THE LIMITED IMPACT OF *NIX V. WHITESIDE* ON ATTORNEY-CLIENT RELATIONS

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One of the most controversial issues in American law in recent decades has been the proper response of an attorney when faced with a client intending to commit perjury at trial. Professor Monroe Freedman sparked a particularly heated debate with his article, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*.¹ In this article, Professor Freedman argued that while a criminal defense attorney must try to persuade her client not to commit perjury, she must nevertheless allow her client to testify falsely with full assistance of counsel if the client insists on testifying.² Professor Freedman's article met with a stiff rejoinder from then Professor, now Judge, John Noonan, who argued that a defense attorney has an affirmative obligation to prevent the perpetration of fraud upon the court, and that this duty transcends any duty to a client wishing to improve her chances through perjured testimony.³ The battle over the appropriate role of the lawyer in client perjury settings has raged ever since among commentators,⁴ in the courts,⁵ and within the organized bar.⁶

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¹ Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

² See *id.* at 1475-1480.

³ See Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

⁴ Compare Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052-57 (1975) (emphasizing the truth-seeking function of the judicial system) and Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 868-70 (same) with Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 395-96 (1976) (arguing that the adversary system requires restricted disclosure of client perjury) and Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) (same).

⁵ Compare *Whiteside v. Scurr*, 744 F.2d 1323, 1328-33 *reh'g en banc denied*, 750 F.2d 713, 714 (8th Cir. 1984), *rev'd sub nom.* *Nix v. Whiteside*, 475 U.S. 157 (1986) (defense counsel's threats to withdraw and testify against defendant if defendant committed perjury violated defendant's constitutional rights) and *Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978) (counsel's efforts to withdraw on suspicion of client

A number of lower courts struggled with the client perjury problem in the 1970s and 1980s but failed to produce either consistent approaches or similar results.⁷ The Supreme Court remained above the fray until it granted review in the case of *Nix v. Whiteside*.⁸ In *Whiteside*, a defense attorney had persuaded his client not to present testimony that the attorney believed would be false. The attorney accomplished this result by delivering a forceful admonition to his client that included a warning that he might be allowed to impeach any untruthful testimony offered by the client if the client insisted on taking the stand and offering false testimony. While the Supreme Court of Iowa⁹ and the federal district court¹⁰ found the lawyer's approach constitutionally acceptable, the Eighth Circuit Court of Appeals found that the defendant's constitutional rights had been violated.¹¹

When the Supreme Court granted review,¹² observers both hoped and feared that the high court would federalize the approach to the attorney-client perjury dilemma through constitutional adjudication. The Court did nothing of the kind. Instead, it simply held that, given the facts of the case, the Constitution did not prevent Iowa from imposing criminal sanctions against *Whiteside*. The unusual factual posture of the case and the narrow character of the Court's actual holding were, however, masked by sweeping statements in the majority opinion on legal ethics. A number of lower courts have assumed erroneously that dicta on ethical issues in *Whiteside* has a constitutional dimension.¹³

perjury violated client's constitutional rights) and *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120-22 (3d Cir. 1977) (judge's ruling that counsel could withdraw if defendant took the stand impermissibly required that the defendant choose between his right to counsel and his right to testify, even though counsel's threat to withdraw was motivated by the conviction that defendant would commit perjury) with *United States v. Curtis*, 742 F.2d 1070, 1073-75 (7th Cir. 1984) (when apparent that defendant would testify perjurally, failure to put him on the stand did not violate constitutional rights) and *McKissick v. United States*, 398 F.2d 342, 343-44 (5th Cir. 1968) (counsel is ethically compelled to reveal perjury to the court).

⁶ See *infra* notes 53-58 and accompanying text.

⁷ See *supra* note 5.

⁸ 475 U.S. 157 (1986).

⁹ *State v. Whiteside*, 272 N.W.2d 468 (Iowa 1978).

¹⁰ *Whiteside v. Scurr*, Civ. No. 81-246-C, slip. op. at 2-3 (S.D. Iowa Dec. 7, 1982).

¹¹ *Whiteside v. Scurr*, 744 F.2d 1323, 1328-31 (8th Cir.) *reh'g en banc denied*, 750 F.2d 713 (8th Cir. 1984), *rev'd sub nom.* *Nix v. Whiteside*, 475 U.S. 157 (1986).

¹² *Whiteside*, 471 U.S. 1014 (1986).

¹³ Courts have reached this conclusion despite the concurring Justices' clear emphasis on the narrowness of the case's holding. See *Nix v. Whiteside*, 475 U.S. 157, 177 (1986) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., concurring in the judgment); *id.* at 176-77 (Brennan, J., concurring in the judgment) (stating that the Court's treatment of legal ethics is "pure discourse without force of law," and that

The purpose of this Article is to bring the actual holding of *Nix v. Whiteside* into focus and to ensure that the debate over the proper response of an attorney to client perjury distinguishes between ethical and constitutional precepts. Part I canvasses the ethical and constitutional issues inherent in the client perjury dilemma, emphasizing that the various state ethical rules governing the conduct of licensed attorneys are primarily rooted in state law, not federal constitutional law. Part II analyzes *Whiteside*, giving special emphasis to the limited character of its constitutional holding. It observes that, at least under the facts presented in *Whiteside*, the constitutional provisions arguably relevant to the client perjury dilemma do not mandate any particular ethical approach, but instead allow the states broad leeway to determine their own solutions to the problem. Finally, Part III discusses the impact *Whiteside* has had on subsequent judicial decisions and on the relationship between criminal defense attorneys and their clients.

I. ETHICAL VERSUS CONSTITUTIONAL ISSUES

In order to understand the practical and theoretical importance of *Nix v. Whiteside*,¹⁴ it is important initially to distinguish between its ethical and constitutional principles. Failure to recognize this critical difference leads to imprecise analysis that allows judges and commentators to cloak ethical policy preferences in constitutional garb.

The focal point of legal ethics is attorney conduct. Principles of legal ethics, as embraced in various state codes of professional responsibility, are designed to govern the conduct of lawyers, which the state regulates through the licensing process. The proper behavior of licensed attorneys in the conduct of their profession is thus a matter of state law.

By contrast, the focus of constitutional analysis is not attorney conduct so much as the circumstances under which a state may impose criminal sanctions against an individual. A constitutional tribunal does not sit to discipline an attorney, but rather to consider the validity of state action against the attorney's client. While constitutional limitations may restrict a state's freedom to make policy choices regarding the ethical rules it expects lawyers to observe in their professional conduct, the Constitution gives the federal judiciary no authority to establish comprehensive ethical rules applicable in state criminal proceedings.

Because of this legal/ethical distinction, it is entirely possible that

"[l]awyers, judges, bar associations, students, and others should understand that the problem has not now been 'decided.'"); *infra* notes 136-38 and accompanying text.

¹⁴ 475 U.S. 157 (1986).

local rules of ethics may require a lawyer to act in a way that renders a trial process constitutionally defective. Conversely, the mere fact that a lawyer violates a local ethical rule while representing a criminal defendant does not necessarily taint a subsequent conviction.

A. *Models of Ethical Professional Conduct*

The literature recognizes two contrasting models of the attorney-client relationship. When regulating the attorney response to client perjury, a state may choose to be guided by one of the two most prominent theoretical models of attorney conduct. The first model, endorsed by Judge Noonan,¹⁵ has been referred to as the "officer of the court" model.¹⁶ Under this model, a lawyer has obligations to the courts and the judicial system that transcend client representation. The officer of the court model imposes a duty upon the lawyer to take all steps necessary to prevent perjury from occurring; if it has occurred, the lawyer must take steps to negate its effect.

Advocates of the officer of the court model argue that mandatory disclosure is required to preserve the integrity of courts of law and the legal profession.¹⁷ According to this view, unless lawyers are bound by affirmative duties to the courts, the practice of law would degenerate into guerilla warfare, in which no rules would be mandatory and the falsification of evidence would be commonplace. Public confidence in the judicial system would erode, thereby encouraging self-help remedies and undermining effective and consistent civil and criminal law enforcement.¹⁸

The second model, sometimes referred to as the "alter ego" model,¹⁹ emphasizes the need for strict confidentiality in the attorney-client relationship. Under this strict confidentiality approach, a lawyer should give undivided loyalty to her client, short of breaking the law. Although a lawyer may not induce or incite false testimony, her only responsibility when faced with a client who intends to offer perjured testimony is to explain to the client that perjury is a crime, and to discourage false testimony with an appeal to the client to abide by the law. If the client insists on committing perjury, however, the lawyer's

¹⁵ See Noonan, *supra* note 3, at 1492.

¹⁶ See, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 27 (1975) ("The attorney, we are told, is an officer of the court . . .").

¹⁷ The policy arguments regarding the proper approach to client perjury will not be repeated in full, as they have been exhaustively discussed elsewhere, for example in those sources listed *supra* note 4.

¹⁸ See Wolfram, *supra* note 4, at 835-6.

¹⁹ See, e.g., *STANDARDS FOR CRIMINAL JUSTICE* § 4.11 commentary (2d ed. 1980).

duty is simply to continue representing the client in the normal course.²⁰

Those who advocate strict confidentiality generally stress the delicate nature of the attorney-client relationship.²¹ Many criminal defendants are socially alienated individuals who have no confidence in the system of criminal justice. Some defendants may fear that their attorneys, particularly court-appointed attorneys, are simply agents of the state whose main function, given the inevitability of conviction, is simply to put on an empty show of due process. Lawyers must be able to insure their clients absolute confidentiality, so the argument goes, if they are to have any realistic prospects of breaking down barriers of fear and establishing the kind of working relationship necessary for an effective defense.

B. *Codes of Professional Responsibility*

1. Canons of Professional Ethics

The American Bar Association's ("ABA") Canons of Professional Ethics (1908) was the first formal code of professional responsibility developed by the legal profession in this country.²² The Canons did not provide clear guidance as to the proper role of an attorney when faced with a client intent on perjuring herself in an upcoming criminal trial. On the one hand, the lawyer is admonished in Canons 15, 22, 29, 32 and 42: a) to refuse to engage in any activity on behalf of a client that involves "violation of law or any manner of fraud or chicane";²³ (b) to conduct her activities with "candor and fairness";²⁴ c) to bring any perjury that has occurred to the attention of prosecuting authorities;²⁵ d) to refuse to render any service on behalf of any client or cause "involving disloyalty to the law";²⁶ and e) to "promptly inform the injured person or his counsel" if a fraud is perpetrated by a client.²⁷ On the other hand, Canon 6 directs a lawyer to represent a client "with undivided fidelity and not to divulge his secrets or confidences."²⁸

The Canon 6 confidentiality provision is qualified, however, by Canon 37, which states that "[t]he announced intention of a client to

²⁰ See Freedman, *supra* note 1, at 1475-78.

²¹ See *id.* at 1473-74.

²² CANONS OF PROFESSIONAL ETHICS (1967).

²³ *Id.* Canon 15.

²⁴ *Id.* Canon 22.

²⁵ See *id.* Canon 29.

²⁶ *Id.* Canon 32.

²⁷ *Id.* Canon 42.

²⁸ *Id.* Canon 6.

commit a crime is not included within the confidences which he is bound to respect."²⁹ This provision, does not necessarily *require* that an attorney take affirmative steps to prevent a client from committing perjury in a criminal trial, particularly when to do so would result in explicit or implicit disclosure of confidential attorney-client communications. Canon 37 arguably gives the attorney the option of disclosing the intended client perjury, or keeping it confidential. Under this interpretation, the attorney's response would depend on the facts of the case, potential prejudice to the client, and the philosophy of the attorney.

Faced with such a discretionary choice, the less risky alternative for an attorney would be to preserve the client's confidence or secret, thereby eliminating the possibility of external review of the attorney's judgment entailed by disclosure. As one commentator has noted, discretionary remedies amount to "a luxury made available to the morally scrupulous at their own risk."³⁰ In addition, by not disclosing, a lawyer avoids a potentially uncomfortable conflict with her client, a situation that most attorneys understandably would rather not confront. For all practical purposes, a discretionary disclosure rule tends to result in the preservation of client confidences and secrets.

The Canons' ambiguous approach to client perjury was considered by the ABA in Formal Opinion 287, issued in 1953.³¹ While the Opinion does not address the question of what an attorney should do when faced with a client intent on committing perjury at an upcoming trial, it does consider the proper response of an attorney when, at the time of sentencing, a client makes a false statement to the court about his criminal record. When the lawyer's knowledge of her client's false statement is derived from client confidences, the Opinion states that the attorney should remonstrate with the client, and withdraw if the situation is not rectified. The lawyer should not, however, violate the client's confidence through disclosure if the client refuses to take appropriate corrective action. If the lawyer knows from sources other than client communications—for instance, from her own independent investigation—that her client's statements are false, the Opinion holds that disclosure is then required.³²

²⁹ *Id.* Canon 37.

³⁰ Fried, *Too High a Price for the Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C.L. REV. 443, 495 (1986).

³¹ ABA Comm. on Professional Ethics, Formal Op. 287 (1953).

³² *See id.*

2. Model Code of Professional Responsibility

The ABA promulgated its Model Code of Professional Responsibility³³ to replace the Canons of Professional Ethics in 1969. The principle of attorney-client confidentiality is embraced in DR 4-101, which states that, subject to certain exceptions, an attorney shall not knowingly reveal a "confidence" or "secret" of the client.³⁴ The Code defines "confidence" as "information protected by the attorney-client privilege."³⁵ The term "secret," however, is more broadly defined as including information gained in the professional relationship, "the disclosure of which would be embarrassing or would be likely to be detrimental to the client."³⁶

The relationship between the duty of confidentiality and the duty owed by an attorney to the court intersect at DR 4-101(C)(3), which states that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."³⁷ Like Canon 37,³⁸ this provision does not *require* disclosure but merely authorizes it. Where disclosure would necessarily reveal a client "confidence" or "secret," the client's interest in confidentiality arguably overrides any duty to the court. Moreover, as indicated in the discussion of Canon 37,³⁹ the less risky and more attractive choice for an attorney is to preserve the client's confidence or secret, thereby avoiding scrutiny of the lawyer's decision and an embarrassing confrontation with the client.

The Model Code does, however, impose a number of mandatory duties upon attorneys, designed to protect the integrity of the judicial process. For instance, the Model Code states that a lawyer shall not "[k]nowingly use perjured testimony or false evidence."⁴⁰ Similarly, the Model Code provides that a lawyer shall not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."⁴¹ On their face, these mandatory provisions arguably prevent an attorney from asking a client questions that she knows will produce false testimony, and, if the client commits perjury, arguably prohibit the attorney from referring to the testimony in final argument.

The most troublesome Model Code provision for advocates of

³³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

³⁴ *Id.* DR 4-101.

³⁵ *Id.* DR 4-101(A).

³⁶ *Id.*

³⁷ *Id.* DR 4-101(C)(3).

³⁸ See *supra* note 29 and accompanying text.

³⁹ See *supra* notes 29-30 and accompanying text.

⁴⁰ *Id.* DR 4-102(A)(4).

⁴¹ *Id.* DR 7-102(A)(7).

strict confidentiality is, however, DR 7-102(B)(1), an unqualified mandatory provision that states that a lawyer who receives information "clearly establishing" that her client has perpetrated a fraud "shall reveal the fraud to the affected person or tribunal" if the client refuses or is unable to rectify the situation.⁴² If the lawyer's knowledge that the client has committed a fraud is based on client confidences or secrets, mandatory disclosure of the fraud, apparently required by DR 7-102(B)(1), would tend to eviscerate DR 4-101 because disclosure "would be embarrassing or would be likely to be detrimental to the client."⁴³

In 1974, The ABA House of Delegates amended DR 7-102(B)(1) by adding the words "except when the information is protected as a privileged communication."⁴⁴ This new provision, however, did little to clarify the situation. If "privileged communication" refers to the attorney-client evidentiary privilege, a lawyer with a client who has committed perjury could be under an obligation to disclose the crime, since attorney-client privilege does not include any expressed intention of a client to commit a crime.⁴⁵ If the term "privileged communication" is defined broadly, however, to include "secrets" as the term is employed in DR 4-101, disclosure would be prohibited because revealing the fraud would "be embarrassing or would be likely to be detrimental to the client."⁴⁶

The ABA addressed the scope of the term "privileged communication" in the 1974 amendment one year later in Formal Opinion 341.⁴⁷ This Opinion takes the position that the term "privileged communication" includes not simply confidences covered by the attorney-client privilege but also client secrets.⁴⁸ While recognizing the conflicting duties to reveal fraud and preserve confidences, the Opinion states that "it is clear that there has long been an accommodation in favor of preserv-

⁴² *Id.* DR 7-102(B)(1).

⁴³ *Id.* DR 4-101(A).

⁴⁴ *Id.* DR 7-102(B)(1) (1981); see Fried, *supra* note 30, at 494.

⁴⁵ A number of authorities hold that the duty of confidentiality imposed by the attorney-client privilege does not extend to prospective criminal or fraudulent conduct by the client. See, *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975); *Sawyer v. Barczak*, 229 F.2d 805, 808-09 (7th Cir. 1956), *cert. denied* 351 U.S. 966 (1956); *United States v. Bob*, 106 F.2d 37, 39-40 (2d Cir. 1939); *Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Grary*, 245 N.W.2d 298, 306 (Iowa 1978); *In re Selser*, 15 N.J. 393, 407-08, 105 A.2d 395, 399-400 (1954); *State v. Phelps*, 24 Or. App. 329, 332, 545 P.2d 901, 904 (1976); C. McCORMICK, *McCORMICK ON EVIDENCE* 229-31 (E. Cleary 3d ed. 1984).

⁴⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981).

⁴⁷ See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

⁴⁸ See *id.*

ing confidences either through practice or interpretation.”⁴⁹ According to the Opinion, the “tradition” that permits a lawyer to assure a client that information (whether a secret or confidence) given to him will not be revealed to third parties is “so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).”⁵⁰ The Opinion further notes, “[A]n interpretation of the 1974 amendment which would limit its scope to the attorney-client privilege as it exists in each jurisdiction and under the Federal Rules of Evidence is undesirable because the lawyer’s ethical duty would depend upon the rules of evidence in a particular jurisdiction.”⁵¹

Formal Opinion 341’s construction of the Model Code of Professional Responsibility is consistent with Formal Opinion 287,⁵² which interpreted the Canons of Professional Conduct. Advocates of client confidentiality thus find support for their position in formal ABA interpretations of ambiguous ethical standards, promulgated prior to the adoption of the Model Rules of Professional Conduct in 1983.

3. Draft Standards Relating to the Prosecution and Defense Function

A faction of the ABA believed that lawyers should be provided with more explicit guidance than that offered by the Model Code. In 1971, the ABA’s House of Delegates approved a draft of Standards Relating to the Prosecution and the Defense Function that contained a provision directly addressing the client perjury problem.⁵³ This provision, as amended to Standard 4-7.7 of the Standards for Criminal Justice, provides that an attorney faced with a client intent on perjury may seek to withdraw, if feasible.⁵⁴ If withdrawal is not possible and the client insists on testifying, the attorney must allow the defendant to take the stand. If, however, a defendant takes the stand against her attorney’s advice, the attorney should make a record of that fact in an appropriate manner, but without revealing her disapproval to the court.⁵⁵ Standard 4-7.7 further directs the lawyer to avoid any direct examination of her client that the lawyer believes will induce false testimony. Instead, an attorney should simply ask the witness if she wishes to

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *supra* notes 31-32 and accompanying text.

⁵³ See STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Defense Function § 7.7 (Approved Draft 1971).

⁵⁴ See STANDARDS FOR CRIMINAL JUSTICE § 4-7.7(b) (2d ed. 1980).

⁵⁵ See *id.* § 4-7.7(c).

make an additional statement to the factfinder. In closing argument, the lawyer may not recite or rely on the perjured testimony.⁵⁶ Known as the "free narrative" solution to the client perjury problem,⁵⁷ this approach amounts to an uneasy compromise between the officer of the court and alter ego models.

The free narrative approach has always been controversial. It is arguably detrimental to the client because it telegraphs to the jury that the defendant's counsel does not credit her client's testimony. Moreover, many defendants find it difficult to testify without the benefit of counsel's structured questioning. The proposed standard does, however, give attorneys clear guidance with respect to what they should do when faced with a client determined to commit perjury. Although Standard 4-7.7 was approved by the ABA Standing Committee on Association Standards for Criminal Justice, it was withdrawn in 1979 prior to submission to the ABA House of Delegates, apparently in anticipation of the Report of the Special Commission on Professional Standards (the Kutak Commission), which had been created by the House of Delegates in 1977.⁵⁸

4. Model Rules of Professional Conduct

No doubt influenced by the role of lawyers in the Watergate scandal and the eroding public confidence in the legal profession, in 1983 the ABA responded to the Kutak Commission by promulgating its long-awaited Model Rules of Professional Conduct.⁵⁹ The Rules reject the "free narrative" compromise of Standard 4-7.7, and appear to extend the mandatory obligations of a lawyer beyond those contained in the Model Code. Model Rule 1.16(b)(1) states that a lawyer *may* withdraw if her client "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."⁶⁰ Model Rule 3.3(a)(4) further provides, however, that a lawyer *must* take "reasonable remedial measures" if a lawyer has offered material evidence and comes to know of its falsity.⁶¹ Most importantly, if the lawyer has offered false evidence, the duty to take "reasonable remedial measures" applies (at least until the conclusion of the proceeding) even if compliance leads to disclosure of information otherwise

⁵⁶ See *id.*

⁵⁷ See, e.g., Wolfram, *supra* note 4, at 827.

⁵⁸ See STANDARDS FOR CRIMINAL JUSTICE § 4-7.7 editorial note.

⁵⁹ See MODEL RULES OF PROFESSIONAL CONDUCT (1987).

⁶⁰ *Id.* Rule 1.16(b)(1).

⁶¹ *Id.* Rule 3.3(a)(4).

considered confidential.⁶² This Rule on its face produces results that contrast sharply with outcomes under Formal Opinion 341 and Formal Opinion 287 which construe previous ABA ethical standards.⁶³

By imposing a mandatory duty on a lawyer to take "reasonable remedial measures" when false testimony has been offered, the Model Rules represent the first unambiguous endorsement by the ABA of the officer of the court approach to the client perjury problem. But by employing the nonspecific phrase "reasonable remedial measures," the Rules recognize that remedial action should be tailored to the facts and circumstances of each case. While there is flexibility as to remedy, a lawyer has an affirmative duty under the Model Rules to prevent client perjury from tainting the courtroom factfinding process.

The Model Rules, however, did not entirely resolve the conflict between advocates of strict attorney-client confidentiality and those who emphasize the attorney's obligation to the courts. The comment to Model Rule 3.3 notes that if disclosure by a lawyer to prevent a fraud upon the court constitutes a violation of a criminal defendant's constitutional rights to due process and effective assistance of counsel, then the obligation of the advocate under the Rules would be subordinate to the such rights.⁶⁴ The fundamental question posed in *Nix v. Whiteside*:⁶⁵ was the closely related question of whether any federal constitutional requirements⁶⁶ would prevent imposition of criminal sanctions where an attorney threatened to disclose client perjury to the court.⁶⁷

Most states have not adopted the Model Rules, but instead continue to use rules of professional responsibility that closely follow the Model Code promulgated in 1969. As a result, in most jurisdictions the ambiguities of the Model Code remain. The Model Rules, however, have been adopted in varying versions by a number of states.⁶⁸ In Iowa, the jurisdiction involved in *Nix v. Whiteside*, the state code of professional responsibility was patterned after the Model Code.⁶⁹

⁶² See *id.* Rule 3.3(b).

⁶³ See *supra* notes 31-32 and accompanying text.

⁶⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1987).

⁶⁵ 475 U.S. 157 (1986).

⁶⁶ The question of whether due process or right to counsel provisions in state constitutions prevent disclosure of secrets or confidences in order to avoid perjury is a question of state law not addressed in *Whiteside*.

⁶⁷ See *Whiteside*, 475 U.S. at 166-71.

⁶⁸ See *id.* at 167 n.4.

⁶⁹ See IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS, Preliminary Statement (1987).

C. *Potential Constitutional Constraints on State Ethical Standards*

Three constitutional restraints arguably limit the authority of states to fashion rules of professional responsibility for lawyers in criminal cases: the sixth amendment right to counsel in criminal cases, applied to state criminal proceedings through the fourteenth amendment; the due process clause of the fourteenth amendment; and a constitutionally-based right to testify arguably found in the shadows of the fifth, sixth and fourteenth amendments.⁷⁰

1. The Sixth Amendment "Right to Counsel"

Ever since the outrageous Scottsboro case⁷¹ in the early days of the Depression, a criminal defendant in a state prosecution has had the right to the "guiding hand of counsel at every step in the proceedings against him."⁷² In the intervening years, the Supreme Court has struggled to define the precise point at which denial of the right to counsel or right to effective counsel will prevent the state from imposing criminal sanctions against a defendant.

a. *Right to the Presence of Counsel at Critical Stages of the Criminal Justice Process*

The Supreme Court has held in a number of cases that the right to counsel extends to specific stages of the criminal justice process. A criminal defendant, for instance, has a sixth amendment right to coun-

⁷⁰ Professor Freedman also sees fifth amendment implications. See Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1946-55 (1988). A lawyer who simply informs the court that her client intends to commit perjury does not, however, violate the fifth amendment rights of her client, since the communication is not used by the state as evidence of criminal liability in the pending proceeding, but is simply revealed to the court in order to prevent a future crime from occurring.

Furthermore, if the client elects to take the stand, the communication probably can be used to impeach the client's testimony without violating the fifth amendment. The notion that probative but otherwise inadmissible evidence may be used against a defendant once the defendant takes the stand is well-established. See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (prearrest silence used to impeach defendant who elected to testify); *Harris v. New York*, 401 U.S. 222, 226 (1971) (statement inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), nevertheless admissible to impeach defendant). Counsel would of course be required to withdraw if she were called by the state to testify against her client.

A serious fifth amendment problem would arise, however, if the defendant did not take the stand, and the state nonetheless attempted to compel a lawyer to reveal communications suggesting that the client proposed to commit perjury at trial.

⁷¹ See *Powell v. Alabama*, 287 U.S. 45 (1932).

⁷² *Id.* at 69.

sel on request during interrogations while in police custody⁷³ and when determining her plea,⁷⁴ and a right to consult with counsel during trial testimony.⁷⁵ These cases provide the accused with procedural rather than substantive protection. They do not mandate any particular behavior by counsel, but simply ensure that counsel has an opportunity to participate in critical stages of the criminal process. In the context of client perjury, these "critical stage" cases become important when local ethical rules prohibiting a lawyer from assisting in the perpetration of a fraud upon the courts force a defendant to take the stand and testify without the assistance of counsel.⁷⁶

b. *Right to Effective Assistance of Counsel*

The Supreme Court has also held that the sixth amendment requires that each criminal defendant be provided "effective assistance of counsel" in the presentation of her defense.⁷⁷ This overarching concept defies precise definition and tends to be case-specific. The requirement of effective assistance of counsel is obviously not designed as a constitutional insurance policy to provide a defendant with relief simply because a particular strategy backfires. On the other hand, counsel bungling a case through ignorance of the law or slothful investigation directly offends the values behind the sixth amendment right to counsel.

In *Strickland v. Washington*⁷⁸ the Court established a two-pronged test to determine whether ineffective assistance of counsel invalidated a conviction. First, a criminal defendant must show that counsel provided assistance "outside the wide range of professionally competent assistance."⁷⁹ Second, the defendant must demonstrate actual prejudice as a result of counsel's deficient performance.⁸⁰ Unless both prongs of the *Strickland* test are satisfied, a lawyer found to have violated a local rule of ethics dealing with client perjury will not have rendered ineffective assistance.

⁷³ See *Miranda v. Arizona*, 384 U.S. 436, 469-74 (1966).

⁷⁴ See *White v. Maryland*, 373 U.S. 59, 59-60 (1963).

⁷⁵ See *Geders v. United States*, 425 U.S. 80, 91 (1976).

⁷⁶ Cf. *United States v. Ellison*, 798 F.2d 1102, 1108 (7th Cir. 1986) (discussing testimony without the assistance of counsel when attorney testified against client who had accused him of coercing plea bargain).

⁷⁷ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

⁷⁸ 466 U.S. 668 (1984).

⁷⁹ *Id.* at 690.

⁸⁰ See *id.* at 692.

c. *The Right to Independent (Conflict-Free) Counsel*

A third strand of the sixth amendment right to counsel states that a criminal defendant is entitled to a lawyer who is not saddled with conflicts of interest, a risk inherent in the joint representation of multiple defendants. A conflict may, for instance, prevent an attorney from arguing "the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another."⁸¹ The Supreme Court has held that "whenever a trial court improperly requires joint representation over timely objection, reversal is automatic."⁸² No demonstration of prejudice was required because it would be difficult, or virtually impossible, to assess the impact of a conflict on an attorney's representation of her client.⁸³ The Court has more recently elaborated that if no objection is raised at trial, the defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."⁸⁴

By either strand of logic, it could be argued that an attorney who believes she must disclose client confidences to a tribunal in order to avoid professional sanctions cannot give her client the undivided loyalty required by the sixth amendment.⁸⁵ According to such a view, because the attorney has a conflict of interest between maintaining her professional reputation and representing her client effectively, the court should presume prejudice. Applying the conflict of interest rationale to the client perjury setting would in effect constitutionally mandate a strict confidentiality approach to the client perjury problem.

2. Due Process Issues

In some circumstances, the client perjury dilemma may also present questions of fundamental fairness. The leading case is *Lowery v. Cardwell*.⁸⁶ In *Lowery*, a defense attorney sought to withdraw when his client insisted on taking the stand. The Ninth Circuit Court of Appeals understandably believed that the attorney's action communicated

⁸¹ *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (citing *Glasser v. U.S.*, 315 U.S. 60 (1942)).

⁸² *Id.* at 488.

⁸³ *See id.* at 490-91.

⁸⁴ *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

⁸⁵ *See Whiteside v. Scurr*, 744 F.2d 1323, 1327-31 (8th Cir. 1984); *cf. United States v. Ellison*, 798 F.2d 1102, 1107-09 (7th Cir. 1986) (holding that by testifying against his client, an attorney denied the client effective assistance of counsel, even though his testimony was aimed at rebutting allegations that he had coerced a guilty plea, an action that "would be tantamount to malpractice").

⁸⁶ 575 F.2d 727 (9th Cir. 1978).

to the factfinder his belief that his client was about to testify falsely.⁸⁷ When the defendant's own lawyer expressly or implicitly calls his own client a perjurer in front of the factfinder, the impact is likely to be highly prejudicial. Juries (and judges) tend to convict perjurers even where the evidence is less than overwhelming.

All this, of course, does not necessarily imply that the attorney in *Lowery* acted improperly. Indeed, the lawyer's actions may have complied with both the letter and spirit of local rules of ethics. Instead, the argument is the defendant's conviction cannot survive because her lawyer's actions, however justified by local rules of ethics, deprived her of her constitutional rights at trial. Under some circumstances, a lawyer maybe ethically bound to take actions that will inevitably result in a mistrial.

3. Right to Testify

A third constitutional theory implicated in client perjury cases is what has been called the right to testify on one's own behalf.⁸⁸ Some have contended that the right is implicit in the fifth, sixth, and fourteenth amendments. Stripped to its bare essentials, the argument that the right of a criminal defendant to take the stand and tell her side of the story is so fundamental that no lawyer should be allowed to prevent or deter the client from doing so.

If there is a constitutional right to testify, it is the result not of historic practice, but of the evolution of constitutional doctrine. For the first hundred years of constitutional interpretation, the dilemma posed by a client determined to commit perjury did not arise, because the law held that criminal defendants were incompetent witnesses in criminal proceedings.⁸⁹ This practice reflected the English common law rule that the accused had no right to take the stand. In part, the policy was based upon a fear that if courts granted a right to testify, such a practice would unduly cast doubt on a defendant who declined to testify.⁹⁰

⁸⁷ See *id.* at 729-30.

⁸⁸ See, e.g., *Whiteside v. Scurr*, 744 F.2d 1323, 1329-30 (8th Cir. 1984) (counsel's threat to discontinue representation of client and testify against him should he perjure himself compromised client's constitutional right to testify in his own defense); *United States v. Bifield*, 702 F.2d 342, 349-50 (2d Cir.) (trial court's ruling that defendant could not testify to a duress defense to which he was not entitled as a matter of law did not deprive defendant of his constitutional right to testify), *cert. denied* 461 U.S. 931 (1983); *Alicea v. Gagnon*, 675 F.2d 913, 923-25 (7th Cir. 1982) (trial court's application of state alibi-notice statute unconstitutionally deprived defendant of his right to testify and present a defense).

⁸⁹ See *Ferguson v. Georgia*, 365 U.S. 570, 574-77 (1961).

⁹⁰ See *id.* at 578-9.

Courts and legislators also assumed that the accused would testify falsely to advance her trial prospects.⁹¹ Only after the Civil War did the states begin passing competency statutes that allowed criminal defendants to testify on their own behalf.⁹² In 1878, Congress enacted a federal statute establishing the right of a defendant to testify in federal criminal cases.⁹³

The Supreme Court has never expressly recognized a constitutional right to testify. In *Ferguson v. Georgia*,⁹⁴ the Court held that if a state allows a criminal defendant to take the stand in her own defense, then it must allow the defendant's lawyer to assist in the presentation. Under *Ferguson*, a state cannot limit the defendant's testimony to a potentially rambling, confusing statement while her lawyer sits helplessly at the counsel table, unable to assist her client by asking questions that would give a logical structure to her testimony.

A constitutional right to testify could prevent expansion to the client perjury setting of holdings that a lawyer may deny her client's wish to call certain witnesses to the stand because the lawyer believes they will present perjured testimony.⁹⁵ Similarly, a lawyer's threat to withdraw over a client's potential perjury could potentially "chill" the exercise of the right to testify.⁹⁶

II. THE HOLDING IN *Nix v. Whiteside*

With the ethical and constitutional issues outlined above in mind, this Part examines *Nix v. Whiteside*.⁹⁷ After a brief review of the case's background, its precise holding will be analyzed.

A. Background

Emmanuel Charles Ray Whiteside was convicted of second-degree murder for a homicide committed in the apartment of an acquaintance

⁹¹ See *id.* at 573-74.

⁹² See *id.* at 577 n.6.

⁹³ Act of Mar. 16, 1878, ch.37, 20 Stat. 30 (codified as amended at 18 U.S.C. § 3481 (1982)).

⁹⁴ 365 U.S. 571, 596 (1961).

⁹⁵ See *People v. Williams*, 2 Cal.3d 894, 905, 471 P.2d 1008, 1015, 88 Cal. Rptr. 208, 215 (1970) (en banc) ("Whether to call certain witnesses is generally a matter of trial tactics" as to which "[a]n attorney may ordinarily waive his client's rights."); *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981) (en banc) ("[C]ounsel was correct in refusing to call the witnesses which the defendant located to support his spurious defense of alibi.").

⁹⁶ See *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120-121 (3d Cir. 1977) (defendant should not be forced to choose between his right to testify and his right to counsel).

⁹⁷ 475 U.S. 157 (1986).

of his, Calvin Love. On the night of the homicide, Whiteside and Love argued over drugs, and Whiteside stabbed Love to death. There were two eyewitnesses, including Love's girlfriend.⁹⁸

Whiteside originally told his court-appointed attorneys that Love had been reaching for a gun beneath a pillow when Whiteside stabbed him. Whiteside stated that he had not actually seen a gun, but had thought he had seen one, and was convinced that Love had had one because Love had a reputation for carrying guns.⁹⁹ The eyewitnesses also had not seen a gun, and a police search of the apartment shortly after the homicide did not uncover a weapon. A week before the trial, however, Whiteside altered his version of the facts. He now told his attorneys for the first time that he had actually seen "something metallic" in Love's hand. When his attorneys questioned his change of story, Whiteside declared "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead."¹⁰⁰

Whiteside's change of story startled his attorneys, but more importantly, it provoked a strong admonition from lead defense counsel, who did not believe Whiteside's revised account. The attorney told Whiteside that if he, Whiteside, was set on testifying that he actually saw a gun in Love's hands, he would not be permitted to perjure himself. The lawyer testified:

[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to impeach that particular testimony.¹⁰¹

Counsel also indicated they would seek to withdraw if he insisted on testifying that he actually saw "something metallic."¹⁰²

Nothing further was said about the perjury issue, and at the time of trial, Whiteside took the stand and testified that although he had not actually seen a weapon, he had thought Love was armed, because Love

⁹⁸ See *id.* at 160.

⁹⁹ *Whiteside v. Scurr*, 744 F.2d at 1325.

¹⁰⁰ *Whiteside*, 475 U.S. at 160-61 (quoting Petition for a Writ of Certiorari app. F at A85, *Nix v. Whiteside*, 475 U.S. 157 (1986) (No. 84-1321) [hereinafter *Pet. app. F*] (portion of defense attorney's testimony at hearing on supplemental motion for new trial)).

¹⁰¹ *Id.* at 161 (quoting Petition for a Writ of Certiorari, *supra* note 100, at A85 (portions of defense attorney's testimony at hearing on supplemental motion for new trial)).

¹⁰² *Id.*

had a reputation for carrying guns, and because during the argument, Love told his girlfriend to "give him his 'piece.'" ¹⁰³ The jury convicted Whiteside of second-degree murder. ¹⁰⁴

After his conviction, Whiteside discharged his attorneys and filed a posttrial motion alleging that they had improperly coerced him into altering his testimony. The state trial court, after hearing testimony from Whiteside and his attorneys, entered a conclusory order denied the motion, which based on the facts as presented by Whiteside's attorneys. ¹⁰⁵

The Iowa Supreme Court affirmed the conviction in a brief opinion. ¹⁰⁶ Without engaging in extensive constitutional analysis, the Court held that the attorneys had "good cause to believe" that Whiteside's "proposed testimony would be deliberately untruthful." ¹⁰⁷ The court quoted Iowa Code of Professional Responsibility for Lawyers DR 4-101(C)(3), that, following the ABA Model Code of Professional Responsibility, states "[A] lawyer *may* reveal the intention of his client to commit a crime." ¹⁰⁸ The Court further cited, among other provisions, Iowa Code of Professional Responsibility DR 7-102(A)(4), prohibits an attorney from knowingly using perjured testimony. ¹⁰⁹ The Court concluded its analysis by commending the attorneys for "the high ethical manner" in which they handled the matter. ¹¹⁰

When Whiteside filed a habeas corpus petition in federal court, the district court denied the petition, simply accepting what it characterized as the state court's factual finding that Whiteside had intended to testify falsely. The district court reasoned that Whiteside was not entitled to relief because there was no constitutional right to perjure oneself. ¹¹¹

¹⁰³ *Id.* at 178 (Blackmun, J., concurring in the judgment) (quoting Appendix at 66-67, *State v. Whiteside*, 272 N.W.2d 468 (Iowa 1978) (No. 61091), *reprinted in* Petition for a Writ of Certiorari, *supra* note 100, at A55-A56)) (defendant's trial testimony). For a transcript of shorthand notes of the state district court trial, *State v. Whiteside*, CRF No. 3199-0277 (Iowa Dist. Ct., Linn County May 12, 1977), see Joint Appendix at 3, *Nix v. Whiteside*, 475 U.S. 157 (1986) (No. 86-1321) [hereinafter Joint Appendix].

¹⁰⁴ See *Whiteside*, 475 U.S. at 160.

¹⁰⁵ *State v. Whiteside*, CRF No. 3199-0277 (Iowa Dist. Ct., Linn County 1977) (ruling on supplemental motion for new trial and order setting sentencing), *reprinted in* Joint Appendix, *supra* note 103, at 56.

¹⁰⁶ See *State v. Whiteside*, 272 N.W.2d 468 (Iowa 1978).

¹⁰⁷ *Id.* at 471.

¹⁰⁸ *Id.* (quoting an earlier version of Iowa Code of Professional Responsibility for Lawyers DR 4-101(C)(3) (1987) (emphasis added)).

¹⁰⁹ See Iowa Code of Professional Responsibility for Lawyers DR 7-102(A)(4) (1987).

¹¹⁰ *State v. Whiteside*, 272 N.W.2d at 471.

¹¹¹ See *Whiteside v. Scurr*, Civ. No. 81-246-C, slip. op. at 2-3 (S.D. Iowa Dec. 7, 1982).

The Eighth Circuit disagreed.¹¹² It accepted, as had the district court, what it characterized as the Iowa Supreme Court's factual determination that Whiteside had intended to testify falsely. It held, however, that Whiteside's attorneys had deprived Whiteside of effective assistance of counsel, due process of law, and his constitutional right, based on the fifth, sixth and fourteenth amendments, to testify on his own behalf.¹¹³

The Eighth Circuit discussion properly began with the observation that its analysis "does not deal with the ethical problem" faced by Whiteside's lawyers.¹¹⁴ Regarding this ethical question, the court recognized that the proper approach to client perjury is "a very controversial matter," and commended the lawyers for "conscientiously attempting to address the problem of client perjury in a manner consistent with professional responsibility."¹¹⁵ The only concerns of the court, however, were the constitutional questions posed by the case.

In its sixth amendment analysis, the Eighth Circuit noted that "[c]ounsel's ability to serve as an effective advocate . . . depends upon the defendant's ability to disclose information fully and in confidence to counsel."¹¹⁶ The court argued that, as with unnecessary disclosure of client confidences, the threat of disclosure "'creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation.'" ¹¹⁷ In particular, the court rejected the suggestion that Whiteside's lawyer could testify against him if he insisted upon committing perjury. At this point, according to the court, counsel became a potential adversary rather than a zealous advocate.¹¹⁸ Relying ultimately on *Cuyler v. Sullivan*,¹¹⁹ the court of appeals held that, given the conflict of interest between counsel and client, prejudice would be presumed.¹²⁰

The court further held that the actions of Whiteside's attorneys compromised Whiteside's constitutional right to testify in his own defense. According to the court, Whiteside's lawyers, by forcing him to

¹¹² See *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

¹¹³ See *id.* at 1328-29.

¹¹⁴ *Id.* at 1327.

¹¹⁵ *Id.* at 1327-28.

¹¹⁶ *Id.* at 1329.

¹¹⁷ *Id.* (quoting *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977)).

¹¹⁸ See *id.*

¹¹⁹ 446 U.S. 335, 348 (1980) ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.") For a discussion of the right to conflict-free counsel, see *supra* notes 81-85 and accompanying text.

¹²⁰ See *Whiteside v. Scurr*, 744 F.2d at 1330.

choose between his right to testify and his right to effective assistance of counsel, infringing both.¹²¹

B. *The Majority Opinion in Nix v. Whiteside*

Chief Justice Burger's majority opinion in *Whiteside* began its sixth amendment analysis with a relatively straightforward application of *Strickland v. Washington*¹²² standards. The Court noted that to establish a claim of ineffective assistance of counsel, a party must show that "'counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment.'" ¹²³ The Court emphasized that in reviewing 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.¹²⁴

As Professors Hazard and Hodes have observed, the issue in *Whiteside* was "not whether counsel was right, but whether counsel was radically wrong"¹²⁵ when he admonished Whiteside.

In order to determine whether the conduct of Whiteside's attorneys was a constitutionally acceptable response to proposed client perjury, the Court examined various ethical standards, from the 1908 Canons of Professional Ethics to the 1983 Model Rules,¹²⁶—which, as noted above,¹²⁷ appear to authorize, though do not require, an attorney to take vigorous action to prevent client perjury. In light of these standards, the Court stated that the conduct of Whiteside's lawyers fell "well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*."¹²⁸

The majority treated Whiteside's due process and right to testify claims with similar dispatch. The majority did not provide any due process analysis, but emphasized the peculiar facts of the case which made it possible to avoid due process problems. The majority noted, for

¹²¹ See *id.* at 1329-30.

¹²² 466 U.S. 668 (1984).

¹²³ *Whiteside*, 475 U.S. at 165 (quoting *Strickland*, 466 U.S. at 687).

¹²⁴ *Id.* at 165.

¹²⁵ G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 360.1 (Supp. 1987).

¹²⁶ See *Whiteside*, 475 U.S. at 166-70.

¹²⁷ See *supra* notes 59-67 and accompanying text.

¹²⁸ *Whiteside*, 475 U.S. at 171.

example, that no client confidences were divulged until Whiteside's posttrial motions.¹²⁹ Thus, by implication at least, the situation presented in *Whiteside* was different from that in *Lowery v. Cardwell*,¹³⁰ in which the trial itself was tainted because the fact finder knew that the accused's own lawyer believed that his client had committed perjury. In a footnote, the Court also observed that the record in *Whiteside* did not support the allegation that Whiteside's attorneys threatened to testify against Whiteside while still acting as his counsel.¹³¹ Any potential testimony from Whiteside's lawyers would have occurred *after* they had withdrawn, thereby avoiding the fundamentally unfair situation in which an attorney serves as both defense lawyer and prosecution witness at the same time.

The majority did not directly address the existence of a constitutional right to testify. The majority noted, however, that whatever the scope of a constitutional right to testify, there was no constitutional right to testify falsely.¹³² Just as "[a] defendant who informed his counsel that he was arranging to bribe or threatening witnesses or members of the jury would have no 'right' to insist on counsel's assistance or silence," so, too, a client who intends to commit perjury cannot hide behind the shield of an attorney's duty of confidentiality.¹³³

The majority also briefly addressed the issue of whether prejudice under *Strickland* should be presumed when a "conflict" exists between a client who wishes to offer perjured testimony and a lawyer who seeks to follow ethical rules.¹³⁴ The majority opinion reasoned that the rationale of the conflict-of-interest cases does not apply when an attorney simply seeks to prevent a client from engaging in illegal acts. To hold otherwise would mean "every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means."¹³⁵

The majority opinion is not without its flaws. It is clearly over-written in several places. For instance, the observation that "[n]o system of justice worthy of the name can tolerate a lesser standard" than mandatory disclosure¹³⁶ is a gratuitous comment that would certainly

¹²⁹ See *id.* at 172.

¹³⁰ 575 F.2d 727, 730 (9th Cir. 1978) (holding that because defense counsel communicated to fact finder his belief that client committed perjury, fact finder was disabled from judging the merits of defendant's defense).

¹³¹ See *Whiteside*, 475 U.S. at 172 n.7.

¹³² See *id.* at 173.

¹³³ *Id.* at 174.

¹³⁴ See *id.* at 175-76.

¹³⁵ *Id.* at 176.

¹³⁶ *Id.* at 174.

startle the authors of Formal Opinion 287 and Formal Opinion 341.¹³⁷ As Justice Brennan noted in his concurring opinion, "[T]he Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law."¹³⁸

The Court also did not address troublesome issues surrounding the fact finding process in the case. The majority simply assumed that a conclusive factual determination had been made that Whiteside intended to testify falsely.¹³⁹ While the unusual record in *Whiteside* supports that conclusion,¹⁴⁰ it is not clear what standard a constitutional tribunal should apply to determine whether a client intends to commit perjury. The Iowa Supreme Court, for instance, stated that Whiteside's lawyers had "good cause to believe" that their client planned to commit perjury.¹⁴¹ Is a "good cause" standard that is apparently deferential to a lawyer's judgment constitutionally sufficient? One could argue that a lawyer's determination that she "knows" the client intends to testify falsely should be reviewed under deferential *Strickland v. Washington* standards. In the alternative, should a trial court make an independent, *de novo* determination that the client was preparing to testify falsely? But would not any such procedure unduly invade the province of the jury in a criminal case?¹⁴²

While the Court's opinion did not settle these important issues, they were clearly on the minds of some Justices at oral argument. The second question addressed to the state's counsel during oral argument asked what standard should be employed before a lawyer has a professional obligation to take action to prevent perjured testimony.¹⁴³ The state's counsel took the position that an attorney must not act on mere

¹³⁷ See *supra* notes 31-32, 47-52 and accompanying text.

¹³⁸ *Whiteside*, 475 U.S. at 177 (Brennan, J., concurring in the judgment). It is worth noting that the four concurring justices relied solely on the lack of prejudice in the record in affirming Whiteside's conviction. They seemed reluctant to consider the difficult questions presented by the case. See *id.* at 178, 184-88 (Blackmun, J., concurring in the judgment).

¹³⁹ After stating that "[t]he Court of Appeals assumed for the purpose of the decision that Whiteside would have given false testimony had counsel not intervened," the Court continued: "We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury." *Id.* at 171-72.

¹⁴⁰ Whiteside's statement that "in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead," *id.* at 161, when contrasted with Whiteside's earlier repetitive statements that he did not actually see a gun, see *id.* at 160, amounts to a direct admission that the defendant was contemplating perjury.

¹⁴¹ *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978).

¹⁴² See Appel, Nix v. Whiteside: *The Role of Apples, Oranges, and the Great Houdini in Constitutional Adjudication*, 23 CRIM. L. BULL. 5, 14-16 (1987).

¹⁴³ See Official Transcript of Oral Argument at 9, Nix v. Whiteside, 475 U.S. 157 (1986) (No. 84-1321) [hereinafter Transcript].

suspicion, but must "know" or "know beyond a reasonable doubt" that the client intended to commit perjury.¹⁴⁴ The Court apparently believed that the appropriate standard of judicial review, whatever it might be, was met under the facts and circumstances of the case.

C. *The Limitations of Nix v. Whiteside*

Whiteside presented what one commentator has called "one of the easier client perjury scenarios."¹⁴⁵ Because the lawyer's admonition in *Whiteside* had the desired affect, no perjury occurred at trial. Thus, the case did not present what Justice Stevens characterized as "much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe."¹⁴⁶ The success of the admonition also avoided the troublesome situation in which the judge or jury, either expressly or implicitly, knows that the attorney believes her own client is lying. Moreover, *Whiteside* did not present a case in which the lawyer refused to allow the client to take the stand altogether, a scenario that in some contexts may raise more serious right-to-testify questions. In addition, *Whiteside* did not present a situation in which a client is without counsel at a critical stage because her attorney either withdraws or refuses to assist in the presentation of perjured testimony.

Perhaps most important, in *Whiteside* the client virtually told the lawyer that he intended to commit perjury at trial: "If I don't say I saw a gun, I'm dead" was his justification for his new testimony.¹⁴⁷ Justice White at oral argument characterized *Whiteside* as "a relatively rare case" in which the defendant's clearly intended to commit perjury.¹⁴⁸ Plainly, *Whiteside* has no application when a lawyer merely suspects that a client may be about to testify falsely. If a defendant is unable to testify because her lawyer refuses to put her on the stand on mere suspicion that her testimony may be false, the defendant's rights to testify and to due process rights may well have been violated.

III. IMPACT OF *Nix v. Whiteside*

Thus far, this Article has argued that the main thrust of *Nix v.*

¹⁴⁴ *Id.*

¹⁴⁵ Note, *Nix v. Whiteside: Is a Client's Intended Perjury A Real Dilemma?*, 22 TULSA L.J. 399, 422 (1987).

¹⁴⁶ *Whiteside*, 475 U.S. at 191 (Stevens, J., concurring in the judgment).

¹⁴⁷ *Whiteside*, 475 U.S. at 161 (quoting Petition for a Writ of Certiorari app. F, *supra* note 100, at A85).

¹⁴⁸ Transcript, *supra* note 143, at 58.

*Whiteside*¹⁴⁹ is that, as the Supreme Court saw the facts, the actions of *Whiteside*'s attorneys were constitutionally permissible. Each state must decide how best to address the client perjury problem presented in *Whiteside*. A state may adopt either the "free narrative" approach of the Standards,¹⁵⁰ or the strict confidentiality ("alter ego") approach¹⁵¹ without constitutional restraints. Similarly, a state could impose upon lawyers the apparently mandatory obligations of the Model Rules without offending constitutional values in a factual context similar to *Whiteside*.

A. Subsequent Judicial Decisions

Unfortunately, since *Whiteside*, courts have not consistently recognized the distinction between a state's regulation of its lawyers' ethical conduct and constitutional restraints upon the conviction of an accused. For instance, in *United States v. Carbone*,¹⁵² the First Circuit, citing *Whiteside*, offered the sweeping observation that "[t]he Supreme Court has declared unequivocally that the attorney-client privilege does not cover the commission of perjury."¹⁵³ *Whiteside*, however, only stands for the proposition that the sixth amendment does not *require* states to recognize an attorney-client privilege that would protect from disclosure the expressed intention of a client to commit perjury in state criminal proceedings. States remain free to adopt a broader attorney-client privilege.

Furthermore, a number of courts seem to believe that the Court in *Whiteside* delineated the scope of a lawyer's ethical obligations when faced with a client intending to commit perjury. For instance, the Ninth Circuit in *In re Curl*¹⁵⁴ at least implies that *Whiteside* stands for the duty of a lawyer never to put on the witness stand a client she has reason to know is committing perjury. Similarly, the court in *Herbster v. North American Co. of Life and Health Insurance*¹⁵⁵ cited *Whiteside* for the proposition that "[w]ithdrawal from representation is not only an appropriate response but may be mandated for an attorney when the client threatens to commit a crime."¹⁵⁶ Also, the court in

¹⁴⁹ 475 U.S. 157 (1986).

¹⁵⁰ See *supra* notes 53-58 and accompanying text.

¹⁵¹ See *supra* notes 19-21 and accompanying text.

¹⁵² 798 F.2d 21, 28 (1st Cir. 1986).

¹⁵³ *Id.* at 28.

¹⁵⁴ 803 F.2d 1004, 1006-07 (9th Cir. 1986).

¹⁵⁵ 150 Ill.App.3d 21, 501 N.E.2d 343 (1986), *appeal denied*, 114 Ill.2d 545, 508 N.E.2d 728 (1987), *cert. denied*, 108 S. Ct. 150 (1987).

¹⁵⁶ *Id.* at 29, 501 N.E.2d at 348.

*State ex rel. Oklahoma Bar Assoc. v. Cantrell*¹⁵⁷ cited *Whiteside* to support its view that there was "no basis" for any sanction less than disbarment when a lawyer suborned perjury.¹⁵⁸

A court can, of course, cite *Whiteside* if it finds its reasoning on legal ethics persuasive. But the Court in *Whiteside* did not determine state legal ethics. Indeed, some states that have adopted the Model Rules have eliminated or modified their provisions in order to avoid requiring the disclosure of a client's intent to commit perjury.¹⁵⁹

B. *Impact on the Attorney-Client Relationship*

Because of *Whiteside*'s limited holding, the decision rarely has a direct impact on criminal defense attorneys and their clients. Although *Whiteside* strips away federal constitutional arguments against disclosure of a client's intent to commit perjury, several requirements nonetheless must be satisfied before a criminal defense lawyer has an affirmative duty to disclose a client's intended perjury.

First, the lawyer must be practicing in a jurisdiction that requires disclosure of intended perjury if necessary to prevent a fraud upon the court. As indicated above, not all local rules of ethics, as interpreted by authoritative state tribunals, impose such a requirement. In addition to local ethical rules, a lawyer must examine provisions of state constitutions, as interpreted by state supreme courts, in order to determine whether they conflict with, and therefore override, local ethical prescriptions.

Second, even if a lawyer practices in a jurisdiction in which the local law appears to require a lawyer to take affirmative action to prevent client perjury, such duties generally arise only when an attorney "knows" that the client intends to testify falsely. Only rarely will a lawyer know both that proposed testimony is false and that the client is determined to offer the false testimony at trial.¹⁶⁰

Third, even when the attorney "knows" that a client's suggested testimony is false, she should first try remedies short of disclosure that may satisfy her ethical obligations. An attorney may be able to withdraw from representation, although such a "solution" might simply

¹⁵⁷ 734 P.2d 1292 (Okla. 1987).

¹⁵⁸ *Id.* at 1293.

¹⁵⁹ See Law. Man. on Prof. Conduct (ABA/BNA) 61:404-405 (1988) (citing rules in New Hampshire, North Carolina, North Dakota, and Washington that eliminate or modify a lawyer's duty to disclose client perjury).

¹⁶⁰ See Freedman, *The Aftermath of Nix v. Whiteside: Slamming the Lid on Pandora's Box*, 23 CRIM. L. BULL. 25, 29 (1987). For a discussion of the requirement that an attorney "know" that a client is prepared to commit, or has committed perjury, see G. HAZARD & W. HODES, *supra* note 125, at 339-44 (1985).

pass the problem on to succeeding counsel. If withdrawal is not allowed, an attorney may nonetheless be able to persuade the client not to testify. The impact of moral persuasion is admittedly limited, especially when a defendant stands accused of serious crimes, conviction of which could result in a long prison term or even the death sentence. Tactical arguments are likely to be more persuasive. A client who is shown to be a liar on cross-examination is likely to be convicted even if the evidence against her is less than overwhelming. Consequently, a lawyer may sometimes be able to appeal to a client's self-interest in order to prevent perjury.

The most serious question, however, is not whether *Whiteside* has had a direct effect on many criminal cases, but whether states after *Whiteside* should adopt mandatory ethical rules, similar to those of the Model Rules,¹⁶¹ that require an attorney, after other remedies prove ineffective, to disclose a client's perjury. Arguably, such a rule makes it less likely that a client will be totally candid with counsel. Conversely, attorneys seeking to dodge mandatory duties may attempt to structure discussions with clients so as to avoid learning "facts." Under either scenario, client representation could suffer because of the stilted character of attorney-client communications. After *Whiteside*, however, the question whether a mandatory disclosure rule similar to Model Rule 3.3 is desirable in client perjury situations is for the states to decide free from federal constitutional restraints.

CONCLUSION

Nix v. Whiteside stands for the proposition that, under the facts presented, the actions of *Whiteside*'s attorneys did not violate the United States Constitution. *Whiteside* thus removes federal constitutional barriers to state rules of ethics that impose mandatory duties, including disclosure, upon attorneys who know that their clients plan to deliberately offer false testimony at trial. Whether such an approach is sound policy is left for each state to decide.

¹⁶¹ See *supra* notes 59-69 and accompanying text.