

FALSE TESTIMONY BY CRIMINAL DEFENDANTS: STILL UNANSWERED ETHICAL AND CONSTITUTIONAL QUESTIONS

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The ethical obligations of a criminal defense lawyer whose client intends to or has testified falsely have been the subject of debate for more than a quarter century, yet they remain unclear. In this article, the author analyzes the impact of revised Model Rule 3.3 on this issue. The author concludes that the revised rule has failed to provide clear answers to the three major questions that arose under prior Rule 3.3: When does a lawyer have sufficient knowledge to take action under the rule? What should a lawyer do if the lawyer learns of the client's intention before the testimony is offered? To what extent do constitutional requirements trump a lawyer's ethical obligations under Rule 3.3?

The author argues that the revised rule poses a number of interpretative issues. His surprising conclusion is that the revised rule, along with developments that have taken place in the states, will result in use of the narrative solution to a much greater extent than the drafters may have intended.

A number of commentators have argued that the Supreme Court's decision in Nix v. Whiteside has laid to rest the constitutional issues raised by Rule 3.3. The author argues that, when properly analyzed, Nix should be viewed as a constitutional outlier. The facts of Nix present almost the weakest case imaginable for finding a Sixth Amendment violation, and the decision does not address Fifth and Fourteenth Amendment issues. In Nix, attorney Robinson remonstrated with his client and successfully prevented him from testifying falsely. His client did in fact take the stand, testified truthfully, and presented the substance of his claim of self-defense. In other cases, where defense counsel goes beyond persuasion to prevent a defendant

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from testifying falsely or when the lawyer's actions prevent the client from testifying at all, constitutional violations may well occur.

What are the obligations of a lawyer when representing a criminal defendant who the lawyer knows intends to testify falsely? The issue is an old one, debated by academics for years;¹ examined² and reexamined³ by drafters of the American Bar Association (ABA) Model Rules of Professional Conduct; and considered by the Supreme Court in *Nix v. Whiteside*.⁴ Despite this attention, many significant unanswered questions remain.

This article makes two major points. The first point involves the interpretation of revised Model Rule 3.3, which the ABA House of Delegates adopted on February 5, 2002. The new rule presents a number of interpretative issues when applied to a lawyer representing a criminal defendant who the lawyer knows intends to testify falsely. This article analyzes these issues. My somewhat surprising conclusion is that revised Rule 3.3, along with developments that have taken place in the states, will result in the use of what is called the "narrative solution"⁵ to a much greater extent than the drafters may have intended.

The second argument deals with the scope of *Nix v. Whiteside*. In *Nix*, the Supreme Court addressed whether a lawyer's actions to prevent his client from testifying falsely violated the client's Sixth Amendment right to effective assistance of counsel.⁶ To many commentators, the Court's decision, finding that no violation occurred, laid to rest the constitutional issues involved when lawyers take steps to prevent false testimony. The Reporter's Note to the Restatement of the Law Governing Lawyers states: "The *Nix* decision has for most purposes settled the questions considered in the Comment in both the federal and state courts, despite some scholarly criticisms of its dicta."⁷ Similarly, the Hazard and Hodes treatise states: "[T]he *Whiteside* case is highly significant precisely because it closed off the main constitutional avenue of debate and remanded the argument over specific 'correct' responses to the

1. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); John Wesley Hall, Jr., *Handling Client Perjury After Nix v. Whiteside: A Criminal Defense Lawyer's View*, 42 MERCER L. REV. 769 (1991); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521 (1988); Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339 (1994); Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

2. MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

3. MODEL RULES R. 3.3 (2002).

4. 475 U.S. 157 (1986).

5. See *infra* Part I.B.6.

6. *Nix*, 475 U.S. at 159.

7. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120, reporter's note to cmt. i (2000).

state courts, where it belongs.”⁸ In this paper, I argue that *Nix v. Whiteside* is a constitutional outlier because the facts of the case present an extraordinarily weak situation for establishing a Sixth Amendment violation. *Nix* does not answer a number of constitutional questions and leaves open the possibility that constitutional violations may be found in other factual settings.⁹

I. ETHICAL OBLIGATIONS OF LAWYERS REPRESENTING CRIMINAL DEFENDANTS WHO THEY KNOW INTEND TO TESTIFY OR HAVE TESTIFIED FALSELY

A. *The 1983 Version of ABA Model Rule 3.3*

The drafters of the 1983 version of the Model Rules confronted the issue of false testimony by a criminal defendant in Rule 3.3. The text of the rule contained four provisions dealing with the problem. Rule 3.3(a)(2) stated that “a lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.”¹⁰ Rule 3.3(a)(4) required 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.”¹¹ Rule 3.3(b) provided that the “duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”¹² Rule 3.3(c) indicated that a “lawyer may refuse to offer evidence that the lawyer reasonably believes is false.”¹³

While the text of the rule did not specifically mention the situation of false testimony by a criminal defendant, the comments provided explicit guidance. They stated that a lawyer representing a criminal defendant who intended to testify falsely should attempt to persuade the defendant from so testifying.¹⁴ If remonstrance failed, the lawyer should move to withdraw.¹⁵ If withdrawal was denied, or if the matter arose during trial, the comments discussed three possible resolutions: offering the defendant’s testimony in narrative form, disclosing the defendant’s false testimony to the tribunal, or representing the defendant in the normal

8. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 29.19, at 29 (3d ed. 2002).

9. For an earlier treatment of some of these issues, see Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988).

10. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (1983).

11. *Id.* R. 3.3(a)(4) (1983).

12. *Id.* R. 3.3(b) (1983).

13. *Id.* R. 3.3(c) (1983).

14. *Id.* R. 3.3 cmt. 7 (1983).

15. *Id.* (1983).

fashion without regard to the falsity of the testimony.¹⁶ The drafters chose the disclosure solution reasoning that “an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).”¹⁷

Rule 3.3 and the comments, however, left unresolved a number of significant issues. First, the disclosure obligation set forth in Rule 3.3(a)(4) applied if the lawyer “knows” that false evidence has been offered, but when does a lawyer have such knowledge? The rules provided the following definition: “‘Knowingly,’ ‘Known,’ or ‘Knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”¹⁸ This definition raised more questions than it answered. What is “actual knowledge” of false testimony?¹⁹ Does actual knowledge require an admission by the defendant that his testimony is false? If so, what happens if the defendant retracts his admission? If not, what facts are sufficient to establish actual knowledge of false testimony?

Second, while the rule required disclosure as a “remedial measure,” should a lawyer disclose a defendant’s insistence on testifying falsely before it occurs? Finally, to what extent do the constitutional rights of criminal defendants trump ethical standards and require lawyers to act differently? The comments to original Rule 3.3 referred to the tension between constitutional rights of criminal defendants and the ethical obligation imposed by the rule:

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.²⁰

16. *Id.* cmts. 9–11 (1983).

17. *Id.* cmt. 10 (1983).

18. *Id.* Terminology (1983).

19. See 1 HAZARD & HODES, *supra* note 8, §§ 1.22–1.24.

20. MODEL RULES R. 3.3 cmt. 12 (1983).

B. The 2002 Version of Rule 3.3

On February 5, 2002, the ABA's House of Delegates adopted a revised version of the Model Rules based on the recommendations of its Ethics 2000 Commission.²¹ Revised Rule 3.3 provides as follows:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.²²

Revised Rule 3.3 fails to answer the three major unanswered questions that existed under the old rule. Further, the new rule raises a number of interpretative issues, including the meaning of a new requirement that a lawyer refuse to call the criminal defendant to testify if the lawyer knows (rather than simply reasonably believes) that the testimony will be false.²³

21. For materials on the work of the Ethics 2000 Commission, see the ABA Center for Professional Responsibility website, at <http://www.abanet.org/cpr/home.html> (last visited Dec. 24, 2002).

22. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3 (2002).

23. *Id.* R. 3.3 cmt. 9 (2002). For a discussion of this requirement, see *infra* Part I.B.5.

1. *The Meaning of "Knowledge" of False Testimony*

Almost all of the duties set forth in Rule 3.3 depend on whether the lawyer has knowledge that the defendant intends to or has testified falsely.²⁴ As discussed above, the 1983 version of the Model Rules was unclear on what circumstances were sufficient to amount to knowledge. Unfortunately, the 2002 version has not remedied the situation. The definition of knowledge under the 2002 version is identical to the 1983 version,²⁵ and none of the comments explicate the application of the concept of knowledge in the context of false testimony by a criminal defendant. Thus, lawyers, disciplinary officials, and judges must struggle with the standard of knowledge necessary for a lawyer to have duties under the rule.

The first place to begin, of course, is with the definition of knowledge contained in the rules. Rule 1.0(f) states two propositions. First, knowledge means "actual knowledge." Second, knowledge may be inferred from the circumstances. What does it mean to say that a lawyer has actual knowledge that a criminal defendant will testify falsely? One possible answer is that a lawyer has actual knowledge if the lawyer personally knows facts showing that the testimony of the defendant is false. Call this the *personal knowledge test*. This test is clearly unsound. It trivializes the ethics rule requiring lawyers to prevent false testimony because lawyers will almost never have personal knowledge of the facts of the case. In those rare situations in which a lawyer does have such knowledge, the lawyer is likely to be disqualified from being an advocate as a witness in the case.²⁶ Moreover, the personal knowledge test seems inconsistent with the second sentence of the definition which states that a lawyer's actual knowledge may be inferred from the circumstances.

A more plausible view is that a lawyer has actual knowledge that the defendant intends to testify falsely if the defendant admits to the lawyer that his testimony will be false. Call this the *admission test*. This test is subject to two meanings. One possible interpretation of the admission test is that the defendant must actually say that he plans to lie on the stand. Call this the *express admission test*. This test also seems unacceptable. Like the personal knowledge test, the express admission test trivializes the rule because defendants will almost never expressly admit that they plan to lie on the stand. The express admission test also seems inconsistent with the second sentence stating that knowledge can be inferred from the circumstances. An express admission test is straightforward and would not require any inference. Finally, the express admis-

24. Rule 3.3(a)(3) is the only exception. It provides that a "lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false." MODEL RULES R. 3.3(a)(3) (2002) (emphasis added). Even this Rule, however, specifically exempts criminal defendants.

25. *Id.* R. 1.0(f) (2002).

26. *See id.* R. 3.7 (2002); *Id.* R. 3.7 (1983).

sion test seems inconsistent with the Supreme Court's decision in *Nix v. Whiteside*.²⁷ In *Nix*, the Supreme Court held that an attorney's actions to prevent defendant Whiteside from testifying falsely did not violate the defendant's Sixth Amendment right to effective assistance of counsel.²⁸ Whiteside originally told his lawyer that he believed the victim had a gun when Whiteside stabbed him, but he had not actually seen a gun.²⁹ Shortly before trial, Whiteside told his lawyer that he planned to testify that he had seen "something metallic" in the victim's hand.³⁰ The Court treated the case as one in which defense counsel had sufficient knowledge to interdict the false testimony, even though Whiteside did not expressly state that he planned to lie on the stand.³¹ Thus, *Nix* contradicts the express admission test.

A second interpretation of the admission test is that it does not require the defendant to say in so many words that he plans to lie on the stand, but instead the defendant must admit facts to his lawyer that contradict the testimony he plans to give. Call this the *factual admission test*. The factual admission test is a much more plausible interpretation of the knowledge requirement than either the personal knowledge test or the express admission test. The factual admission test does not trivialize the rule because there are plausible situations in which a lawyer would have actual knowledge. The test also gives meaning to the second sentence of the rule because, when deciding whether a contradiction exists between the defendant's testimony and the facts that he has admitted, the lawyer must consider all the circumstances of the case. Finally, the factual admission test seems consistent with the constitutional rights of criminal defendants. As noted above, in *Nix v. Whiteside*, the defense counsel faced a situation of factual inconsistency between the defendant's prior admissions and his proposed testimony.³²

The factual admission test is difficult to apply when defendants make retractions. Does a lawyer have knowledge of false testimony if the defendant admits facts that would be inconsistent with the defendant's planned testimony but then retracts his original admission? *Nix v. Whiteside* is again instructive. In *Nix*, defendant Whiteside never retracted his admission that he had not seen a gun in the victim's hand.³³ In fact, he implicitly reaffirmed the accuracy of his original statement when he told Robinson shortly before trial that he planned to testify that he

27. 475 U.S. 157 (1986). The scope and significance of *Nix* is discussed in Part II.

28. *Id.* at 171, 175-76.

29. *Id.* at 160-61.

30. *Id.* at 161.

31. *Id.* at 173-74.

32. If Whiteside had told Robinson he would testify that he *thought he had seen* something metallic, then there would not have been a contradiction between his proposed testimony and the facts he admitted. However, in the context of his conference with Robinson, it appears that he planned to testify that he had *actually seen* a gun because he told Robinson, "If I don't say I saw a gun, I'm dead." *Id.* at 161.

33. *Id.*

had seen something metallic; at that time, he said, "If I don't say I saw a gun, I'm dead."³⁴ Suppose, however, that Whiteside had retracted his prior admission that he had not seen a gun. Whiteside could justify his retraction in various ways. For example, he might say that his memory of the homicide was originally cloudy, but is now much clearer as time has lessened the emotional trauma he has suffered from killing the victim and from being charged with murder.

The issue of retractions could be handled in either of two ways. One way is to accept a retraction at face value. Under this approach, if a defendant retracts an earlier factual admission, the lawyer does not have actual knowledge of false testimony. This approach seems unsound because it requires the lawyer to ignore the circumstances surrounding the retraction. It is, of course, not the lawyer's role to judge the facts or determine the defendant's credibility, so a restrained approach is necessary. A lawyer should be treated as having knowledge that the defendant intends to testify falsely even if the defendant retracts an earlier factual admission if the retraction is made under circumstances where no reasonable person could accept the credibility of the retraction. In making this determination, the lawyer should consider the timing of the retraction. If the retraction is made shortly before trial, the retraction is less likely to be credible.³⁵ The lawyer should also consider the reasons given by the defendant for the retraction, with a presumption that the reasons are sound. To continue the hypothetical based on *Nix*, the lawyer should accept the client's retraction if there is some indication that the defendant suffered from emotional stress or that his memory was hazy. On the other hand, if the defendant never indicated that he suffered emotionally or that his memory was hazy until he recanted his earlier statement on the eve of trial, then the lawyer should be treated as having knowledge that the defendant intends to testify falsely.

Are there situations in which a lawyer has actual knowledge of the defendant's false testimony even if the defendant has not made factual admissions that are inconsistent with the defendant's planned testimony? It is not difficult to imagine such cases. Suppose the defendant wants to testify to an alibi defense. The lawyer knows from her factual investigation that the alibi is false. For example, the defendant might want to testify that he was with a certain individual, but the lawyer's investigation establishes that the individual was out of the country. In this situation, the defendant's testimony is false, and the lawyer knows it to be false even though the defendant has not admitted any facts that are inconsis-

34. *Id.*

35. See *State v. Hischke*, 639 N.W.2d 6, 11 (Iowa 2002) (finding that the lawyer had good cause to believe that the defendant intended to commit perjury when the defendant retracted his statement that he owned a leather jacket shortly before trial after learning of the possibility of an enhanced sentence if he was convicted of a third offense of possession of marijuana).

tent with the defendant's planned testimony. Call this the *factual inconsistency test*.

Care must be taken in applying the factual inconsistency test. Consider a case in which a defendant claims that he was in a bar when the crime for which he is accused took place. The defendant identifies by description certain individuals who were in the bar. The lawyer has been unable to locate these individuals, and no one at the bar remembers seeing the defendant. In this situation, the defendant's testimony is *not* inconsistent with the facts known to the lawyer. The facts known to the lawyer do not support the defendant's contention, but those facts are consistent with the defendant being in the bar. It may simply be the case that the patrons the lawyer interviewed either did not communicate with or did not remember the defendant. Here the lawyer does not have actual knowledge of false testimony; indeed, the defendant's testimony may well be true.

The preceding analysis can be summarized as follows: A lawyer has actual knowledge that a criminal defendant intends to testify falsely if the defendant's testimony will be inconsistent with facts that defendant has admitted (the factual admission test) or with facts known to the lawyer through independent investigation (the factual inconsistency test). If the defendant retracts an admission of facts, a lawyer still has actual knowledge if the retraction is so lacking in credibility that no reasonable person would accept it.

This test is consistent with the test adopted by the Restatement of the Law Governing Lawyers, although the Restatement uses the language of a "firm factual basis": "A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false."³⁶

2. *Remonstratation*

Like the 1983 version of Rule 3.3, the first step under the revised rule for the lawyer representing a criminal defendant who intends to testify falsely is to remonstrate with the client in an effort to dissuade the client from falsely testifying.³⁷ While the text of Rule 3.3 does not mention remonstratation, the comments do: "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should

36. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c (2000).

37. See MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6 (2002).

not be offered.”³⁸ In remonstrating with a client, the lawyer could emphasize factors such as the following:³⁹ (1) the client has a legal obligation to testify truthfully; (2) false testimony by the client may be unsuccessful either because of vigorous cross-examination by the prosecutor or because the jury rejects the testimony; (3) if the judge believes the defendant testified perjurally, the judge may take the perjury into account in sentencing;⁴⁰ (4) the defendant may be prosecuted for perjury; and (5) the lawyer ethically may move to withdraw.⁴¹

3. *Withdrawal*

Suppose the lawyer’s efforts to persuade the criminal defendant against testifying falsely are ineffective, what action should the lawyer take? In particular, do lawyers have an ethical obligation to move to withdraw?

If the lawyer has a reasonable belief (as opposed to knowledge) that the defendant intends to testify falsely, the lawyer has discretion, but is not ethically required to move to withdraw. The Model Rules state that a lawyer may move to withdraw if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.”⁴²

Suppose the lawyer has actual knowledge rather than a reasonable belief that the defendant intends to testify falsely, is withdrawal required? Commenting on the original version of Rule 3.3, the Hazard and Hodes treatise takes the position that if remonstrations fail, lawyers are ethically required to move to withdraw, at least when the issue does not arise on the eve of trial:

For a lawyer to present perjured or fabricated evidence, knowing it to be such, would not only violate Rule 3.3 but would also violate Rule 1.2(d), prohibiting assistance of client crime and fraud. To continue with the representation would also violate Rule 1.16(a), governing mandatory withdrawal. In situations where the lawyer knows in advance that perjured testimony will be presented, therefore, there is virtually unanimous agreement that the lawyer must interdict the perjured testimony or withdraw.⁴³

38. *Id.* (2002). Even if a lawyer does not know that the client intends to testify falsely, a lawyer who believes that the defendant’s testimony lacks credibility has an obligation to counsel the client regarding the possible ramifications of the testimony. *See id.* R. 2.1 (1983 and 2002).

39. *See generally* Wolfram, *supra* note 1, at 846–47 (discussing five elements of remonstrations).

40. *See* *United States v. Dunnigan*, 507 U.S. 87 (1993) (upholding trial judge’s enhancement of defendant’s sentence under federal sentencing guidelines because of perjury committed at trial); *United States v. Grayson*, 438 U.S. 41 (1978) (upholding sentencing increase because of defendant’s perjury).

41. *See* MODEL RULES R. 1.16(b)(2) (2002); *id.* R. 1.16(b)(1) (1983).

42. *Id.*

43. 2 HAZARD & HODES, *supra* note 8, § 29.13, at 21.

Revised Rule 3.3, however, appears to reject the proposition that lawyers have an ethical obligation to move to withdraw when they know that a criminal defendant intends to testify falsely. The comment to Revised Rule 3.3 states:

Withdrawal

Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.⁴⁴

Similarly, the Restatement takes the position that, because of the defendant's right to counsel, withdrawal may be an inappropriate response to threatened perjury.⁴⁵

If this analysis is correct, and motions to withdraw are permissive rather than mandatory, should lawyers exercise their discretion to file for permissive withdrawal? In most instances, lawyers should refrain from moving to withdraw. When the false testimony arises on the eve or during trial, the motion is unlikely to be granted.⁴⁶ Even if the situation arises earlier, lawyers should generally not exercise their discretion to move to withdraw.

Hazard and Hodes argue in favor of withdrawal on several grounds: Withdrawal is preferable to remaining in the case because lawyers are protected from a knowing involvement in perjury and because the client's confidences are preserved.⁴⁷ By remaining in the case, lawyers ensure that false testimony will be offered.⁴⁸ Finally, if lawyers remain in the case and then report clients' perjury, lawyers are turned into police-

44. MODEL RULES R. 3.3 cmt. 15 (2002).

45. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. i (2000).

46. See *United States v. Litchfield*, 959 F.2d 1514, 1518 (11th Cir. 1992) (rejecting defendant's argument that counsel should have withdrawn because it was unlikely that the court would have granted a withdrawal in the middle of a lengthy trial due to prejudice to both the defendant and the State); *Lucas v. State*, 572 S.E.2d 274, 277 (S.C. 2002) (holding that the trial court did not abuse its discretion in denying defense counsel's motion to withdraw on ground that the client intended to commit perjury because the issue arose halfway through the trial and substitute counsel would face the same problem).

47. 2 HAZARD & HODES, *supra* note 8, § 29.16, at 26–27.

48. *Id.*

men.⁴⁹ Their analysis is based on three principles: minimization of lawyer involvement in false testimony, protection of client confidences, and reduction of the amount of false testimony. None of these principles, however, support use of a motion to withdraw when the lawyer knows the defendant intends to testify falsely.

Filing of a motion to withdraw increases rather than diminishes lawyers' involvement in false testimony. If the motion is granted, two lawyers have been affected by the perjury: the first has knowledge, while the second often becomes an innocent instrumentality of the client's fraud. It seems better to limit the involvement in false testimony to one lawyer rather than two. In addition, if the lawyer stays in the case, he can limit his involvement in the false testimony by not formally calling the client as a witness and by not asking the client questions that the lawyer knows will elicit false testimony.⁵⁰

Resort to a motion to withdraw does not provide greater protection for client confidences. Filing the motion will often result in revelation of confidential information, either implicitly or explicitly, if the court orders the lawyer to give specific reasons for the withdrawal.⁵¹ By contrast, refraining from filing the motion will result in disclosure of confidential information only if the client actually testifies falsely, requiring the lawyer to take remedial action under Rule 3.3(a)(3).⁵² Even the most committed liar may change his mind after taking an oath to testify truthfully.

Use of the motion to withdraw is likely to increase rather than reduce the amount of false testimony. The motion to withdraw may promote false testimony by discouraging the client from discussing false testimony with his lawyer.⁵³ In addition, when a lawyer files a motion to withdraw, the most important impediment to false testimony—the persuasive power of a lawyer trying to prevent the false testimony from being offered—has been removed from the case.

Finally, Hazard and Hodes ignore the important interest of judicial economy. Hearing the motion to withdraw involves judicial resources. Delay and expense result if the motion is granted.

49. *See id.*

50. *See infra* Part I.B.5.

51. In *United States v. Long*, 857 F.2d 436 (8th Cir. 1988), the court stated:

The most weighty decision in a case of possible client perjury is made by the lawyer who decides to inform the court, and perhaps incidentally his adversary and the jury, of his client's possible perjury. This occurs when the lawyer makes a motion for withdrawal (usually for unstated reasons) or allows his client to testify in narrative form without questioning from counsel. Once this has been done, the die is cast. The prejudice will have occurred. At a minimum, the trial court will know of the defendant's potential perjury.

Id. at 447.

52. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002).

53. *See* Hall, *supra* note 1, at 800.

4. *Disclosure of the Criminal Defendant's Intention to Testify Falsely*

If defense counsel knows in advance that a criminal defendant will testify falsely, must counsel disclose the defendant's planned false testimony to the court? Under revised Rule 3.3 two arguments can be made in favor of a duty of disclosure. First, Rule 3.3(a)(3) states that a lawyer "shall not knowingly . . . offer evidence that the lawyer knows to be false."⁵⁴ The rule can be read as implicitly requiring disclosure if that is the only way to prevent offering false evidence. Second, revised Rule 3.3(b) states: "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."⁵⁵

On the other hand, both rules can be interpreted as not requiring defense counsel to disclose contemplated false testimony by a criminal defendant. A lawyer can comply with the duty not to "offer" false evidence without disclosing the defendant's planned false testimony. As discussed later in this subpart, defense counsel may advise the defendant of his right to testify and the defendant can exercise that right without defense counsel calling or offering the defendant as a witness.⁵⁶

Several arguments can be made against interpreting Rule 3.3(b) to require disclosure of intended false testimony. First, the rule only requires disclosure as a "remedial" measure.⁵⁷ The common meaning of remedial is to correct or cure a problem rather than prevent one from occurring. Second, the rule only requires disclosure when "necessary."⁵⁸ A lawyer could reason that disclosure is only necessary when the false testimony has occurred; a client who is threatening false testimony may always change his mind, especially after taking the stand under oath. Third, the comments do not mention disclosure before the false testimony occurs. Comments 10 and 11, which deal with remedial measures, including disclosure, do not mention disclosure before the client testifies, only after the fact.⁵⁹ In addition, Comment 6 indicates that, rather than disclosing planned false testimony, the lawyer should refrain from asking questions that would elicit false testimony:

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. *If only a*

54. MODEL RULES R. 3.3(a)(3) (2002).

55. *Id.* R. 3.3(b) (2002).

56. *See infra* Part I.B.5.

57. MODEL RULES R. 3.3(b) (2002).

58. *Id.* (2002).

59. *Id.* cmts. 10–11 (2002).

*portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.*⁶⁰

Finally, it appears that the drafters of Rule 3.3(b) intended it to cover situations of contemplated criminal or fraudulent conduct other than false testimony by the criminal defendant. The comment to the rule mentions other situations of criminal or fraudulent conduct without referring to false testimony by criminal defendants. It states:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.⁶¹

Thus, in light of the ambiguity in Rule 3.3, coupled with the strong policy in favor of client confidentiality, the rule should not be interpreted as requiring lawyers to disclose the intention of criminal defendants to testify falsely.

If disclosure is not mandatory under Rule 3.3, is it permissive under some other rule? A lawyer might have a variety of reasons for wishing to disclose the client's intention to testify falsely. The lawyer might be uncertain how to proceed and fearful of being accused of misconduct. He may feel an obligation either as an officer of the court or based on general principles to prevent false testimony from occurring. The attorney may wish to disclose the client's planned conduct to support a motion to withdraw.

The lawyer could make disclosure of the defendant's intentions either independently or in connection with a motion to withdraw. Under revised Rule 1.6(b)(1), a lawyer may reveal confidential information "to prevent reasonably certain death or substantial bodily harm."⁶² Disclosure of the client's intention to testify falsely would not be authorized under this exception to the duty of confidentiality because the testimony does not involve imminent death or substantial bodily harm. Many jurisdictions have deviated from the Model Rules and provide lawyers with discretion to disclose confidential information to prevent a client from

60. *Id.* cmt. 6 (2002) (emphasis added).

61. *Id.* cmt. 12 (2002).

62. *Id.* R. 1.6(b)(1) (2002).

committing a crime.⁶³ It is likely that state supreme courts will adopt similar modifications of the 2002 revision of the Model Rules. Under such a rule, a lawyer would have discretion whether to reveal the client's intention to testify falsely to the court.

Alternatively, if the lawyer is moving to withdraw,⁶⁴ disclosure of confidential information should be made only to the extent reasonably necessary.⁶⁵ Thus, the issue becomes whether it is reasonably necessary for the lawyer to disclose the client's intention to succeed in the motion. The lawyer could make the motion in general terms, such as for "ethical reasons," a "conflict of interest," or "privileged reasons,"⁶⁶ but these are catch phrases which are likely to be a tip-off to the court that the client plans to testify falsely. A better way to file the motion, while also maintaining confidentiality, is to inform the client that the lawyer will be moving to withdraw, that the lawyer will attempt to protect the client's confidences, and that confidentiality would be more easily achieved if the client discharges the lawyer. The lawyer could then file the motion under Rule 1.16(a)(3) with a written statement from the client that the client has discharged the lawyer. If the court inquires from the lawyer the reason for the discharge, the lawyer could inform the court that there has been a breakdown in the attorney-client relationship. The court is much less likely to infer false testimony from such a statement.⁶⁷ Some lawyers may feel that this approach goes too far in trying to protect the interests of a client who is attempting to commit perjury, but for lawyers who feel a commitment to protecting client confidences to the maximum extent possible, this form of withdrawal through discharge may be attractive.

5. *Refusing to Call the Criminal Defendant as a Witness*

Revised Rule 3.3(a)(3) adds the following new sentence: "A lawyer may refuse to offer evidence, *other than the testimony of a defendant in a*

63. THOMAS D. MORGAN & RONALD D. ROTUNDA, *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 161-72 (2003).

64. As discussed above, lawyers should refrain from making motions to withdraw. *See supra* text accompanying note 46.

65. MODEL RULES R. 3.3 cmt. 15 (2002).

66. *People v. Schultheis*, 638 P.2d 8, 14 (Colo. 1981) (stating that counsel who moves to withdraw should not give specific reasons or cite specific provisions of rules of ethics, but should instead state that an "irreconcilable conflict" exists); *see Manfredi & Levine v. Superior Court*, 78 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 1998) (concluding that the decision to grant a motion to withdraw is within the discretion of the trial court and the court should ordinarily accept the representations of counsel that confidentiality precludes disclosure of specific reasons for the motion when the court concludes counsel is acting in good faith); *see also Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460, 465-66 (W. Va. 1997) (ordering that the lawyer receive a four-month suspension for disclosure of confidential information in connection with a motion to withdraw in a criminal case because disclosure went beyond what was necessary and was accompanied by threats to the client).

67. If a court directed the lawyer to give more information, the attorney could assert the attorney-client privilege. If the court then ordered the lawyer to provide information in support of the motion, the lawyer should comply with the court order. *See* MODEL RULES R. 1.6(b)(4) (2002).

criminal matter, that the lawyer reasonably believes is false.”⁶⁸ The sentence suggests the intention to protect criminal defendants against a mistaken belief by defense counsel that a defendant intends to testify falsely. The comment reaffirms this point, but it also indicates that the rule imposes a duty that many defense counsel may find startling—a duty not to call the criminal defendant to testify when defense counsel knows the testimony will be false:

Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence and thus impair the lawyer’s effectiveness as an advocate. *Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify.* See also Comment [7].⁶⁹

Is this new duty constitutional?⁷⁰ Criminal defendants enjoy a fundamental constitutional right to testify in their own behalf. In *Rock v. Arkansas*, the Supreme Court held that Arkansas’s per se prohibition against the hypnotically refreshed testimony of criminal defendants was unconstitutional.⁷¹ The Court stated that “[t]he right to testify on one’s own behalf at a criminal trial . . . is one of the rights that ‘are essential to due process of law in a fair adversary process.’”⁷² At the same time, the Court has pointed out that the right to testify is not absolute. In *Nix v. Whiteside*, the Court noted: “Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.”⁷³ The Court has, however, never held that a criminal defendant can be prevented from taking the stand by his lawyer, which is what Comment 9 suggests.⁷⁴ In fact, the Court in *Nix*, while approving Robinson’s response to threatened perjury, also recognized the right of a

68. *Id.* R. 3.3(a)(3) (2002) (emphasis added).

69. *Id.* R. 3.3 cmt. 9 (2002) (emphasis added).

70. I refer to the duty not to call the criminal defendant as a witness when the lawyer knows the testimony will be false as a “new” duty for two reasons. Old Rule 3.3 and its comments did not have any language like that found in comment 9 that would direct a lawyer not to “honor the client’s decision to testify” when the lawyer knows the client’s testimony will be false. Second, comment 12 to old Rule 3.3 stated that the ethical obligations of lawyers were “qualified by constitutional provisions for due process and the right to counsel in criminal cases.” The revised comments do not mention these constitutional obligations. See *infra* text accompanying notes 109–13.

71. 483 U.S. 44, 56–62 (1987).

72. *Id.* at 51 (quoting, in part, *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

73. 475 U.S. 157, 173 (1986); see also *United States v. Dunnigan*, 507 U.S. 87, 96 (1993) (concluding that the enhancement of a sentence due to perjury committed at trial does not violate the right to testify); *Harris v. New York*, 401 U.S. 222, 225 (1971).

74. MODEL RULES R. 3.3 cmt. 9 (2002).

criminal defendant to testify in his own behalf: “Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so held, and the right has long been assumed.”⁷⁵ In addition, almost all courts of appeals have held that the right to testify is personal to the defendant and not waivable by defense counsel.⁷⁶ On the other hand, at least two federal appellate courts have held that it does not violate the defendant’s constitutional right to testify in his own behalf when his lawyer fails to call the defendant as a witness because the lawyer knows the defendant will testify falsely.⁷⁷

The Restatement of the Law Governing Lawyers is clear on the point of the defendant’s right to testify even if the testimony will be false:

However, the defendant may still insist on giving false testimony despite defense counsel’s efforts to persuade the defendant not to testify or to testify accurately (see Comment *g*). The accused has the constitutional rights to take the witness stand and to offer evidence in self-defense (see § 22). Unlike counsel in a civil case, who can refuse to call a witness (including a client) who will offer false evidence (see Comment *e*), defense counsel in a criminal case has no authority (beyond persuasion) to prevent a client-accused from taking the witness stand. (Defense counsel does possess that authority with respect to nonclient witnesses and must exercise it consistent with this Section (see § 23).) If the client nonetheless insists on the right to take the stand, defense counsel must accede to the demand of the accused to testify. Thereafter defense counsel may not ask the accused any question if counsel knows that the response would be false. Counsel must also be prepared to take remedial measures, including disclosure, in the event that the accused indeed testifies falsely (see Comment *h*).⁷⁸

In *United States v. Teague*,⁷⁹ the Eleventh Circuit discussed the ethical propriety and constitutionality of defense counsel’s decision to prevent the defendant from testifying:

For example, if defense counsel refused to accept the defendant’s decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to testify. Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant’s right to testify is protected and that any

75. *Nix*, 475 U.S. at 164, 171–75.

76. *See, e.g.*, *Brown v. Artuz*, 124 F.3d 73, 77 (2d Cir. 1997) (citing cases from the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh circuits).

77. *United States v. Rantz*, 862 F.2d 808, 811 (10th Cir. 1988); *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984).

78. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. i (2000).

79. 953 F.2d 1525 (11th Cir. 1992).

waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted “within the range of competence demanded of attorneys in criminal cases,” and the defendant clearly has not received reasonably effective assistance of counsel.⁸⁰

Similarly, Judge Frank Easterbrook of the Seventh Circuit has stated that defense counsel may not prevent the defendant from testifying, even if counsel knows the testimony will be false:

What *Rock* holds is that the accused may not be prohibited from testifying—not by a judge, not by a lawyer. So if a defendant’s theory were that he told his lawyer that he wanted to testify, but that his lawyer refused to allow this (for example, flatly refused to call his client to the stand without suggesting the possibility, if he thought that his client’s testimony would be perjury, that he could withdraw and allow the accused to represent himself, see *Nix v. Whiteside*, 475 U.S. 157(1985)), this would be a sound constitutional claim.⁸¹

How should lawyers proceed in light of the questionable constitutionality of the “duty” set forth in Rule 3.3(a)(3) and Comment 9 to refuse to honor the defendant’s decision to testify if the lawyer knows the testimony will be false? One way to proceed is for the lawyer to conclude that the defendant has a constitutional right to testify on his own behalf and that this right trumps the lawyer’s duty to refuse to offer testimony that the lawyer knows is false. This approach is reasonable, but it means that the lawyer is ignoring an ethical obligation due to a constitutional right that is unclear under the current state of the law.

A better approach is for the lawyer to attempt to honor both the ethical obligation and the defendant’s constitutional right to testify. How can a lawyer harmonize the ethical duty and the defendant’s right to testify? Reconciliation can be achieved if the attorney refrains from calling the defendant as a witness, but makes it possible for the defendant to call himself. When the time comes for the defendant to testify, the attorney would not formally call the defendant as a witness but would instead make a statement like the following: “Your honor, the defendant would now like to exercise his constitutional right to testify in his own behalf.” During the examination of the defendant, the attorney would not ask questions that would elicit false testimony.⁸²

Some lawyers may find this approach too formalistic and not sufficiently respectful of their ethical obligations under revised Rule 3.3. De-

80. *Id.* at 1534.

81. *Taylor v. United States*, 287 F.3d 658, 661–62 (7th Cir. 2002). On the facts of *Taylor*, the court found that the defendant’s constitutional rights had not been violated. The court held that defense counsel was not constitutionally required to give the defendant a *Miranda*-type warning that the decision of whether to testify was the defendant’s alone. *Id.* at 661–63.

82. “If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.” MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 6; *see also* RESTATEMENT § 120 cmt. i (2000), quoted in text accompanying *supra* note 78.

fense counsel who feels this way could approach the bench with the defendant (either before trial or outside the presence of the jury), inform the court that he cannot call the defendant as a witness, and ask the defendant to inform the court that he wants to exercise his constitutional right to testify.⁸³ The latter course of action is more damaging to the defendant and could lead to the judge's enhancement of the defendant's sentence if the defendant is found guilty. For that reason, lawyers who have a more client-centered philosophy of lawyering may favor the former approach.⁸⁴

6. *Narrative Testimony*

The 1983 version of the Model Rules specifically rejected the narrative approach⁸⁵ to false testimony by a criminal defendant. The comments stated:

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel⁸⁶

Revised Rule 3.3, however, is much more tolerant of the narrative solution. The comments to the new rule no longer explicitly reject the narrative solution and now recognize that the narrative solution has been accepted by some jurisdictions:

The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].⁸⁷

In fact, a growing number of jurisdictions have adopted the narrative solution, including California⁸⁸ and New York,⁸⁹ through court decisions

83. The conference with the court could exclude the prosecutor. *See* *United States v. Long*, 857 F.2d 436, 443–47 (8th Cir. 1988), discussed *infra* at notes 157–80 and accompanying text.

84. For a discussion of the concept of a philosophy of lawyering, see NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* ch. 1 (2d ed. 2000).

85. The most extensive defense of the narrative approach can be found in Lefstein, *supra* note 1; *see also* 2 HAZARD & HODES, *supra* note 8, § 29.17; Nathan M. Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 U. KAN. L. REV. 215, 236–44 (1982).

86. MODEL RULES R. 3.3 cmt. 9 (1983); *see also* 2 HAZARD & HODES, *supra* note 8, § 29.17, at 29.

87. MODEL RULES R. 3.3 cmt. 7 (2002).

88. *People v. Guzman*, 755 P.2d 917 (Cal. 1988) (en banc); *see also* *People v. Johnson*, 72 Cal. Rptr. 2d 805 (Cal. Ct. App. 1998) (adopting the narrative solution after comprehensive review of other

and the District of Columbia by rule.⁹⁰ Jurisdictions that have adopted the narrative solution may require the lawyer to move to withdraw before employing this technique. For example, District of Columbia Rule 3.3(b) states:

(b) When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.⁹¹

While Comment 7 to revised Rule 3.3⁹² explicitly authorizes the use of the narrative solution in those jurisdictions that have directed lawyers to follow this approach, it could be read as implicitly rejecting the use of the narrative solution in those jurisdictions that have not specifically approved of this approach. However, Comment 6 appears to approve the use of what is, in essence, the narrative solution in other situations:

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. *If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.*⁹³

Thus, under Revised Rule 3.3, it appears that lawyers should use the narrative solution in two situations: first, if the jurisdiction in which they practice requires use of the narrative solution;⁹⁴ and second, in all other jurisdictions when the lawyer remains in the case and a portion of the defendant's testimony will be false.⁹⁵ These two situations cover almost all cases the lawyer will face. The result is that Comments 6 and 7, taken together, move a long way towards adoption of the narrative solution.

options; but finding that even though the defendant did not testify, error was harmless beyond a reasonable doubt because of other evidence).

89. *People v. DePallo*, 754 N.E.2d 751 (N.Y. 2001). In *DePallo*, the Court of Appeals held that defense counsel did not render ineffective assistance of counsel when he presented the defendant's testimony in narrative form. The court did not specifically hold that attorneys were required to follow the narrative approach. *Id.* at 754.

90. D.C. RULES OF PROF'L CONDUCT R. 3.3(b).

91. *Id.*

92. See *supra* note 87 and accompanying text.

93. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6 (2002) (emphasis added).

94. See *id.* cmt. 7 (2002).

95. See *id.* cmt. 6 (2002).

There is perhaps one difference between the approach set forth in these comments and the narrative solution. Under the narrative solution, a lawyer maintains confidentiality and does not disclose to the tribunal that the defendant has testified falsely.⁹⁶ Under Revised Rule 3.3(a)(3), the lawyer would arguably still have a duty to inform the tribunal of the false testimony. I say “arguably” because the duty to disclose only attaches when the lawyer “comes to know” that false testimony has been offered. The language of the rule appears to contemplate a duty to disclose when the lawyer is surprised by false testimony.⁹⁷ It may not apply if defense counsel knows that a defendant will testify falsely, but continues the representation in narrative form under Comment 6.⁹⁸ In addition, it can be argued that if the defendant testifies in narrative form, no disclosure is necessary because the tribunal has been implicitly informed of the matter and may make such inquiry as it deems appropriate.⁹⁹

7. Summary

To summarize the analysis of this section, under Revised Rule 3.3, a lawyer has actual knowledge that a criminal defendant intends to testify falsely if the defendant’s testimony will be inconsistent with facts that the defendant has admitted (the factual admission test) or with facts known to the lawyer through independent investigation (the factual inconsistency test). If the defendant retracts an admission of facts, a lawyer still has actual knowledge if the retraction is so lacking in credibility that no reasonable person would accept it.¹⁰⁰ If the lawyer has such knowledge, he must first remonstrate with the client in an effort to prevent the testimony.¹⁰¹ If the remonstration fails, the lawyer may, but is not required to, move to withdraw.¹⁰² In most situations, lawyers should not exercise their discretion to move to withdraw.¹⁰³ If the lawyer does not withdraw, the lawyer should not disclose the defendant’s planned false testimony to the tribunal.¹⁰⁴ The lawyer should not formally call the defendant as a witness, but should protect the defendant’s right to testify by allowing

96. See, e.g., D.C. RULES OF PROF’L CONDUCT R. 3.3(b), quoted in text accompanying *supra* note 90.

97. See MODEL RULES R. 3.3 cmt. 10 (2002).

98. See *id.* cmt. 6 (2002). As a matter of policy it is defensible to treat the cases of surprise false testimony and known false testimony given in narrative form differently. When the lawyer is surprised by false testimony, the lawyer’s services have been used in presenting the testimony. Disclosure is necessary to rectify the lawyer’s involvement. When the lawyer knows of the false testimony in advance and employs the narrative solution, the lawyer’s services have not been used to present the testimony because the lawyer has not elicited or promoted the testimony in any way.

99. See *United States v. Long*, 857 F.2d 436, 447 (8th Cir. 1988), quoted at *supra* note 51.

100. See *supra* Part I.B.1.

101. See *supra* Part I.B.2.

102. See *supra* Part I.B.3.

103. See *supra* note 44 and accompanying text.

104. See *supra* Part I.B.4.

him to call himself.¹⁰⁵ In examining the witness, the lawyer should adhere to the narrative approach.¹⁰⁶ It is unclear whether the lawyer has a duty to inform the tribunal of the false testimony after it has been offered in narrative form, but it is reasonable to conclude that there is no such duty, because the duty to disclose only applies if the lawyer “comes to know” of the false testimony.¹⁰⁷ In situations in which the lawyer believes the defendant will testify truthfully but is surprised by false testimony, the lawyer has a duty to take reasonable remedial measures, including disclosure if necessary.¹⁰⁸

The comments to the 1983 version of Rule 3.3 referred specifically to the constitutional rights of criminal defendants and indicated that the ethical obligations set forth in the rule were subject to these rights: “However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.”¹⁰⁹ The comments to the new rule no longer mention “constitutional provisions,” “due process,” or “right to counsel.”¹¹⁰ All that remains is a reference in Comment 7 to case law in some jurisdictions requiring lawyers who face a situation of false testimony by a criminal defendant to allow the client to testify in narrative form¹¹¹ and a mention in Comment 9 of the “special protections historically provided criminal defendants.”¹¹² Although the comments to the 2002 Revision do not include the reference to constitutional rights of criminal defendants, the Reporter’s Notes indicate that no change was intended.¹¹³

While revised Rule 3.3 and its comments reduce reference to constitutional rights of criminal defendants, they cannot eliminate the tension that has long existed between the ethical duty to disclose false evidence and other improper conduct directed to a tribunal and the constitutional rights of defendants. Indeed, Revised Rule 3.3 creates a new constitutional issue by directing defense counsel not to call a criminal defendant who the defense counsel knows will testify falsely.¹¹⁴ The next section turns to these constitutional issues, focusing upon the scope of the Supreme Court’s decision in *Nix v. Whiteside*.

105. See *supra* note 82 and accompanying text.

106. See *supra* Part I.B.6.

107. See *supra* Part I.B.6.

108. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) and cmt. 10 (2002).

109. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 12 (1983).

110. See *infra* note 113.

111. MODEL RULES R. 3.3 cmt. 7 (2002).

112. *Id.* cmt. 9 (2002).

113. “The caption ‘Constitutional Requirements’ has been deleted because the discussion of constitutional requirements in current Comment [12] has been incorporated into Comments [7] and [9].” See ABA Commission on Evaluation of Rules of Professional Conduct, Reporter’s Explanation Memorandum R. 3.3, at http://www.abanet.org/cpr/e2k-report_home.html (last visited Dec. 26, 2002).

114. See *supra* notes 68–81 and accompanying text.

II. CONSTITUTIONAL ISSUES RAISED WHEN THE CRIMINAL DEFENDANT TESTIFIES FALSELY

A. *Nix v. Whiteside, a Constitutional Outlier*

In *Nix v. Whiteside*, the Supreme Court considered the relationship between a lawyer's ethical obligations to prevent false testimony and a criminal defendant's Sixth Amendment right to effective assistance of counsel.¹¹⁵ The defendant Whiteside, along with two companions, came to the apartment of Calvin Love seeking marijuana.¹¹⁶ Love was in bed at the time, and the two men argued.¹¹⁷ Love got up from bed, asked his girlfriend to get his "piece," and then returned to bed.¹¹⁸ According to Whiteside's testimony, he saw Love reach under his pillow.¹¹⁹ Whiteside then stabbed Love fatally in the chest.¹²⁰

Whiteside was charged with murder.¹²¹ He told his court-appointed lawyer, Gary Robinson, that he had not actually seen Love pulling a gun, but he was convinced that Love had a pistol.¹²² None of the witnesses had seen a pistol, and the police did not find one on the premises.¹²³ Robinson advised Whiteside that to establish self-defense, Whiteside need not show that Love actually had a gun, but only that Whiteside had a reasonable belief that Love had a weapon.¹²⁴

About a week before trial, Whiteside told Robinson that he had seen something "metallic" in Love's hand.¹²⁵ When Robinson questioned Whiteside about the change in his story, Whiteside said: "If I don't say I saw a gun, I'm dead."¹²⁶ Robinson told Whiteside that this testimony would amount to perjury, that it was unnecessary to establish self-defense, that as a lawyer he would be involved in suborning perjury, that he would inform the court if Whiteside testified in this fashion, and that Robinson would probably be allowed to testify to impeach Whiteside's testimony.¹²⁷ Robinson also indicated that he would attempt to withdraw if Whiteside persisted in this testimony.¹²⁸

At trial, Whiteside testified that he "knew" Love had a gun and that he believed Love was reaching for a gun under his pillow, but he admit-

115. 475 U.S. 157 (1986).

116. *Id.* at 160.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 161.

126. *Id.*

127. *Id.*

128. *Id.*

ted on cross-examination that he had not actually seen a gun.¹²⁹ Robinson presented evidence to substantiate Whiteside's belief that Love had a weapon.¹³⁰ Nonetheless, Whiteside was convicted of second-degree murder.¹³¹ On direct appeal and in subsequent habeas corpus proceedings, Whiteside contended that Robinson's conduct had denied him effective assistance of counsel.¹³²

The Supreme Court found that Robinson's conduct did not amount to ineffective assistance of counsel.¹³³ The Court's majority opinion, written by Chief Justice Burger, judged Robinson's actions under the test for ineffective assistance of counsel set forth in *Strickland v. Washington*.¹³⁴ In *Strickland*, the Court established a two-part test for determining when ineffective representation required reversal of a conviction.¹³⁵ First, the defendant must show that counsel's performance fell below an objective standard of "reasonably effective assistance."¹³⁶ In making this judgment, a court should consider all facts and circumstances, including prevailing norms of the profession.¹³⁷ The Court warned that judicial scrutiny should be "highly deferential" and should engage in a "strong presumption" that counsel's conduct was reasonable.¹³⁸ Second, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."¹³⁹

The majority in *Nix* first concluded that Robinson's actions amounted to a reasonable professional response to Whiteside's indication that he planned to give false testimony.¹⁴⁰ The opinion noted that the Court's role was not to constitutionalize particular standards of professional conduct.¹⁴¹ After making this concession, however, the opinion proceeded to consider various professional norms and to cite with approval Rule 3.3, requiring disclosure to the court to rectify client perjury.¹⁴² Based on this review, the Court found that Robinson had acted reasonably:

Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well

129. *Id.* at 161–62.

130. *Id.* at 162.

131. *Id.*

132. *Id.*

133. *Id.* at 175.

134. 466 U.S. 668 (1984).

135. *Id.* at 687.

136. *Id.* at 687–88.

137. *Id.* at 688–89.

138. *Id.* at 689.

139. *Id.* at 692.

140. *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).

141. *Id.* at 165.

142. *Id.* at 168.

within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.¹⁴³

The Court also found that Whiteside had not suffered prejudice, the second prong of the *Strickland* test, as a result of Robinson's conduct.¹⁴⁴ It is noteworthy that Whiteside did testify and presented the substance of his self-defense argument to the jury.¹⁴⁵

In a concurring opinion written by Justice Blackmun, Justices Blackmun, Brennan, Marshall, and Stevens agreed that Whiteside had failed to show any prejudice, but they criticized the majority opinion for implicitly defining as a matter of constitutional law the appropriate standard of conduct for lawyers in dealing with perjury by criminal defendants.¹⁴⁶ Justice Blackmun argued that states should be free to adopt "differing approaches" to a complex ethical problem: "The signal merit of asking first whether a defendant has shown any adverse prejudicial effect before inquiring into his attorney's performance is that it avoids unnecessary federal interference in a State's regulation of its bar."¹⁴⁷

Analysis of the facts in *Nix* shows that Whiteside presented a very weak case for establishing a Sixth Amendment violation under both prongs of the *Strickland* test—thus, my characterization of the case as a constitutional outlier. In other cases with stronger facts, defendants may be able to establish that defense counsels' conduct infringed their constitutional rights. In particular, *Nix* leaves unanswered the following questions: (1) What level of knowledge must defense counsel have before taking steps to prevent false testimony? (2) What responses by defense counsel to false testimony fall below reasonable professional behavior? (3) When has a defendant suffered prejudice as a result of improper actions by defense counsel? and (4) Could defense counsel's actions to prevent or rectify false testimony violate a defendant's other constitutional rights, especially due process and the privilege against self-incrimination?

*B. What Level of Knowledge Must Defense Counsel Have Before Taking Steps to Prevent False Testimony?*¹⁴⁸

One of the most significant ways in which *Nix* is an extreme case is that attorney Robinson knew *beyond any doubt* that Whiteside planned to testify falsely. Robinson's knowledge was based on (1) Whiteside's admissions to him, and was (2) supported by uncontradicted independent evidence.¹⁴⁹ Whiteside admitted to Robinson that he planned to testify

143. *Id.* at 171.

144. *Id.* at 175–76.

145. *Id.* at 172.

146. *Id.* at 188–89.

147. *Id.* at 190.

148. See Freedman, *supra* note 9, at 1942–45 (stating that while the standard of knowledge was raised during oral argument, the Court's opinion in *Nix v. Whiteside* left this issue unresolved).

149. *Nix*, 475 U.S. at 160–61.

falsely when he said, "If I don't say I saw a gun, I'm dead."¹⁵⁰ In addition, uncontradicted independent evidence supported the conclusion that Whiteside planned to testify falsely. The police did not find a gun at the crime scene.¹⁵¹ None of the witnesses reported seeing a gun.¹⁵² Further, Whiteside originally told Robinson that he had not seen a gun, but then changed his testimony as the trial approached.¹⁵³ Thus, *Nix* does not decide what test courts should use in determining whether a lawyer has sufficient knowledge to interdict false testimony, nor does it decide what evidence would be sufficient to satisfy the test.

While at least one case has held that a lawyer should have knowledge beyond a reasonable doubt before taking action to interdict false testimony,¹⁵⁴ the prevailing view seems to be that for constitutional purposes defense counsel must have a "firm factual basis" before taking action to prevent or to rectify false testimony by a criminal defendant.¹⁵⁵ The Restatement also adopts the firm factual basis test.¹⁵⁶

Assuming the firm factual basis test applies in determining whether a Sixth Amendment violation has occurred, what evidence is sufficient for a lawyer to have a firm factual basis? In particular, suppose, unlike *Nix*, the defendant has not admitted that he plans to testify falsely, or suppose the defendant does express such an intention but his intention is not corroborated by other evidence?

*United States v. Long*¹⁵⁷ supports the proposition that a firm factual basis requires the defendant to have admitted that he plans to testify falsely. *Long* was a prosecution for a check forging and bank fraud scheme.¹⁵⁸ After the prosecution rested, the attorney for codefendant Jackson asked to approach the bench.¹⁵⁹ The lawyer told the court that his client wanted to take the stand, but that he was concerned about the client's testimony.¹⁶⁰ After excusing the jury and everyone else in the courtroom except a United States marshal, the defendant, and his lawyer, the judge informed the defendant of his right to testify and of his lawyer's ethical obligations not to place evidence before the court which

150. *Id.* at 161.

151. *Id.* at 160.

152. *Id.*

153. *Id.* at 160-61.

154. *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989).

155. *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977); *State v. James*, 739 P.2d 1161, 1169 (Wash. Ct. App. 1987). For a discussion of the authorities, see *Commonwealth v. Mitchell*, No. Crim. A. 9673 CR0132, 2000 WL 33119695, at *19-20 (Mass. Super. Ct. Dec. 18, 2000); see also *State v. Hischke*, 639 N.W.2d 6, 10 (Iowa 2002) (stating that the lawyer must be convinced with good cause that the client will testify falsely).

156. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c (2000); see *supra* text accompanying note 36.

157. 857 F.2d 436 (8th Cir. 1988).

158. *Id.* at 439.

159. *Id.* at 444.

160. *Id.*

he “believed” to be untrue.¹⁶¹ Jackson stated that he understood both his right to testify and his lawyer’s ethical obligations.¹⁶² The court told Jackson that he could take the stand and give a narrative statement without questioning by his lawyer.¹⁶³ The judge told Jackson that if his lawyer found things that he “believes to be not true . . . he may have other obligations at that point.”¹⁶⁴ The lawyer then told the court that Jackson had decided not to testify.¹⁶⁵ The court questioned Jackson, who said he understood his right to testify and his lawyer’s ethical obligations.¹⁶⁶ Jackson then informed the court that he had decided not to testify.¹⁶⁷

The Eighth Circuit held that the facts of *Long* were distinguishable from those of *Nix* in three respects.¹⁶⁸ On the issue of whether defense counsel had sufficient information to act to prevent false testimony by Jackson, the court held that the record was insufficient to establish a firm factual basis.¹⁶⁹ The court stated that only in rare cases would defense lawyers have a firm factual basis: “Counsel must remember that they are not triers of fact, but advocates. In most cases a client’s credibility will be a question for the jury.”¹⁷⁰ The court interpreted *Nix* to require the client to express an intention to testify falsely before taking action:

The Supreme Court’s majority opinion in *Whiteside* emphasizes the necessity of such caution on the part of defense counsel in determining whether a client has or will commit perjury. In discussing the attorney’s duty to report possible client perjury, the majority states that it extends to “a client’s *announced plans* to engage in future criminal conduct.” 475 U.S. at 174 (emphasis added). Thus, a clear expression of intent to commit perjury is required before an attorney can reveal client confidences.¹⁷¹

Because the record was insufficient to determine whether Jackson’s lawyer had a firm factual basis for action, the court ruled that an evidentiary hearing on the issue was required.¹⁷² The court nonetheless affirmed the conviction on the ground that the evidentiary hearing could take place in postconviction relief proceedings.¹⁷³

In postconviction proceedings, the Eighth Circuit affirmed the district court’s determination that Jackson’s constitutional right to effective assistance of counsel had not been violated by his lawyer’s actions.¹⁷⁴

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 445 (citation omitted).

171. *Id.*

172. *Id.* at 446.

173. *Id.* at 447.

174. *Jackson v. United States*, 928 F.2d 245 (8th Cir. 1991).

Jackson testified that he never considered testifying falsely.¹⁷⁵ He stated that he planned to testify that he believed the scheme he was involved in was a legitimate business venture.¹⁷⁶ His lawyer testified that Jackson told him that he planned to lie and take the rap for the other codefendant because he (Jackson) was going to jail anyway.¹⁷⁷ The district court found that the lawyer's testimony was more credible than Jackson's, in large part because Jackson's credibility was destroyed when the state played a tape in which Jackson and a third party conspired to kill a codefendant who planned to testify for the government.¹⁷⁸ Accepting the lawyer's testimony as correct, the lawyer had a firm factual basis for action based on Jackson's stated intention to testify falsely.¹⁷⁹

Nix and *Long*, however, should not be read as constitutionalizing a requirement that the defendant admit he plans to testify falsely. As discussed in part I, knowledge of false testimony is not limited to situations in which the defendant has admitted that he will testify falsely; it also includes cases in which the defendant's testimony would be contradicted by facts known to the lawyer. The Restatement also takes the position that a firm factual basis is not limited to situations in which the defendant admits that he plans to testify falsely.¹⁸⁰ Compliance with these standards is reasonable professional behavior and should not amount to a Sixth Amendment violation under *Strickland*.

C. *What Responses by Defense Counsel to False Testimony Fall Below the Standard of Reasonable Professional Behavior?*

A defense lawyer who knows a criminal defendant intends to testify falsely has five possible responses to the situation: remonstrance, withdrawal, disclosure, refusal to call the defendant as a witness, and narrative testimony. Part I examined the ethical propriety of each response under Revised Rule 3.3. *Nix v. Whiteside* is a constitutional outlier in its consideration of whether these responses could result in a Sixth Amendment violation. In *Nix*, Robinson's response to Whiteside's planned intention to offer false evidence was to attempt to dissuade him from doing so.¹⁸¹ Thus, *Nix* dealt with only the first response, remonstrance, stating that there was "universal[] agree[ment]" on this principle.¹⁸²

Nix should not be read, however, as approving all forms of remonstrance. So long as the lawyer gives accurate information to the client,

175. *Id.* at 247.

176. *Id.* at 247-48.

177. *Id.* at 247.

178. *Id.* at 248.

179. *Id.*

180. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c (2000), quoted in text accompanying *supra* note 36.

181. 475 U.S. 157, 161 (1986).

182. *Id.* at 169.

informing the client of the possible consequences of false testimony,¹⁸³ the remonstrance falls within the standard of reasonable professional behavior. If the lawyer's persuasion involves intentionally false statements or improper threats, however, the lawyer's conduct should be considered to fall below the standard of reasonable professional behavior.¹⁸⁴ The majority of the Supreme Court indicated that the following aspects of Robinson's conduct were within the range of reasonable professional behavior: persuasion to prevent perjury, threat to withdraw, and threat to disclose illegal conduct.¹⁸⁵ The Court, however, left open the possibility that other threats might fall below the standard of reasonable professional behavior.¹⁸⁶ In reversing the court of appeals, the Supreme Court rejected the lower court's finding of an improper threat:

The Court of Appeals also determined that Robinson's efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client. We find no support for a threat to testify against Whiteside while he was acting as counsel. The record reflects testimony by Robinson that he had admonished Whiteside that if he withdrew he "probably would be allowed to attempt to impeach that particular testimony," if Whiteside testified falsely. The trial court accepted this version of the conversation as true.¹⁸⁷

The Supreme Court seemed to draw a distinction between "testifying" against the client and "impeaching" the client's testimony. It is unclear what the Court had in mind by this distinction, but what it probably meant by impeaching the client was informing the judge that the client's testimony would be false without actually taking the stand against the client.

Suppose Robinson had told Whiteside that if he testified falsely, Robinson would take the stand to refute his client's testimony. Such a threat should be found to fall below reasonable professional standards. This statement is false and misleading because a lawyer cannot tell his client that he will take the stand. The prosecutor would have to decide to call the lawyer as a witness, and the judge would have to decide that the lawyer's testimony would be allowed. Many judges would probably not allow such testimony because testimony by the defendant's own lawyer is likely to be so prejudicial as to undermine any prospect of a fair trial.¹⁸⁸

183. See *supra* notes 39–41 and accompanying text.

184. See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2002) (involving conduct such as dishonesty, fraud, deceit, or misrepresentation).

185. *Nix*, 475 U.S. at 171.

186. *Id.*

187. *Id.* at 172–73 n.7.

188. The Supreme Court has allowed the prosecution to impeach a defendant who testifies with an illegally obtained confession, *Harris v. New York*, 401 U.S. 222 (1971), and with the product of a suppressed search, *United States v. Havens*, 446 U.S. 620 (1980). Allowing a defendant's own lawyer to testify against him, however, is likely to be far more prejudicial.

If a defense lawyer's conduct goes beyond remonstrance, such conduct may lead to a Sixth Amendment violation if the conduct falls below reasonable professional standards and the defendant establishes prejudice.¹⁸⁹ *State v. Jones*¹⁹⁰ illustrates this point. In *Jones*, the defendant was charged with felony assault "by striking Sowers about the head and face with a beer bottle."¹⁹¹ Two days before trial, Jones's appointed defense counsel, Halvorson, moved to withdraw.¹⁹² The trial court did not hold a formal evidentiary hearing on Halvorson's motion.¹⁹³ Instead, Halvorson and Jones were allowed to make statements to the court.¹⁹⁴ Halvorson offered three grounds for his motion.¹⁹⁵ He argued that he should be allowed to withdraw under either Rule 1.16(a)(1) or 1.16(b)(1) because Jones intended to testify falsely at trial.¹⁹⁶ He also argued that he should be permitted to withdraw under 1.16(b)(3) because he found Jones's refusal to accept a proffered plea bargain repugnant or imprudent.¹⁹⁷ Halvorson informed the court that Jones had committed the felony assault and had admitted his conduct to Halvorson.¹⁹⁸ He stated that Jones's decision to go to trial when he had admitted his guilt and stood almost no chance of acquittal was repugnant to him.¹⁹⁹

Jones denied that he intended to testify falsely; he stated that he did not intend to testify at trial.²⁰⁰ Jones stated that Halvorson had "lied about a few things," that he disagreed with Halvorson's statements, and that he did not object if Halvorson withdrew.²⁰¹ Based on Jones's representation that he did not intend to testify at trial, the court denied Halvorson's motion to withdraw.²⁰² The case went to trial, Jones did not testify, and he was convicted of felony assault.²⁰³

On appeal, the Montana Supreme Court held that the motion to withdraw was improper on all grounds claimed by Halvorson.²⁰⁴ The court first found that the motion was improper under Rule 1.16(a)(1) because Halvorson had failed to show that his continued representation would result in a violation of the rules of professional conduct:

Rule 1.16(a)(1), MRPC, requires an attorney to withdraw where continued representation will result in a violation of the rules

189. On the prejudice requirement, see *infra* text beginning at Part II.D.

190. 923 P.2d 560 (Mont. 1996).

191. *Id.* at 561.

192. *Id.*

193. *Id.* at 562.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. See *id.* at 566, 568.

of professional conduct or other law. Halvorson stated that he had a conversation with Jones in which Jones communicated an intent to testify falsely and, in response, he informed Jones of the consequences of perjury and that he could take no part in presenting perjured testimony to the District Court. He further stated that he gave Jones a weekend over which to further consider Jones' intent to commit perjury and his advice in this regard. The record does not reflect that Halvorson checked back with Jones after the weekend passed, to ascertain whether Jones had reconsidered based on his advice, before filing his motion to withdraw.

Halvorson conceded at the hearing on his motion to withdraw that Jones may have reconsidered and decided not to testify falsely. Thus, the record before us contains only an alleged possible intent to commit perjury. It does not support Halvorson's contention that his continued representation of Jones *would* result in a violation of the rules of professional conduct or other law and, as a result, it also does not support his motion to withdraw under Rule 1.16(a)(1), MRPC.²⁰⁵

Similarly, the court rejected the argument that Halvorson's motion was proper under 1.16(b)(1) because the record did not establish that Halvorson reasonably believed Jones was persisting in a course of conduct that was illegal or fraudulent.²⁰⁶

In rejecting these arguments, the court pointed out that the situation was clearly distinguishable from *Nix*, which involved only the propriety of Robinson's advice to Whiteside.²⁰⁷ Because Whiteside accepted the advice and did not testify falsely, Robinson was not required to take any further action.²⁰⁸ By contrast, the issue in *Jones* involved the propriety of Halvorson's conduct in moving to withdraw and in disclosing his client's confidential information, not the advice he gave Jones:

Neither the facts nor the holding in *Nix* support Halvorson's motion to withdraw based on Jones' alleged intent to testify falsely in this case. The only pertinent facts in *Nix* were the attorney's advice, in response to the client's stated intent to commit perjury, that he would not allow the client to testify falsely and, if the client did so, he would disclose the perjury to the trial court and move to withdraw; the client did not commit perjury. Here, in response to Jones' alleged intent to testify falsely, Halvorson advised of the potential consequences. To this extent, Halvorson's actions mirrored those of counsel in *Nix*. Halvorson, however, followed his advice by moving to withdraw and making disclosures to the District Court of client confidences. These significant facts were not present in *Nix*.²⁰⁹

205. *Id.* at 563.

206. *Id.*

207. *See id.* at 564–65.

208. *See id.* at 565.

209. *Id.* The court also rejected the argument that Halvorson's disclosure of confidential information to the court was proper under Rule 3.3(a)(2), which provides that a lawyer shall not knowingly

Finally, the court rejected the argument that Halvorson's motion was proper under Rule 1.16(b)(3).²¹⁰ By moving to withdraw on this ground and by supporting the motion with disclosure of confidential information, Halvorson had put his personal interests ahead of the constitutional rights of his client to zealous representation.²¹¹ The court pointed out that none of the rules of professional conduct authorized disclosure of confidential information to support a motion to withdraw under Rule 1.16(b)(3).²¹² Disclosure was permitted under Rule 1.6 without the consent of the client only in limited circumstances.²¹³ Rule 3.3(a)(2) did not require disclosure because Halvorson did not know that Jones intended to commit perjury.²¹⁴ In addition, Halvorson's motion and disclosure were inconsistent with Rule 1.2(a), which provides: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."²¹⁵ Thus, the court held that Halvorson's conduct fell below reasonable professional standards.

D. When Has a Defendant Suffered Prejudice as a Result of Improper Actions by Defense Counsel?

To establish a Sixth Amendment violation, a defendant must show not only that defense counsel's conduct fell below the standard of reasonable professional behavior, but also that the defendant suffered prejudice as a result of such conduct.²¹⁶ In defining prejudice, the defendant need not show that the attorney's ineffective assistance was "outcome determinative." Instead, the Court stated in *Strickland*: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."²¹⁷

"fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Halvorson admitted that he did not know Jones's intent. *Id.* at 565-66.

210. *See id.* at 566-68.

211. *Id.* at 566.

212. *See id.*

213. *Id.*

214. *See id.* The court in *Jones* was not required to address the issue of the standard of knowledge required before an attorney can take action to prevent or rectify false testimony. *See supra* text accompanying notes 148-180. The record in the case did not establish that Jones was persisting in his intention to testify falsely. *Jones*, 923 P.2d at 563.

215. *Jones*, 923 P.2d. at 566 (quoting Rule 1.2(a)).

216. *See Strickland v. Washington*, 466 U.S. 668, 687-96 (1984); *supra* text accompanying notes 134-39.

217. *Strickland*, 668 U.S. at 694. Even if the defendant can establish a reasonable probability of a different outcome, the defendant may still not succeed in establishing prejudice. The Court in *Nix* indicated that the benchmark for prejudice was the underlying fairness of the proceeding. *Nix v. Whiteside*, 475 U.S. 157, 174 (1986). Later Supreme Court decisions indicate that *Nix* may be an ex-

As discussed above, in *Nix*, Whiteside had a weak case for establishing the first prong of the *Strickland* test.²¹⁸ Whiteside's claim of prejudice was even more tenuous.²¹⁹ Because Robinson's efforts to persuade Whiteside to testify truthfully were successful, he did not have to take any of the actions that he threatened.²²⁰ In particular, Robinson did not inform the court that Whiteside planned to testify falsely nor did he move to withdraw.²²¹ In addition, Robinson's efforts did not prevent Whiteside from testifying.²²² He took the stand and presented the substance of his claim for self-defense.²²³ Robinson supported this defense with the testimony of other witnesses.²²⁴ The judge instructed the jury on self-defense.²²⁵

Under what circumstances could a defendant establish prejudice? If defense counsel's unprofessional conduct prevented the defendant from testifying, then such a defendant, unlike Whiteside, would have a much stronger claim for prejudice. The defendant could make three arguments to overcome the requirement of prejudice. First, the defendant could claim that when the defendant is prevented from testifying in his own behalf, the trial suffers from a structural error, prejudice is presumed, the defect is not subject to harmless error analysis, and reversal is automatic.²²⁶

This argument for a presumption of prejudice based on a structural error is unlikely to succeed. It is unclear whether denial of the defendant's right to testify amounts to a structural error. While the right of a criminal defendant to testify on his own behalf is a fundamental constitutional right, it differs markedly from rights that the Supreme Court has classified as structural. The effect of the defendant's failure to testify can be weighed with other evidence to determine the likely effect that the de-

ception to the normal *Strickland* standard for prejudice. See *Williams v. Taylor*, 529 U.S. 362, 391–93 (2000).

218. *Nix*, 475 U.S. at 171.

219. *Id.* at 161.

220. *Id.* at 161–62.

221. *Id.*

222. *Id.* at 161.

223. *Id.*

224. *Id.* at 162.

225. *State v. Whiteside*, 272 N.W.2d 468, 471–72 (Iowa 1978).

226. The Supreme Court has distinguished between structural errors and trial errors. See *Neder v. United States*, 527 U.S. 1 (1999) (finding that a jury instruction that omitted an element of an offense was a trial error subject to harmless error review rather than a structural defect). Structural errors are defects that affect the framework within which the trial proceeds, rather than simply errors in the trial process. *Id.* at 8. If the effect of the error on the outcome of the case can be weighed by considering other evidence in the case, the error is likely to be treated as a trial error. On the other hand, if the effect of the error is indeterminate and unquantifiable, the error is likely to be treated as structural. *Id.* at 10. The Supreme Court has held that the following errors are structural: a biased trial judge, racial discrimination in jury selection, denial of the defendant's right to self-representation, denial of a public trial, and a defective reasonable doubt instruction. *Id.* at 8. Lower courts have held that defense counsel's failure to inform the defendant of a right to trial by jury, *McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998), or a right to appeal, *White v. Johnson*, 180 F.3d 648 (5th Cir. 1999), amount to structural errors warranting automatic reversal.

fendant's proffered testimony would have had on the trial.²²⁷ Moreover, all recent decisions of the courts of appeals have applied a *Strickland* analysis to claims of denial of the right to testify when the claim arises from alleged errors by defense counsel.²²⁸ As the court stated in *Brown v. Artuz*:²²⁹

Because the burden of ensuring that the defendant is informed of the nature and existence of the right to testify rests upon defense counsel, we conclude that this burden is a component of the effective assistance of counsel. As a result, any claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant's desire to testify—must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), for assessing whether counsel has rendered constitutionally ineffective assistance.²³⁰

Second, even if denial of the right to testify is not a structural defect, the Supreme Court has recognized another exception to the requirement of prejudice. In *United States v. Cronin*,²³¹ a companion case to *Strickland*, the Supreme Court recognized an exception to the prejudice requirement when counsel “entirely fails to subject the prosecution's case to meaningful adversarial testing.”²³² If defense counsel failed to put up any meaningful defense because counsel was convinced of the defendant's guilt, prejudice should be presumed under the *Cronin* exception.²³³ To meet the *Cronin* exception, however, defense counsel's failure must be complete rather than partial.²³⁴

Finally, the Supreme Court has held that when a lawyer suffers from an actual conflict of interest, it is unnecessary to show that the result probably would have been different, but it is still necessary to show that the conflict adversely affected the lawyer's performance.²³⁵ In the

227. See, e.g., *Ross v. Johnson*, No. Civ. A. 95-0745-BH-S, 2000 WL 284204 (S.D. Ala. Feb. 7, 2000) (concluding that defendant failed to establish a reasonable probability that the outcome would have been different if defendant had testified, after considering the defendant's proffered testimony along with other evidence). For a contrary argument, see *United States v. Butts*, 630 F. Supp. 1145 (D. Me. 1986), which found that *Strickland* prejudice analysis was not applicable when defense counsel flagrantly disregarded defendant's repeated expressions of a desire to testify.

228. See *Dows v. Wood*, 211 F.3d 480, 484 (9th Cir. 2000); *Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998); *Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997); *Payne v. United States*, 78 F.3d 343, 346 (8th Cir. 1996).

229. *Brown*, 124 F.3d 73.

230. *Id.* at 79.

231. 466 U.S. 648 (1984).

232. *Id.* at 659.

233. *Id.*

234. *Bell v. Cone*, 535 U.S. 685 (2002) (holding that the *Cronin* exception did not apply when defense counsel did not call witnesses at the sentencing proceeding and waived final argument, but had otherwise challenged the prosecution's case during sentencing).

235. *Mickens v. Taylor*, 535 U.S. 162 (2002) (holding that when the defendant was represented by counsel who suffered from a conflict of interest, reversal was not automatic but would only be granted when the conflict adversely affected the lawyer's performance); see also *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980); *Glasser v. United States*, 315 U.S. 60 (1940).

normal conflict of interest case, a lawyer is representing multiple clients.²³⁶ A conflict of interest between lawyer and client could also exist if the lawyer's personal interests conflict with the client's interests.²³⁷ For example, if the lawyer expresses the belief that a person who has admitted his guilt should accept his punishment, then a conflict exists between the lawyer's personal values and the client's interests. If a lawyer tries to persuade a client to refrain from testifying and to accept a guilty plea because the lawyer does not want to spend the time to prepare for trial, a conflict of interest exists between lawyer and client.

In *State v. Jones*, the court noted that normally a defendant must establish that defense counsel's failures probably affected the result in the case.²³⁸ However, when an actual conflict of interest exists, prejudice is presumed.²³⁹ The court ruled that Halvorson's motion to the court to withdraw on grounds of personal repugnance, coupled with his disclosure of confidential information establishing his client's guilt, created an actual conflict of interest²⁴⁰ justifying a presumption that prejudice existed: "We conclude that this case constitutes the very rare instance in which a presumption of prejudice is warranted."²⁴¹

Although a conflict exists when a lawyer has a firm factual basis for concluding that a client will testify falsely and the lawyer tries to persuade the client not to so testify, this is not a conflict of interest within the meaning of the Supreme Court's decisions. To rise to the level of a conflict of interest, the lawyer's behavior must be impermissible. The Court addressed and rejected this claim in *Nix*:

In his attempt to evade the prejudice requirement of *Strickland*, Whiteside relies on cases involving conflicting loyalties of counsel. In *Cuyler v. Sullivan*, 446 U.S. 335 . . . (1980), we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was "actively represent[ing] conflicting interests." . . .

Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*. Even in that case we did not sug-

236. See generally, e.g., *Cuyler*, 446 U.S. 335 (finding a conflict of interest when the defendant and two of his codefendants were all represented by the same two lawyers).

237. See, e.g., *Frazer v. United States*, 18 F.3d 778, 780 (9th Cir. 1994) (noting that the lawyer's alleged comment to his client that he hoped the client would get life imprisonment, if proved, would establish a conflict of interest).

238. 923 P.2d 560 (Mont. 1996); see *supra* notes 189–215 and accompanying text.

239. *Jones*, 923 P.2d at 568.

240. *Id.* at 567–68.

241. *Id.* at 568. The court was quick to point out that it would continue to enforce strictly the requirement of actual prejudice in ordinary cases involving claims that counsel's performance was deficient. *Id.*

gest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a “conflict” between a client’s proposal and counsel’s ethical obligation gives rise to a presumption that counsel’s assistance was prejudicially ineffective, every guilty criminal’s conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?²⁴²

Even if the defendant is unable to show that prejudice should be presumed under one of the three approaches discussed above, the defendant may still be able to establish that there was a reasonable probability that the outcome of the trial would have been different had the defendant testified. This is likely to be difficult to establish, but not impossible. For example, *Nichols v. Butler* was a case concerning the robbery of a convenience store.²⁴³ The only evidence linking Nichols to the crime was the testimony of the store employee.²⁴⁴ During the trial, Nichols and his lawyer differed on whether Nichols should take the stand.²⁴⁵ Nichols wanted to testify, but his lawyer disagreed because the trial had gone well and Nichols had several convictions for serious offenses.²⁴⁶ The lawyer threatened to withdraw if Nichols insisted on testifying.²⁴⁷ Nichols acquiesced in the lawyer’s decision.²⁴⁸ After his conviction, Nichols raised a claim of ineffective assistance of counsel.²⁴⁹ The court used the *Strickland* test to analyze the claim.²⁵⁰ After finding that the lawyer’s threat to withdraw fell below the standard of reasonable professional behavior, the court addressed the requirement of prejudice:

We also find that the second requirement of *Strickland*—that counsel’s errors prejudiced the defense—has been met. The testimony of a criminal defendant at his own trial is unique and inherently significant. “The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” *Green v. United States*, 365 U.S. 301, 304 (1961). When the defendant testifies, the jury is given an opportunity to observe his demeanor and to judge his credibility firsthand. As the United States Supreme Court noted in *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), “the most important witness for the defense in many criminal cases is the defendant himself.” Further, in a case such as this where the question was not whether a crime

242. *Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (parallel citations omitted).

243. 953 F.2d 1550 (11th Cir. 1992).

244. *Id.* at 1551.

245. *Id.*

246. *Id.* at 1552.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1552–54.

was committed, but whether *the defendant* was the person who committed the crime, his testimony takes on even greater importance. Indeed, “[w]here the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.” *United States v. Walker*, 772 F.2d 1172, 1179 (5th Cir.1985).

This was a very close case; the only evidence that Nichols was the person involved in the robbery was the eyewitness identification of him by a store employee who had glimpsed him only briefly. If Nichols had testified, he could have presented his version of the events of that evening in his own words. The jury would then have been able to weigh his credibility against that of the store employee’s perception. Moreover, Nichols’ testimony would have been supported by the exculpatory testimony of Donald Hannah. Under these circumstances, there is at least a reasonable probability that, but for counsel’s unprofessional conduct, the result in this case would have been different.²⁵¹

E. Could Defense Counsel’s Actions to Prevent or Rectify False Testimony Violate a Defendant’s Other Constitutional Rights, Especially Due Process and the Privilege Against Self-Incrimination?

Nix v. Whiteside was a Sixth Amendment case.²⁵² The Supreme Court has not directly considered the application of the Fifth or Fourteenth Amendments to a lawyer’s response to the expressed intention by a criminal defendant to testify falsely.²⁵³

1. *Due Process*

If defense counsel informs the trier of fact that the defendant has testified falsely, defense counsel has undermined the ability of the trier of fact to impartially evaluate the evidence, violating the defendant’s right to due process.²⁵⁴ The situation can arise in bench trials if defense counsel informs the court of the defendant’s false testimony as a remedial measure under Rule 3.3(a)(4). To avoid violating the defendant’s due process rights, defense counsel has several options. If disclosure is made to the trial judge, defense counsel should move that the judge recuse himself and transfer the case to another judge for trial.²⁵⁵ Defense counsel could disclose the defendant’s false testimony to a judge other than the trial judge, such as the chief administrative judge of the court in which the case is being heard. The Restatement suggests that disclosure

251. *Id.* at 1553–54 (parallel citations omitted).

252. 475 U.S. 157, 159 (1986).

253. See Freedman, *supra* note 9, at 1946.

254. See *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978); *State v. Jefferson*, 615 P.2d 638, 641 (Ariz. 1980); *Butler v. United States*, 414 A.2d 844, 852 (D.C. 1980).

255. *Butler*, 414 A.2d at 853.

to the prosecutor rather than the judge may be an appropriate remedial measure.²⁵⁶

In jury trials, the argument has been made that the defendant's testimony by way of narrative informs the jury that defense counsel does not believe the defendant's testimony, violating due process.²⁵⁷ This argument, however, has generally been rejected. In *Commonwealth v. Mitchell*²⁵⁸ the court discussed the issue:

Further, this court disagrees with the defendant's assertion that his testifying in a narrative form without guidance through counsel's questioning signaled to the jury that his own counsel disbelieved his testimony. During trial, at a sidebar immediately following closing argument, this court noted that the narrative testimony went smoothly and that the jury did not display any alarm or surprise at the defendant's method of testifying. Indeed, the jury may well have been of a mind that it was ordinary for a defendant, as opposed to other witnesses, to testify in that manner. See *People v. Guzman*, 755 P.2d at 935; *Reynolds v. State*, 625 N.E.2d 1319, 1320 (Ind. App. 3d Dist.1993) (noting that the jury likely believed that the defendant wished to tell his story unhampered by the traditional question and answer format). It is doubtful that jurors are familiar with the ethical rules, such that they would recognize the use of the narrative form of testimony as indicative of possible perjury by the defendant. . . . As noted by one court, "[w]hatever prejudice results to the defendant in the eyes of the jury occurs more from defendant's choosing to expose himself to the rigors of cross-examination than from the form in which the direct examination is conducted." *People v. Lowery*, 366 N.E.2d 155, 157-58 (Ill. App. Ct. 1977).²⁵⁹

If defense counsel goes beyond the narrative approach, however, and in essence "washes his hands" of the defendant, the court may justifiably find that the trier of fact has been prejudiced.²⁶⁰ In *State v. Robinson*,²⁶¹ the court described such a situation:

The court did not relieve Mr. Burns from his assignment, but left him in charge of a portion of the trial while relieving him of responsibility for questioning the witness called by the defendant and of assisting the defendant, himself, to present his own testimony if the defendant elected to take the stand. As a result of this procedure, Mr. Burns began the questioning of the defendant's only witness and then fell silent, leaving the defendant to take over the direct examination, Mr. Burns remaining seated at the counsel table. This procedure could hardly have failed to convey to the jury the

256. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. i (2000).

257. *Commonwealth v. Mitchell*, No. CRIM.A. 9673 CR0312, 2000 WL 33119695, at *26 (Mass. Super. Ct. Dec. 18, 2000).

258. *Id.*

259. *Id.*

260. See, e.g., *State v. Robinson*, 224 S.E.2d 174 (N.C. 1976).

261. *Id.*

impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable.

For this reason, we conclude that the defendant has been denied the fair trial which is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the comparable provision in the Constitution of North Carolina, Art. I, § 19. The defendant must, therefore, be awarded a new trial. At such new trial, we assume that he will be represented by his present counsel, appointed by the court to represent him upon his appeal. If not, the trial court should appoint competent counsel, selected by the court not by the defendant, to represent him and, if such counsel is not acceptable to the defendant, permit the defendant to conduct his own trial without counsel.²⁶²

2. *Privilege Against Self-Incrimination*

In *Nix v. Whiteside*, Robinson prevented Whiteside's false testimony by remonstrance, so it was unnecessary for Robinson to disclose the false testimony to the court.²⁶³ If defense counsel discloses that a defendant either intends to testify falsely or has done so, a privilege against self-incrimination issue arises.

In *Fisher v. United States*, the Supreme Court established Fifth Amendment principles applicable to this situation.²⁶⁴ *Fisher* involved an investigation of possible civil and criminal violations of the federal income tax laws.²⁶⁵ The taxpayers obtained their accountants' work papers relating to the preparation of their tax returns and turned the documents over to their attorneys for assistance in the investigation.²⁶⁶ The Internal Revenue Service subsequently issued subpoenas to the attorneys seeking production of these documents.²⁶⁷ When the attorneys refused to comply, the government brought enforcement actions against them.²⁶⁸

Fisher considered two major issues.²⁶⁹ Does the privilege against self-incrimination apply to documents voluntarily prepared by the defendant or third parties? Can the privilege continue to apply when a client transfers documents to his attorney? On the first issue, the Court held that the privilege protects a criminal defendant from being compelled to give incriminating testimony against himself; it does not bar the use of

262. *Id.* at 180.

263. *See* 475 U.S. 157, 160–62 (1986).

264. *See generally* 425 U.S. 391 (1976).

265. *Id.* at 393–94.

266. *Id.* at 394.

267. *Id.* at 394–95.

268. *Id.* at 395.

269. *See generally Fisher*, 425 U.S. 391.

incriminating evidence against a person.²⁷⁰ Because the accountants' work papers did not involve any testimony by the taxpayers, they were not subject to the privilege against self-incrimination.²⁷¹ In its discussion, the Court confirmed that "[p]urely evidentiary (but 'nontestimonial') materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances."²⁷²

The Court qualified the proposition that nontestimonial materials may be searched and seized by recognizing the "act of production" doctrine.²⁷³ The Court noted that the act of production of documents voluntarily prepared (as opposed to their substantive content) could have testimonial aspects, depending on the circumstances.²⁷⁴ In some cases, production of documents or other evidence could establish their existence, possession or control, or authentication.²⁷⁵ In a subsequent case, *United States v. Doe*,²⁷⁶ the Court applied the act of production doctrine and held that the government could not enforce a subpoena directed to the owner of sole proprietorships seeking the production of voluntarily prepared business records, unless it granted the defendant "use immunity" from any incrimination resulting from the production of the material.²⁷⁷

On the second issue, because the Court had defined the privilege as protecting a person from being compelled to give incriminating testimony, it ruled that the privilege did not prevent enforcement of the subpoenas against the attorneys; the subpoenas did not compel the taxpayers to do anything.²⁷⁸ While the privilege against self-incrimination no longer applied directly, it still continued to apply indirectly:

Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that *when the client himself would be privileged* from production of the document, . . . [because of] self-incrimination, the attorney having possession of the document is not bound to produce."²⁷⁹

270. *Id.* at 409.

271. *Id.* at 409–10.

272. *Id.* at 407.

273. *Id.* at 410.

274. *Id.*

275. *Id.*

276. 465 U.S. 605 (1984).

277. *Id.* at 616–17. In *United States v. Hubbell*, 530 U.S. 27, 38–46 (2000), the Court held that the grant of use immunity must be coextensive with the scope of the privilege against self-incrimination. Therefore, the grant of use immunity prohibited the prosecution from making both direct and derivative use of the material produced under the grant of immunity. The prosecution must show that evidence arises from a "legitimate source wholly independent of" produced testimony. *Id.* at 39–40. For a discussion of the application of the privilege against self-incrimination and the act of production doctrine to the lawyer's ethical duty to turn over to the prosecution incriminating material in the lawyer's possession, see Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Protected Privilege*, 41 DUKE L.J. 572 (1991).

278. *Fisher*, 425 U.S. at 397.

279. *Id.* at 404.

Thus, under *Fisher*, an attorney is not bound to produce information if (1) the attorney received the information from a client in a communication that is subject to the attorney-client privilege; and (2) the compulsion, if directed toward the client rather than the attorney, would violate the Fifth Amendment because the client would be compelled to give incriminating testimony against himself.

Whether a lawyer's disclosure of a criminal defendant's intended or completed false testimony violates the defendant's privilege against self-incrimination raises a number of issues. Is the communication of the information from the defendant to the attorney subject to the attorney-client privilege? In almost every imaginable case, the lawyer would come to know of defendant's false testimony as a result of communications from the client. For example, this was the situation in *Nix v. Whiteside*.²⁸⁰ It is possible that a lawyer could learn of the client's intentions from someone other than the client (a friend or relative, for example), but information from a third party as to the client's intentions would not be sufficient for the lawyer to take action. The lawyer would then need to confront the client with the information, in which case the client would be communicating his intentions to the lawyer.

Assuming the lawyer learns of the client's intentions in a communication from the client, would the communication be subject to the attorney-client privilege? Two arguments could be made that the attorney-client privilege does not apply to such a communication. First, the communication was for the purpose of committing a crime. A well recognized exception to the attorney-client privilege is the crime-fraud exception.²⁸¹ Second, the client did not make the communication for the purpose of obtaining legal advice, one of the essential elements of the attorney-client privilege.²⁸²

The soundness of these arguments will turn on how the jurisdiction interprets the attorney-client privilege. For example, the Supreme Judicial Court of Massachusetts addressed both these arguments in *Purcell v. District Attorney for the Suffolk District*.²⁸³ In *Purcell*, a lawyer represented a client who had received a court order to vacate his apartment.²⁸⁴ The client made a threat, which the attorney took seriously, to burn down the apartment building.²⁸⁵ The attorney warned the police of the client's threat, leading to the client's arrest and prosecution for attempted arson.²⁸⁶ The prosecution subpoenaed the lawyer to testify at trial about the client's threat, and the lawyer moved to quash the sub-

280. 475 U.S. 157 (1986).

281. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

282. *Id.* § 68(4).

283. 676 N.E.2d 436 (Mass. 1997).

284. *Id.* at 437.

285. *See id.* at 437-38.

286. *Id.*

poena.²⁸⁷ The Massachusetts Supreme Judicial Court held that the lawyer had acted properly under DR 4-101(C)(3) of the Code of Professional Responsibility (compare Model Rule 1.6(b)(1)) in revealing the client's threat to commit a crime, but the court held that the admissibility of the lawyer's testimony was a different issue.²⁸⁸

The court considered the application of the attorney-client privilege and the crime-fraud exception to the privilege.²⁸⁹ Because the trial court based its refusal to quash the subpoena on the crime-fraud exception to the attorney-client privilege, the Supreme Judicial Court addressed that issue first.²⁹⁰ The exception provides that a communication is not privileged "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."²⁹¹ The court found that the record would not support application of the exception because the client had "reflectively made a disclosure," rather than seeking advice to further criminal conduct.²⁹² The court went on to discuss the prosecution's argument that the privilege did not apply at all because the client's communication was not for the purpose of "facilitating the rendition of legal services," an essential requirement for the privilege to exist.²⁹³ Rejecting this argument, the court stated: "Unless the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct."²⁹⁴

The Restatement of the Law Governing Lawyers defines the crime-fraud exception more broadly than did the court in *Purcell*.²⁹⁵ Section 82 states:

The attorney-client privilege does not apply to a communication occurring when a client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.²⁹⁶

287. *Id.* at 438.

288. *Id.*

289. *Id.* at 438-41.

290. *Id.* at 438.

291. *Id.* at 439 (quoting proposed MASS. R. EVID. 502(d)(1)).

292. *Id.* at 440.

293. *Id.*

294. *Id.* at 441.

295. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

296. *Id.*

When a lawyer knows in advance that a defendant intends to testify falsely, neither subsection should apply. A defendant who intends to testify falsely is rarely seeking assistance from his lawyer in doing so. Indeed, the defendant's intentions will normally produce a confrontation in which the attorney remonstrates with the client to prevent the defendant from testifying falsely. *Nix v. Whiteside* is illustrative.²⁹⁷ If the defendant insists on testifying falsely, the lawyer's services will not be used. Either the lawyer will be allowed to withdraw, or the lawyer will continue the representation with the defendant testifying in narrative form.

Suppose, however, the lawyer does not know in advance of the defendant's false testimony, but is instead surprised by the testimony at trial? In this situation, it appears that Restatement § 82(b) applies. Because the lawyer has called the defendant as a witness and elicited false testimony, the lawyer's services were used in the commission of perjury.

Assuming the communication of the client's intention to testify falsely is subject to the attorney-client privilege, would the information be subject to the privilege against self-incrimination if the government sought to obtain this information directly from the client? The information about the client's intention could be incriminating in several ways. If the client testified falsely but was nonetheless convicted, the judge could use this information to enhance the defendant's sentence.²⁹⁸ In addition, the client could be prosecuted for perjury. On the other hand, the element of incrimination could be absent. If the lawyer's disclosure prevented the client from testifying, then the element of incrimination would appear to be lacking, unless the client's intention to testify falsely amounted to criminal attempt.²⁹⁹ Even if the defendant testified, the state might not use the disclosure either to enhance the defendant's sentence or to prosecute for perjury.

Thus, it is unclear whether disclosure by defense counsel of contemplated or completed false testimony violates the defendant's privilege against self-incrimination. Therefore, defense counsel who concludes that there is an ethical duty to disclose the client's intended or completed testimony to the tribunal should take steps to protect the defendant from having the disclosed information used against him. Before disclosing the client's intended or false testimony, defense counsel could seek use immunity; if immunity was not granted, defense counsel could move to suppress the use of the disclosed information on Fifth and Fourteenth Amendment grounds.

297. See *Nix v. Whiteside*, 475 U.S. 157 (1986).

298. See *supra* note 40 and accompanying text.

299. MODEL PENAL CODE § 5.01 (1962).

III. CONCLUSION

Revised Rule 3.3 poses a number of interpretative issues. After analyzing the application of the rule to false testimony by the criminal defendant, this article concludes that the rule is likely to result in the use of the narrative solution to a much greater extent than the drafters may have intended. The 1986 case of *Nix v. Whiteside* held that a lawyer's successful efforts by remonstrance to prevent false testimony by a criminal defendant did not violate the defendant's Sixth Amendment right to effective assistance of counsel. This article argues that *Nix* is a constitutional outlier leaving unresolved a number of Sixth, Fifth, and Fourteenth Amendment issues. The ethics and constitutionality of responses by counsel to false testimony by the criminal defendant are not much closer to resolution than they were a quarter century ago.