
ney-client relationship, a lawyer should be certain that her client, in fact, intends to commit perjury, and that certainty must not be based on instinct, intuition or her personal opinion of the true story.\textsuperscript{30} Rather, it should be based on the sort of irrefutable evidence present in the \textit{Alderman}\textsuperscript{31} case.

Another provision of rule 3.3 permits a lawyer to refuse to offer evidence he “reasonably believes” is false.\textsuperscript{32} Obviously, this rule contemplates a lesser standard than “knows.” Unfortunately, the Pennsylvania Rules’ definition of “reasonably believes” adds little, providing that the condition is satisfied if the lawyer believes the matter in question and the belief is reasonable.\textsuperscript{33} However, because of the implications of refusing to offer evidence which the client wishes to have presented, the lawyer must be convinced to a certainty, based on a firm factual foundation, before he refuses to present evidence.

B. \textit{What Should a Lawyer Do?}

Assuming the lawyer is convinced that his client intends to commit perjury, what action must he take? It is clear that a lawyer cannot participate in presenting perjury to a tribunal.\textsuperscript{34} The law-

\textsuperscript{30} Cf. \textit{Wilcox}, 555 F.2d at 122 (attorney must have firm factual basis for belief of intent of client to commit perjury).

\textsuperscript{31} \textit{Alderman}, 282 Pa. Super. at 267, 437 A.2d at 38 (applying “reasonable doubt” as standard for counsel certainty of a client’s intent to perjure himself).

\textsuperscript{32} \textit{Pennsylvania Rules of Professional Conduct} Rule 3.3(c) (1987) (emphasis added).


\textsuperscript{34} As noted above, for the lawyer to participate in presentation of perjurious testimony would violate the specific prohibition of rule 3.3(a)(4), and the more general prohibition of rule 1.2(d). \textit{See Whiteside}, 475 U.S. 157, 167-71 (1986); \textit{People v. Brown}, 203 Cal. App. 3d 1335, 1339, 250 Cal. Rptr. 762, 764 (1988); \textit{Alderman}, 292 Pa. Super. at 270-72, 437 A.2d at 39-40.

Some authorities suggest that to participate would amount to subornation of perjury by the attorney. \textit{See People v. Schultheis}, 638 P.2d 8, 11 (Colo. 1981). Pennsylvania defines subornation of perjury as requiring proof of “perjury by a witness plus proof that the accused induced, persuaded and instigated the witness to commit the crime of perjury.” \textit{Commonwealth v. Mervin}, 230 Pa. Super. 552, 556, 326 A.2d 602, 604 (1974). Whether presentation of false evidence without suggesting or actually inducing it would meet this standard is unclear. It should be noted that \textit{Schultheis} dealt not with client perjury, but rather with the client’s desire that the lawyer put alibi witnesses other than the defendant on the stand. 638 P.2d at 11-12. While this has a major impact on the whole question of how to proceed, it should have no impact on whether the attorney’s actions constituted subornation of perjury. However, since the \textit{Schultheis} suggestion that such action would constitute subornation of perjury was only dictum, it is perhaps not a clear indication of what the court would decide if the matter were before it in the context of client perjury.

The dissenting minority to the position that a lawyer must act to prevent client perjury, represented most vocally by Monroe Freedman’s eloquent argu-
yer's first step should be to dissuade his client from committing perjury. The purely strategic arguments a lawyer can make in this context are as compelling as the ethical ones. Lying on the witness stand is simply a bad idea. First, opposing counsel will be able to cross-examine the client, a tool designed to ferret out untruth. Second, he may have credible rebuttal testimony that will expose the lie. Third, once exposed, the client faces not only a charge of perjury, but also a jury which now might not believe any part of his case, as well as a judge who more than likely will take the obvious perjury into account in any discretionary decisions she makes.

*Nix v. Whiteside* offers an example of the sort of persuasion counsel might employ. In that case, faced with the inconsistency described above, counsel told Whiteside that as officers of the court they could not allow Whiteside to commit perjury. Counsel also advised Whiteside that if he took the stand and lied under oath, it would be counsel's duty to advise the court that they believed Whiteside was committing perjury. Counsel also stated that they would probably be called to testify as rebuttal witnesses for the prosecution to impeach Whiteside's testimony. Finally, counsel informed Whiteside that they would seek to withdraw if Whiteside insisted on committing perjury.

The United States Supreme Court held that the course of action taken by Whiteside's counsel was perfectly consistent with the reasonable requirements of the codes of ethics, and did not destroy the attorney-client relationship so as to deny him his constitutional right to effective assistance of counsel. How much of this holding is based on the Supreme Court's conclusion in dicta that disclosure would be a perfectly appropriate response is unclear. What is clear is the Court's conclusion that counsel may become quite aggressive in attempting to dissuade a client from committing perjury, would suggest that the lawyer should not take any action beyond seeking to dissuade the client upon learning that the client intends to commit perjury, but rather should present the testimony in the same fashion as he would any other testimony. See *The American Lawyer's Code of Conduct* Rules, Rules 1.1-1.5 comment, Rules illustrative cases 1(a)-(b), (i), (j) (Roscoe Pound, American Trial Lawyers Found. Comm'n on Professional Responsibility, Discussion Draft 1981).

36. *Id.* at 161.
37. *Id.* at 174-75. The United States Court of Appeals for the Eighth Circuit concluded that counsel's actions had created such a conflict between lawyers and client that the attorney-client relationship was destroyed and Whiteside was denied effective assistance of counsel. Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), rev'd sub nom. *Nix v. Whiteside*, 475 U.S. 157 (1986).
committing perjury without destroying the attorney-client relationship.

Frequently such vigorous persuasion by counsel will work, and it is one reason we protect confidences, even at times where to do so appears contrary to the search for truth. Our system relies on the client’s ability to be absolutely candid with counsel without fear of being judged and without fear of secrets being used against her. The client should not decide what is relevant and what is not—what helps her case and what hurts it. Rather, that is best left to the professional judgment of the lawyer—the client’s one champion against a hostile world.

With complete and candid information, not only can a lawyer effectively prepare his client’s case, but also he has the opportunity to use his persuasive powers and superior knowledge to dissuade his client from pursuing an illegal (and unwise) course of action. He will not have that chance if the client is afraid to be honest. The protection of confidentiality of information disclosed to the lawyer, and the loyalty of the lawyer to the client are critical to establishing the trust that encourages the candor necessary for the system to work.

However, if the lawyer’s persuasive skills do not work and the client still insists on testifying falsely, the lawyer’s course becomes somewhat tricky, with the analysis differing depending on whether a criminal or civil trial is involved. Generally speaking, because the lawyer cannot participate in presenting perjury, she must extricate herself. Two options come to mind: simply refuse to put the client on the stand, or withdraw from representation. Neither offers a clean escape, and the problem has spawned numerous unsatisfactory attempts at compromise.

Counsel’s refusal to put the client on the stand raises diffi-

38. M. Freedman, Lawyers’ Ethics in an Adversary System 4-5 (1975). Professor Freedman cites the following example:

[O]ne client was reluctant to tell her lawyer that her husband had attacked her with a knife, because it tended to confirm that she had in fact shot him (contrary to what she had at first maintained). Having been persuaded by her attorney’s insistence upon complete and candid disclosure, she finally “confessed all”—which permitted the lawyer to defend her properly and successfully on grounds of self-defense.

Id.


42. A slightly different set of questions arise when the proposed perjury is
cult questions, especially in the context of criminal trials. If the client insists on taking the stand, and the lawyer insists she not do so, who holds the trump card?

Rule 1.2 mandates that a lawyer abide by the client's decisions concerning the objectives of trial and consult with the client as to the means by which they are to be pursued. While no absolute line between means and objectives can be drawn, the decision of what witnesses to call or what evidence to offer has traditionally been viewed as a tactical call, falling within the "means" category. Thus, the lawyer might simply consult with the client and then decide not to offer the client's own testimony. Such an approach is also supported by rule 3.3(c) which permits a lawyer to refuse to offer evidence the lawyer reasonably believes is false. But quite apart from the general question of what evidence to offer, the decision as to whether the accused himself should testify is so important and so personal that it should be made by him, and not relegated to a strategic-means decision to be made by counsel. Pennsylvania law specifically holds that the defendant should make the decision of whether to testify.

In criminal cases the question is complicated by the possibility that the criminal defendant may have a constitutionally protected right to testify on his own behalf. While the United States Supreme Court has never specifically held that a criminal defendant has the right to testify on his own behalf, the Court has observed that "cases in several Circuits have so held, and the right has been long assumed." Pennsylvania's Constitution specifies not that of the client, but rather of witnesses the client wishes to call. This must be carefully distinguished and will be discussed only to the extent relevant to the discussion of client perjury.

44. Id. comment; see also C. Wolfram, Modern Legal Ethics 156 (1986).
45. See People v. Schultheis, 638 P.2d 8, 12 (Colo. 1981) (defense counsel determines which witnesses to call); see also Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4.52(b) (1979) [hereinafter Defense Standards] (attorney has exclusive control over all strategic and tactical decisions).
48. Whiteside, 475 U.S. at 164; United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984) (defendant has personal constitutional right to testify truthfully on his own behalf), cert. denied, 475 U.S. 1064 (1986); United States v. Bifield, 702 F.2d 342, 349 (2d Cir. 1983) (accused has constitutionally guaranteed right "to be present and to be heard in person" at trial), cert. denied, 461 U.S. 931
that the criminal defendant has a right "to be heard by himself and his counsel." However, the defendant's right to testify does not carry with it a right to testify falsely. An argument could therefore be made that once convinced the criminal defendant intends to commit perjury, the lawyer could refuse to put her on the stand.

This approach appears somewhat extreme, although the ABA has suggested it as an option. It would allow the lawyer to act as judge, jury and prosecutor with respect to the client's important constitutional right. It would also prevent the client from telling any part of her story, not just the part deemed perjurious. Such an extreme approach does not seem to be contemplated even by Justice Burger's strict view of the appropriate reaction elaborated in dicta in Whiteside. Thus, regardless of whether the decision to testify is classified as a "means" or an "objective," the constitutional implications of keeping a criminal defendant off the witness stand will probably force counsel to let the client testify.

In a civil suit, because a party has no comparable constitutional right to testify, it would seem that counsel could keep his client off the stand if counsel believes his client would commit perjury. Accordingly, the Model Rules would permit this. There is, of course, another possible solution—withdrawal from the case. It is the lawyer's participation in offering the perjury that creates the ethical problem in the first place. If the lawyer can extricate herself from the perjury, the problem may be


49. PA. CONST. art. I, § 9 (1974, amended 1984) (emphasis added). It is possible that this provision was included only to change the traditional common law rule which not only gave the defendant no right to testify, but in fact made him incompetent to do so.

50. Whiteside, 475 U.S. at 173.

51. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353, at 901:106 (1987) [hereinafter ABA Formal Op. 87-353] (lawyer's responsibility with respect to client perjury). The Committee suggests this course of action in "the unusual case" where the client has clearly stated an intention to testify falsely and the lawyer is unable to withdraw from the case. Id. For further discussion of the options presented by the Committee, see infra notes 78-95 and accompanying text.

52. Whiteside, 475 U.S. at 159-76. For further discussion of Whiteside, see supra notes 35-36 and accompanying text.

53. See C. WOLFRAM, supra note 44, at 657.

54. Recall we are trying to comply with rule 3.3, which prohibits a lawyer from offering false evidence, and rule 1.2, which prohibits a lawyer from assisting a client to engage in conduct the lawyer knows is criminal or fraudulent. For further discussion of these rules see supra notes 5-9 and accompanying text.
solved. Rule 1.16 requires a lawyer to withdraw from representation if continued representation will result in violation of the rules of professional conduct or other law, and permits a lawyer to withdraw from representation if the client “persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.” Involving the lawyer in knowingly offering perjured testimony would seem to fit neatly into either of these rules. Therefore, we might assume that withdrawal is the solution. However, it may neither solve the problem nor be possible.

As a preliminary matter, does withdrawal solve the problem? On the face of things, it would appear to solve the particular lawyer’s problem because she is no longer involved in the offering of perjured testimony. She has, in the most decisive way, extricated herself from the mire. But does this protect the court from the perjury? Recall it is the lawyer’s duty as an officer of that court and her obligation to protect the system, contrasted with her obligation to her client, that created the conundrum in the first place. Does withdrawal prevent the perjury, or simply leave the tribunal unprotected and dump the problem on the next lawyer unfortunate enough to encounter this client?

Further complicating the problem, the savvy client will now be educated to cover his perjury so the next lawyer may be completely unaware of it, and the system wholly without protection. Moreover, the effective representation of the client by this next lawyer will be impaired in that the client has withheld information from his “champion” who could be blindsided by the client’s unwise tactical choices. Consider, for example, the situation where the prosecution has irrefutable evidence to rebut the perjured testimony. New counsel will be unprepared to effectively deal with this, nor will she have had a chance to argue the client out of perjury. While we might not have much sympathy for the client, and a strong case could be made for the proposition that he brought it on himself, the question remains, have we gained anything by this approach?

57. This is true provided, of course, that the lawyer was certain of the perjury. For a discussion of the certainty requirement, see supra notes 12-33 and accompanying text.
58. M. Freedman, supra note 38, at 33.
Assuming withdrawal at least accomplishes compliance with the mandates of the rules that the lawyer not participate in the perjury, the other problem is whether withdrawal is even a possible solution. Certainly, where a privately retained criminal defense lawyer finds out well in advance of trial that his client intends to commit perjury, withdrawal under the rules may be accomplished. However, where the lawyer is court appointed, or where the criminal trial is imminent, the problem becomes more difficult. In these cases, a lawyer must receive court approval to withdraw. Putting aside for the moment the issue of whether the court will permit withdrawal, how does counsel go about asking for it?

The decision to grant or deny a lawyer’s request to withdraw is within the discretion of the court. Presumably that discretion cannot be exercised in a vacuum, but rather the court must consider some information. But how much can the lawyer disclose without breaching his obligation of confidentiality?

If a lawyer simply tells the court she must withdraw, but cannot explain why, the court is very likely to refuse her request. In fact, to grant the request with no information might violate the court’s duty to exercise its discretion in such matters. However, refusing the request for withdrawal under these circumstances may cause irreparable harm to the client’s right to effective representation. In effect, the court’s refusal has told client and counsel there is no problem and the representation must continue. There may be a huge problem, but the court has never considered it.

It is true that the party making the motion bears the burden of convincing the court, and in the case described, has not done so. But the point here is that a rule which suggests solving the client perjury problem by deciding withdrawal requests without inquiry raises serious problems.

Some have suggested that the lawyer be required to cite irreconcilable conflict and no more in order to be released from representation. Although this offers an attractive alternative, it
may still say too little and at the same time say too much. “Irreconcilable conflict” offers the court precious little additional information with which to exercise its discretion, unless it becomes a code word for the circumstances of proposed client perjury. If it is a code word, then the lawyer has disclosed to the court that her client intends to commit perjury. May she do so? At what point in pursuing a motion to withdraw has the lawyer “telegraphed” to the court that her client intends to lie?

In Lowery v. Cardwell, a criminal bench trial, counsel was faced with surprise perjury by his client during the client’s testimony. Counsel stopped questioning and sought to withdraw, but told the court he could not state his reason. The court denied counsel’s request. Upon returning to court, counsel abruptly ended his examination stating he had no further questions. During his closing, counsel made no reference to the testimony in question. The United States Court of Appeals for the Ninth Circuit concluded that this amounted to an unequivocal announcement to the factfinder of the client’s perjury, and as such was a denial of his right to due process. Similarly, where a lawyer cited chapter and verse of the ethical rules he would violate by continued representation, he was found to have telegraphed the client’s intent to the court.

But is this even an impermissible disclosure?

This question involves two levels of inquiry: the protection offered by the attorney-client privilege and the protection offered by the Pennsylvania Rules. Turning first to the attorney-client privilege, an argument can be made that the client’s decision to commit perjury is not protected since it is the announced intention to commit a crime which has traditionally been found to fall outside the privilege. Arguably, this situation could be covered by Pennsylvania’s “administration of justice” exception as well.

63. 575 F.2d 727 (9th Cir. 1978).
64. Id. at 729.
65. Id. at 730.
67. Packel supra note 6, at 91.
68. Whiteside, 475 U.S. at 174 (1986) (attorney’s duty of confidentiality not extended to a client’s announced plans to engage in future criminal conduct); see also L. Packel & A. Poulin, Pennsylvania Evidence § 501.5(b) (1987).
However, even if the client's intention to commit perjury is not protected, the incriminating facts from which counsel necessarily must have concluded the client intended to lie should still be protected. Disclosure of the intent to commit perjury very likely will implicitly disclose these protected facts to the court. Thus, the question of attorney-client privilege in this context cannot be definitively answered.

But even if we assume the information is not protected by the attorney-client privilege, the question remains, is the lawyer bound by the obligation of confidentiality imposed by the rules to protect this information from disclosure? Traditionally, similar to the law of privilege, the rules of ethics permitted (but did not require) disclosure of confidences to prevent a crime when the client announced his intention to commit a crime. The new Model Rules, as adopted and promulgated by the ABA, permit disclosure of the announced intention to commit a crime only if the lawyer believes the crime will result in death or substantial bodily harm. Under the Model Rules, then, the lawyer could not disclose his client's intention to commit perjury. However, Pennsylvania amended the ABA's proposed version of the Rules when it adopted them. Pennsylvania's rule 1.6 provides that a lawyer may reveal confidential information if he reasonably believes it is necessary "to prevent . . . a client's criminal or fraudulent act in the commission of which the lawyer's services are being . . . used." Further, rule 1.6 as adopted by Pennsylvania, provides that a lawyer "shall reveal such information as is necessary to comply with rule 3.3." Thus, the rules as adopted in Pennsylvania would appear to permit disclosure of the intention to commit perjury, and perhaps require it if it is the only way to prevent the lawyer's participation in perjury. But is disclosure the best solution to the rule 3.3 problem?

As noted earlier, we protect confidences through the rules of

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71. Model Code of Professional Responsibility DR 4-101(C)(3) (1980). Prior to approval by the ABA of the Model Rules of Professional Conduct and adoption by what now amounts to half the jurisdictions including Pennsylvania, the Model Code was the universally adopted set of rules. For a discussion of the history of the Model Rules, see supra note 2.
73. Pennsylvania Rules of Professional Conduct Rule 1.6(c)(2) (1987). The Model Rules as promulgated by the ABA contain no such provision.
74. Pennsylvania Rules of Professional Conduct Rule 1.6(b) (1987) (emphasis added). The Model Rules as promulgated by the ABA contain no such provision.
professional responsibility and the law of privilege not only to benefit the client, but just as important, to benefit the system.

The privilege is to protect, not the guilty, but the administration of justice. "[T]he theory . . . is that the detriment to justice from a power to shut off inquiry to pertinent facts in court, will be outweighed by the benefits to justice (not to the client) from a franker disclosure in the lawyer's office." 75

Therefore, perhaps the suggestion of relying on counsel's honest representation of irreconcilable conflict should suffice. As discussed above, this still leaves the system of justice at the mercy of the perjurious defendant, and raises again the question of whether withdrawal solves the problem at all, regardless of how it is accomplished. 76 When relying on "irreconcilable conflict" as the basis of a withdrawal petition, counsel should make a private record of the details of his reasons for withdrawal which should be sealed and used only for appellate review if necessary. 77

If the lawyer is unable to dissuade her client from testifying falsely in a criminal case where she may be required to put the client on the stand, and she cannot withdraw (or we conclude that withdrawal does not solve the problem), what alternatives remain? 78

One solution, which has received favorable response from

76. For a discussion of problems associated with an attorney withdrawing from a case, see text accompanying supra note 58.
77. See People v. Schultheis, 638 P.2d 8, 14 (Colo. 1981); see also Defense Standards, supra note 45, Standard 4-7.7(c). The court in Schultheis concluded that:
   [a]ny disagreement between counsel and the accused on a decision to be made before or during trial, however, may be the subject of postconviction proceedings questioning the effectiveness of the lawyer's performance. It is not sufficient to determine the matter solely on the strength of the memories of the lawyer and client, which are invariably in conflict if the issue arises. Therefore, although no record of disagreement is required for the trial judge, counsel should proceed with a request for a record out of the presence of the trial judge and the prosecutor if the court denies the motion to withdraw. . . .
638 P.2d at 14.
78. In deciding the issues piecemeal, some courts have set up irreconcilable situations. In People v. Brown, the court held that the trial court did not err when it refused to permit counsel to withdraw even after counsel disclosed his belief that the client intended to commit perjury. People v. Brown, 203 Cal. App. 3d
some courts, is the narrative approach stated in ABA Defense Standard 4-7.7:

If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuringly in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. 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 may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

1335, 1338-39, 250 Cal. Rptr. 762, 764-65 (1988). The court then dismissed the untenable position it had put counsel in:

Requiring defense counsel to generally continue representing defendant did not expose counsel to disciplinary or criminal action. He fulfilled his ethical obligation by bringing the motion to withdraw. As the California Supreme Court noted, in People v. Pike . . . "[i]t is to be remembered that a person cannot accurately be said to 'allow' that which he cannot prevent." . . . We do not address defense counsel's obligation in respect to how defendant's testimony should be presented, whether he could question defendant at all, should simply announce defendant wants to make a statement, or whether some other procedure should be employed. That issue is not presented by this case since defendant entered pleas of no contest to the charges.

Id. at 1341 n.3, 250 Cal. Rptr. at 765 n.3 (citations omitted).


80. Defense Standards, supra note 45, Standard 4-7.7(c). The standard was not enacted by the ABA House of Delegates during the February 1979 meeting pending the outcome of the Kutak Commission's studies.
The assumption made by this approach is that by not actually questioning the client and not arguing the perjured testimony to the factfinder, the lawyer has not offered the false evidence, or engaged in, or assisted the client in her criminal conduct.

Putting aside for the moment the question of whether this passive approach in fact extricates the lawyer from participation in the perjury, courts and commentators disagree as to whether it even protects the client as it is intended to do. Professor Monroe Freedman charges that it amounts to disclosure to the judge and jury that the lawyer does not believe his client’s story. He points out that experienced trial attorneys have noted that jurors assume the defendant’s lawyer knows the truth and will draw only one reasonable inference from the lawyer who “turns his or her back on the defendant at the most critical point in the trial, and then, in closing argument sums up the case with no reference to the fact that the defendant has given exculpatory testimony”—that the client lied. Freedman also suggests that the lawyer might not get away with the narrative approach, noting that the prosecutor might well object to this method of testifying.

Others disagree, finding this a perfectly valid possibility. In Lowery, the court suggested that “passive refusal to lend aid to what is believed to be perjury in accordance with the Defense Function Standards” would not necessarily violate due process. It noted that most jurors would not observe any difference and that there may be many reasons for a lawyer’s failing to actively pursue a particular line of defense. The court cited a comment by then Circuit Judge Warren E. Burger, who, responding to a hypothetical case, suggested the narrative approach and noted that “[s]ince this informal procedure is not uncommon with witnesses, there is no basis for saying that this tells the jury the witness is lying. A judge may infer that such is the case but lay jurors will not.”

In a recent opinion, however, the ABA Committee on Ethics and Professional Responsibility rejected the narrative approach as

81. M. Freedman, supra note 38, at 37.
82. Id.
83. Lowery, 575 F.2d at 731. For further discussion of Lowery, see supra notes 63-65 and accompanying text.
84. 575 F.2d at 731.
85. Burger, Standards of Conduct for Prosecution and Defense Personnel: A Judge’s Viewpoint, 5 Am. Crim. Law Q., 11, 13 (1966), cited in Lowery, 575 F.2d at 731 n.4. It is interesting to note that Chief Justice Burger wrote the opinion of the Court in Whiteside and there rejected the narrative approach based, however, on the revised Model Rules. Whiteside, 475 U.S. at 170 & n.6, 171.
not solving the problem, citing *Whiteside* for support. The Committee stated in Opinion 87-353 that under Model Rule 3.3(a)(2) and *Whiteside*, when a lawyer knows for certain that the client intends to commit perjury, "the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury."^{86}

The ABA Opinion began by stating that the lawyer's first step when faced with the announced intention to commit perjury would be to warn the client of the consequences of perjury, including that the lawyer would have a duty to disclose if the client in fact commits perjury. The Committee noted that, as occurred in *Whiteside*,^{87} this approach will generally work. Thus, the lawyer may assume the client will testify truthfully, and may examine him in the normal manner.^{88

However, in what the Committee described as the "unusual case, where the lawyer does know, on the basis of the client's clearly stated intention, that the client will testify falsely at trial . . . , the lawyer cannot examine the client in the usual manner."^{89} Emphasizing the duty of confidentiality, the Committee advised that "the lawyer's conduct should be guided in a way that is consistent, as much as possible, with the confidentiality protections provided in Rule 1.6, and yet not violative of Rule 3.3."^{90} To accomplish this, the Committee suggested first that the lawyer refuse to call the client to the stand when the lawyer knows that the only testimony the client will offer is false.^{91} In the criminal case, however, this approach raises the problem of the defendant's right to testify, a right the Supreme Court assumed in *Whiteside*. It is not clear how the Committee resolved this. Later in the opinion, it did point out that while there may be a constitutional right to testify, there is no constitutional right to testify falsely, a point made in *Whiteside*, and about which there can be no serious dis-

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86. ABA Formal Op. 87-353, *supra* note 51, at 901:107. It is interesting to note that *Whiteside* relied on the new Model Rules promulgated by the ABA for its rejection of the narrative approach. *Whiteside*, 475 U.S. at 170 & n.6, 171. Thus, the ABA's reliance on *Whiteside* is a bit circular, especially since the ABA's own comments to the rule at least raise the narrative approach as an option. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

87. The defendant in *Whiteside* did finally testify truthfully. *Whiteside*, 475 U.S. at 161-62. Unfortunately, he was convicted, which brought about the ineffective assistance of counsel claim and an appeal to the Supreme Court. *Id.* at 160-63.


89. *Id.*

90. *Id.*

91. *Id.*
pute. However, simply stating the obvious truism that there is no constitutionally protected right to testify falsely does not resolve the tricky question of whether or not the criminal defendant has the right to take the stand in her own defense.

Perhaps the Committee's simplistic statement is limited to the virtually inconceivable situation where absolutely no testimony other than the clearly false testimony is involved. As such, it addresses an unrealistic situation, and therefore offers little real guidance. While that might appear to be harmless error, it is not, since the solution could be applied in a dangerously broad fashion to suggest that a lawyer could refuse to put a criminal defendant on the stand in other situations. Not putting the client on the stand in a criminal matter does not offer a realistic solution to this problem, and its inclusion in the opinion is deceiving.

The Committee itself identified another problem with not allowing the defendant to testify. It noted that if the client does not testify the court may well inquire as to whether the client has been advised of his right to testify. If the client states his desire to testify, the lawyer, according to the Committee, "may have no other choice than to disclose to the court the client's intention to testify falsely."93

Moving past the situation where the only testimony to be offered would be false, the Committee advised that if the client will offer some testimony other than the announced perjury, the lawyer may examine the client on only those matters, and not on the subject of the announced intention to lie.94 It is here that the Committee pointedly distinguished its resolution from the narrative approach and specifically disapproved that solution.95 Realistically, it may be difficult to limit the client to only truthful testimony, and the possibility that he will go beyond the lawyer's questions to give the false testimony looms. This leads to the next situation: unanticipated or surprise perjury.

III. Surprise Perjury

While the client's announced intention to commit perjury creates a complicated problem, unannounced or surprise client

92. Id. at 901:107; Whiteside, 475 U.S. at 173; United States v. Henkel, 799 F.2d 369, 370 (7th Cir. 1986) (defendant had no right to commit perjury), cert. denied, 479 U.S. 1101 (1987).
93. ABA Formal Op. 87-353, supra note 51, at 701:106.
94. Id.
95. Id. at 901:106-107.
perjury may present a more troublesome problem for the profession. Sometimes a lawyer will have no advance warning that her client intends to commit perjury. This was the case in Lowery. Other times, as is suggested in ABA Opinion 87-353, the lawyer may believe he has convinced the client not to lie, but the client may have misrepresented his intentions, or simply panicked and changed his mind once on the stand. What can a lawyer do at this point? Has he “knowingly” offered false evidence? Is he assisting the client in conduct he “knows is criminal or fraudulent” when he finds out after the fact? What action must he take? The authorities are split.

The first and least controversial option which parallels the first option under the announced intention to commit perjury, is to persuade the client to rectify the perjury. If this does not work, and, frankly, persuasion is less likely to work after the perjury has been committed than before, the lawyer may seek to withdraw. However, withdrawal at this point is even less likely to be permitted by the court, is even less likely to solve the problem and is even more likely to telegraph the situation than when it occurs prior to the defendant lying on the stand.

But what are the lawyer’s alternatives if his client does not rectify the perjury? The lawyer could either disclose the perjury, or simply continue with full representation, examining the client and arguing the perjured testimony to the jury. The latter view is advanced by Professor Freedman, but has been universally rejected by the courts and most other commentators. By actively offering and arguing the false testimony, the lawyer would un-

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96. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) (under Model Rules and Whiteside, narrative model unacceptable as impermissibly disclosing client confidence to fact finders). For a discussion of Lowery, see supra notes 63-65 and accompanying text.


98. Before the perjury is committed, the client faces only a disagreement on what he can do and the possible strategic and other consequences of his intended approach. His risk in agreeing with his lawyer is limited. However, once he has lied on the stand, he faces not only criminal prosecution for perjury, but also the grim prospects of the jury convicting him on the primary case because of his demonstrated perjury, and the impact discovery of this perjury may have on the judge who will sentence him if convicted.

99. For further discussion of Professor Freedman’s work, see supra note 38 and accompanying text.

100. Whiteside, 475 U.S. at 170-71; Alderman, 292 Pa. Super. at 271, 437 A.2d at 40.
questionably participate in the fraud on the tribunal and would clearly violate the Rules.

Alternatively, the lawyer could follow the ABA's position in Opinion 87-353 and disclose. This response represents a reversal of the ABA's policy under the old code and may raise real attorney-client privilege problems, but it is the answer many courts have suggested.

Model Rule 3.3 provides that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." The rule never describes what the reasonable remedial measures may be. The comment, while acknowledging the tension between the duty to keep confidences and the obligation of candor toward the court, indicates that if all else fails (persuading the client and attempting to withdraw), "the advocate should make disclosure to the court. . . . It is for the court then to determine what should be done— . . . mistrial or perhaps nothing." Actually a mistrial is a likely result, because if there is a dispute as to the basis of the lawyer's conclusion that the client committed perjury, and surely there will be, the matter will have to be resolved and another lawyer would have to represent the client in the resolution proceeding.

Opinion 87-353 elaborated on this, stating that withdrawal, though suggested as an option in the comment, will rarely serve as a remedy for the client's perjury. Interpreting Rule 3.3, the Committee concluded that "it is now mandatory . . . for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury." The Committee acknowledged that the comment to Rule 3.3 indicates the possible ineffective assistance of counsel problem when disclosure occurs in the criminal context. The Opinion, however, cited Whiteside's finding that there is no constitutional right to testify falsely, and that threatening disclosure did not de-
prive a defendant of his right to effective assistance of counsel,\textsuperscript{106} apparently to support its conclusion that there is no problem with disclosing the fact after the perjury has been committed.\textsuperscript{107} The Committee's Opinion thereby blurs important distinctions in its citation of \textit{Whiteside}.

When analyzing \textit{Whiteside}, it is important to identify exactly what the Supreme Court \textit{held} as distinct from what it \textit{said}. The question before the Court, and in fact the only issue it could decide, was the question whether the attorneys' behavior in aggressively dissuading the client from committing perjury, denied Whiteside his constitutional right to effective assistance of counsel. It is not for the United States Supreme Court to decide the appropriate rules of ethics to govern attorneys in the several states. Rather, that is left up to each state.\textsuperscript{108} The Court's discussion of what a lawyer is ethically required to do, permitted to do and prohibited from doing when faced with client perjury was relevant only to its determination of whether Whiteside's lawyers behaved reasonably in the context of an ineffective assistance of counsel claim. The Court's discussion of lawyers' duties and obligations is simply not binding.

Further, the Court's holding addressed the situation of threatened disclosure, not the actual disclosure of the client's perjury. Whether actual disclosure would constitute a denial of effective assistance of counsel was a question not before the Court. Realistically, however, given the Court's lengthy excursion into what it considered acceptable conduct, one might reasonably conclude that the Supreme Court, when faced with disclosure after the fact, would also find no sixth amendment violation.

Further, the Supreme Court was interpreting the federal Constitution's guarantee of effective assistance of counsel. This is not to say that a state court might not find a violation of the state's constitutional guarantee of effective assistance in such a case. Pennsylvania might interpret its own provision more broadly.\textsuperscript{109}

Another important point must be made. From the attorney-client privilege perspective, there is a dramatic difference be-

\textsuperscript{106} \textit{Id.} at 901:104.

\textsuperscript{107} \textit{Id.}


between disclosure of the intention to commit perjury and disclosure after the fact. Traditionally, the privilege has not protected a client’s announced intention to commit a crime.110 Therefore, the disclosure to the court of the intention of a client to commit perjury in an attempt to prevent the crime may not present an attorney-client privilege problem.111 However, if the attorney-client privilege attaches to anything, it attaches to a past crime. Once the client has committed perjury, does it not fall into the past crimes category?

It could be argued that perjury constitutes a “continuing” crime of the type which has been characterized as more like an announced intention than a past crime.112 One can assert that perjury, uncorrected, is a continuing crime that taints the deliberations of the tribunal. Presumably that is why the ABA in drafting the Model Rules required remedial action by the lawyer discovering perjury only until the end of the proceedings.113 If the lie is discovered after the conclusion of the proceedings, no duty exists.

However, one can as reasonably, perhaps more reasonably, characterize perjury as a past crime. Is perjury any more a continuing crime than robbery where the goods and money have not been returned? In the robbery situation, the true owners continue to be deprived of rightful possession of their goods and the risk is they will never be returned while the thief maintains wrongful possession. However, nobody would suggest that a lawyer representing a criminal defendant must disclose confidential information regarding such goods or the client’s participation in the crime, or that such information would not be protected by the attorney-client privilege.114 To cavalierly conclude that perjury

110. Whiteside, 475 U.S. at 174. For a discussion of this concept, see supra note 68 and accompanying text.

111. For a discussion of this concept, see supra notes 68-70 and accompanying text.


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constitutes a "continuing crime" sends us down a slippery slope that may lead to unanticipated results.

As noted in Opinion 87-353, the ABA's disclosure approach represents a reversal of its previous policy, a change perhaps intended by the Rules.\textsuperscript{115} However, a change in the rules of ethics cannot change the law of attorney-client privilege. The ABA itself had earlier thought that once committed, perjury was a past crime, information relating to which, if it met the other requirements of the law of attorney-client privilege, must be protected.\textsuperscript{116} As originally drafted, Disciplinary Rule 7-102(B)(1) of the old Code of Professional Responsibility provided that the lawyer who has information clearly establishing that "[h]is 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, shall reveal the fraud to the affected person or tribunal."\textsuperscript{117} The ABA amended that rule to add an exception to the duty to disclose "when the information is protected as a privileged communication."\textsuperscript{118} According to the ABA this amendment was necessary to avoid putting the lawyer in the untenable position of being required by the Code to reveal communications which he was bound not to reveal according to the law of evidence.\textsuperscript{119} Thus, the ABA, at least in 1975, considered disclosure to the court of information relating to perjury, once committed, to violate the law of attorney-client privilege.

Under Pennsylvania law, it is possible to fit disclosure of past perjury into an exception to the attorney-client privilege. In \textit{Brennan v. Brennan}, the superior court noted that the privilege applies "unless the exercise of the privilege either operates to permit or continue a crime or fraud or is clearly shown to be frustrating the administration of justice."\textsuperscript{120} Such a solution, however, raises many of the same concerns discussed earlier with respect to relying on the continuing crime argument.

Pennsylvania law may offer another possibility. In consider-

\begin{itemize}
  \item \textsuperscript{115} ABA Formal Op. 87-353, \textit{supra} note 51, at 901:103.
  \item \textsuperscript{116} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) [hereinafter ABA Formal Op. 341].
  \item \textsuperscript{117} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 7-102(B)(1) (1980).
  \item \textsuperscript{118} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 7-102(B)(1) (1980); \textit{see} ABA Formal Op. 341, \textit{supra} note 116.
  \item \textsuperscript{119} ABA Formal Op. 341, \textit{supra} note 116.
\end{itemize}
ing the arguably analogous situation of a bail-jumping defendant, the Pennsylvania Supreme Court drew an interesting distinction. In Commonwealth v. Maguigan, the prosecutor sought to compel the defendant’s lawyer to disclose what she knew about her client’s whereabouts. When she refused, citing attorney-client privilege, she was found in contempt. The supreme court upheld the contempt order of the trial court. The court based its decision on a number of grounds, but in elaborating on its reasoning regarding the attorney-client privilege, it said that since the defendant had sought professional representation regarding the original crime he was charged with, information relating to it would, of course, be privileged. However, the court distinguished as separate the defendant’s subsequent decision to flee the jurisdiction of the court and found that it was not something the lawyer could be consulted professionally about, and, therefore, was not subject to the privilege.

This, however, may do considerable damage to the goals of the privilege, as discussed above, and may simply not be the best approach to protecting the tribunal from perjury. If we believe that the lawyer, given candid disclosure by the client, can usually dissuade her from perjury, we should avoid any facile rule requiring disclosure which might chill the candid exchange. Disclosure is not required by rules which call for only “reasonable remedial measures.” Disclosure is specifically mentioned only in the comment which, according to the court order adopting the Pennsylvania Rules, “shall not be a part of the Rules.”

If disclosure is going to be required, should attorneys not be required to “Mirandize” the client, warning him in advance of when disclosure might be permitted or required? It seems only fair to do so, especially if the lawyer makes the other representations about the protection of the attorney-client privilege. However, such a warning would surely chill the relationship and involve the client in just the sort of second guessing and attempts to figure what information should be given the lawyer that the

122. Id. at 131-32, 511 A.2d at 1337.
123. See supra notes 38-41, 68-69 & 75 and accompanying text.
126. See M. Freedman, supra note 38, at 37-38.
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privilege is designed to avoid. It would also make it less likely that the lawyer would have the information and thus the opportunity to dissuade the client's intended perjury.

The question comes down to what constitutes “reasonable remedial steps,” and what approach best serves the administration of justice in the broadest sense, not simply in this narrow context of solving a particular problem.

IV. Conclusion

Under the new Pennsylvania Rules of Professional Conduct, lawyers continue to face the intractable dilemma of client perjury. Although neither the Rules nor other sources of Pennsylvania law provide complete solutions to the perjury problem, careful consideration of options in particular instances of client perjury provides the only method open to the lawyer which simultaneously protects her duties to her client and the court. In balancing both these interests, the lawyer is challenged by the Pennsylvania Rules to formulate a response to situations of client perjury without compromising the fundamental yet often divergent loyalties required by the legal profession.

127. For a discussion of this chilling effect, see supra notes 38-41 & 75, and accompanying text.