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Who Should Decide the Appropriate Response to the Criminal Defendant Who Proposes or Commits Perjury: A Comparison of the North Carolina Rules of Professional Conduct and the America Bar Association's Model Rules of Professional Conduct

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WHO SHOULD DECIDE THE APPROPRIATE RESPONSE TO THE CRIMINAL DEFENDANT WHO PROPOSES OR COMMITS PERJURY: A COMPARISON OF THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT AND THE AMERICAN BAR ASSOCIATION'S MODEL RULES OF PROFESSIONAL CONDUCT.

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I. INTRODUCTION

Legal scholars have long debated how an attorney should respond to his criminal defendant client who threatens or commits perjury.[1] One cannot comfortably resolve the tension between the desire to protect client confidences and the need to promote ascertainment of the truth. It may be useful to ask who can best decide the appropriate response to the perjurious client: the client himself, the individual lawyer or the organized bar through a rule that mandates a particular response? The North Carolina Rules of Professional Conduct[2] allocate most of the decisionmaking to the individual lawyer, while the American Bar Association's Model Rules of Professional Conduct[3] mandate a specific response to actual perjury. This comment compares the allocation of decisionmaking power in the two sets of rules and suggests that North Carolina should amend its rules to require disclosure of client perjury.

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1. *E.g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966), arguing that a defense lawyer who is unsuccessful in preventing his client's perjury and in his efforts to withdraw should not reveal his client's perjury and should continue to conduct the trial as if the perjury has not occurred; Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 848-53 (1977), suggesting that the only workable approach is to require the attorney to inform the court that the client's testimony has no factual basis.

2. The Council of the North Carolina State Bar adopted these rules in July 1985, and the North Carolina Supreme Court approved them in October 1985.

3. The American Bar Association adopted the Model Rules in August 1983. The format, which substitutes Comments for the Ethical Considerations contained in the earlier Model Code, was used by the drafters of the 1985 North Carolina Rules who did not, however, always chose to adopt the text of the Model Rules and Comments.

II. ALLOCATION OF DECISIONMAKING AUTHORITY: A COMPARISON OF THE MODEL RULES OF PROFESSIONAL CONDUCT AND THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT.

A. *When the Client Threatens Perjury*

This section discusses the extent of the lawyer's decisionmaking power when a client has revealed an intent to testify falsely but has not yet done so. The lawyer's duties and the extent of his discretion are examined, first, in the pre-trial period and then at trial.

1. Allocation of Decisionmaking Power Before Trial

The North Carolina Rules of Professional Conduct in Rule 7.2(b)(1) place two initial mandatory requirements on the lawyer when his client threatens to commit perjury. The lawyer shall promptly call on his client to rectify the situation (i.e. state that he will not commit perjury), and if the client refuses to do so the lawyer must request permission from the court to withdraw. Although the American Bar Association's Model Rules of Professional Conduct contain nothing in black letter about the lawyer's duty at this stage, comment 5 to Model Rule 3.3 states that a lawyer should seek to persuade the client that the false evidence should not be offered. Comment 7 to Model Rule 3.3 states that if persuasion fails, the lawyer ordinarily can withdraw during the pre-trial period, and the lawyer apparently must seek to withdraw under Rule 1.16 in order to avoid violating the rules against the use of false evidence.

May the attorney reveal to the court the client's intention to commit perjury? At the pre-trial stage North Carolina Rule 7.2(b)(1) lets the lawyer decide by providing that his request for permission to withdraw is made "without necessarily revealing his reason for wishing to withdraw." North Carolina Rule 4(C)(4) permits, but does not require, a lawyer to reveal confidential information concerning the client's intention to commit a crime and the information necessary to prevent the crime. The leading North Carolina case on client perjury, *State v. Robinson*,[4] described as "commendable" defense counsel's action in revealing to the court the defendant's proposed perjury.[5] *Robinson* is still controlling authority because North Carolina Rule 4(C)(4) retains the language that was in effect at the time *Robinson* was decided.

The Model Rules also allow, but do not require, the lawyer to reveal his client's threat to commit perjury, although a cursory reading of Model Rule 1.6 would seem to prohibit revelation. Model Rule 1.6 has narrowed the scope of the exceptions to the confidentiality requirement

4. 290 N.C. 56, 224 S.E.2d 174 (1976).
5. *Id.* at 66, 224 S.E.2d at 180.

by allowing the lawyer to reveal confidential information about the client's threatened criminal activity only if the lawyer believes it is likely to result in imminent death or substantial bodily harm. Perjury would not be within this category, and a reading of this rule alone indicates the attorney must not disclose the client's threat to commit perjury. In *Nix v. Whiteside*,[6] however, the United States Supreme Court interpreted the Model Rules to allow disclosure of intended perjury. The Court focused on Rule 3.3(b) which states that the duties to avoid assisting a criminal or fraudulent act by the client and to avoid offering evidence the lawyer knows to be false, apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Brent Appel, the Iowa Deputy Attorney General who participated in *Nix*, believes that the Court interpreted the Model Rules as *requiring* disclosure of a client's perjury plan to the trial court.[7] Appel's reading of *Nix* is understandable because the Court combined language about intended client perjury with language about accomplished perjury in such a way that it is very difficult to tell what the Court meant. The Court stated:

> Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. DR 4-101(C)(3) (intention of client to commit a crime); Rule 3.3 (lawyer has duty to disclose falsity of evidence even if disclosure compromises client confidences). Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure. See Rule 3.3(a)(4); DR 7-102 (B)(1) . . . ."[8]

Contrary to what Appel believes, this language should be read as allowing, not requiring, disclosure of proposed client perjury. The Court is indicating first that the attorney-client privilege does not prevent a lawyer from disclosing either threatened perjury or accomplished perjury, and second that both the Model Rules and the Model Code of Professional Conduct require such disclosure of perjury once it occurs. The permissiveness of DR 4-101 (C)(3), which was cited by the Court, strengthens this interpretation. The rule states that a lawyer *may* reveal the intention of his client to commit a crime and the information necessary to prevent it. Furthermore, Model Rule 3.3, which also was cited by the Court, has comments which make a fairly clear distinction between a lawyer's duties during the pre-trial period and his duties once perjury

6. Nix v. Whiteside, 475 U.S. 157 (1986). In *Nix* the Court held that criminal defense counsel's threat to disclose was within the reasonable range of conduct required for effective assistance of counsel under the Sixth Amendment.

7. APPEL, *Nix v. Whiteside: The Role of Apples, Oranges and the Great Houdini in Constitutional Adjudication*, 23 CRIM. L. BULL. 5, 20 (1987).

8. *Nix*, 475 U.S. at 168.

actually occurs at trial. Comments 5 and 7 make clear that during the pre-trial period the lawyer should seek to dissuade the client from offering false evidence; and if such remonstrances fail, the lawyer ordinarily can withdraw. After setting forth these appropriate prophylactic measures to prevent client perjury, comment 11 to Model Rule 3.3 then emphasizes remedial measures which include mandatory revelation of the perjury if confidential remonstrances with the client and attempted withdrawal have failed.

Finally, in *Nix* the Court did not criticize defense counsel Robinson for allowing his client to take the stand without first disclosing to the trial court Whiteside's intent to commit perjury. For these reasons, the troublesome language in *Nix* should be interpreted as allowing, not requiring, disclosure of threatened client perjury.

After giving the criminal defense lawyer the discretion to either conceal or reveal his client's plan to testify falsely, neither the Model Rules nor the North Carolina Rules specify how the lawyer may properly cajole his client to tell the truth. *Nix v. Whiteside* partially filled that gap by making it clear that under the Model Rules the lawyer may, without violating his client's sixth amendment right to effective assistance of counsel, encourage truthful testimony by threatening to attempt withdrawal and to reveal any perjury that the client does commit.[9] As will be discussed in section II(B), the Model Rules require disclosure of actual perjury, while the North Carolina Rules leave revelation in the discretion of counsel. Therefore, a North Carolina lawyer properly could threaten to reveal the client's accomplished perjury only if the lawyer intended to exercise his discretion by carrying through with the threat. Otherwise he would be in violation of North Carolina Rule 1.2(C) which prohibits a lawyer from engaging in conduct involving dishonesty or misrepresentation. This prohibition against misrepresentation precludes a North Carolina lawyer from telling his client that the lawyer is *required* to reveal client perjury.

In summary, both North Carolina Rule 7.2(b)(1) and Model Rule 3.3(b), as interpreted by the Supreme Court in *Nix*, allow, but do not require, a lawyer to disclose his client's planned perjury to the trial court. The propriety of this delegation of power to counsel will be discussed later.

2. Allocation of Decisionmaking Power at the Trial Stage: Who Decides Whether the Client Takes the Stand and the Scope of Direct Examination

Suppose the criminal defense lawyer has engaged in the prophylactic

9. *Id.* at 171.

procedures of remonstrating with the client and seeking to withdraw, but without revealing the threatened perjury to the court, and the court then refuses to allow withdrawal. Assume further that the lawyer believes the client will perjure himself if put on the stand. Should the client or the lawyer make the decision whether the client will testify?

On matters that relate to objectives of the representation, the client traditionally has been granted the decisionmaking authority. According to Model Rule 1.2(a), in a criminal case the client decides the plea to be entered, whether to waive a jury trial and whether to testify. The same rule is set forth in North Carolina Rule 7(C)(1). Some doubt was cast on the defendant's constitutional right to testify in his own defense by the majority opinion in *Nix v. Whiteside* which states:

> Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*. In *Harris v. New York*, we assumed the right of an accused to testify 'in his own defense, or to refuse to do so' and went on to hold: '[T]hat privilege cannot be construed to include the right to commit perjury' . . . .[10]

Justice Blackmun, in his concurring opinion, expressed puzzlement about the court's implicit suggestion that the constitutional right to testify in one's own defense remains an open question.[11] He cited Supreme Court cases referring to the existence of such a right, including *Jones v. Barnes*[12] in which the court stated that the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, [such as]. . .whether to. . .testify in his or her own behalf . . . ."[13]

In the recent case of *Rock v. Arkansas*,[14] which centered on the issue of whether a criminal defendant's right to testify may be restricted by a state rule that excludes defendant's post-hypnosis testimony, the Supreme Court stated that "it cannot be doubted that a defendant in a criminal case has the right to take the stand and testify in his or her own behalf."[15] Acknowledging that this right is subject to some limitation, the Court said restrictions "may not be arbitrary or disproportionate to the purpose they are designed to serve."[16] Arkansas' *per se* rule excluding all post-hypnosis testimony was held to infringe impermissibly on defendant's right to testify in her own behalf.

What appropriate and non-arbitrary restrictions on a criminal defendant's right to testify may the criminal defense lawyer impose on the client who has indicated he will testify falsely? The narrative approach, which

10. *Id.* at 173.
11. *Id.* at 186 n. 5.
12. Jones v. Barnes, 463 U.S. 745 (1983).
13. Id. at 751.
14. Rock v. Arkansas, 107 S.Ct. 2704 (1987).
15. *Id.*at 2708.
16. *Id.* at 2711.

would allow counsel to stand mute while the defendant presents his false testimony unaided by direct examination, is rejected in comment 9 to Rule 3.3. It also was rejected by the North Carolina Supreme Court in *State v. Robinson*[17] as a violation of due process under both the federal and state constitutions, where the trial court allowed defense counsel to begin questioning the defendant's only witness and then to step aside leaving the defendant himself to take over the direct examination. The North Carolina Supreme Court found that this trial tactic inevitably prejudiced the defendant's case.[18] Presumably the court would have reached the same result had the defendant himself taken the stand and been forced to use the narrative approach to present his own testimony.

In *Nix* the Court pointed out in footnote 6 that although the eighth and ninth Circuits have expressed approval of the narrative approach, most courts have rejected it.[19] The ABA has left the narrative approach as "proposed" Standard 4-7.7 of the Standards for Criminal Justice without ever actually adopting it.[20] Apparently this method of coping with the perjurious client is an idea whose time came briefly and is now quickly passing.[21]

Another method of protecting the client's right to give truthful testimony without forcing the lawyer to breach his obligation to avoid offering false evidence has been set forth in ABA Formal Opinion 87-353.[22] If the perjurious client has steadfastly maintained that he will testify falsely, and if the false testimony is the only testimony the client would give, that opinion allows the lawyer to refuse his client's request to take the stand. Assuming the client also has truthful testimony to offer in his defense, the opinion advises the lawyer to examine the client only on matters that will not produce false testimony. If the lawyer reasonably believes that his pre-trial remonstrances have convinced his client to testify truthfully, he may examine the client in the usual manner. This procedure seems reasonably tailored both to protect the defendant's right to take the stand to give truthful testimony and to derail his planned perjury.

In order to carry out the approach suggested in Formal Opinion 87-353, the lawyer needs guidelines as to how certain he should be that the client intends to commit perjury.[23] North Carolina Rule 7.2(B)(1) requires that the lawyer receive information "clearly establishing" that his

17. 290 N.C. 56, 224 S.E.2d 174 (1976).

18. *Id.* at 67, 224 S.E.2d at 180.

19. *Nix*, 475 U.S. at 170.

20. Standards Relating to the Administration of Criminal Justice § 4-7.7 (1979).

21. However, some courts continue to use the narrative approach. *See*, Commonwealth v. Mascitti, 368 Pa. Super. 454, 534 A.2d 524 (1987).

22. Lawyers' Man. on Prof. Conduct (ABA/BNA) § 901:101 (1987).

23. Some lawyers will follow Professor Monroe Freedman's advice to avoid "knowing" that a client plans to give false testimony. FREEDMAN, *The Aftermath of Nix v. Whiteside: Slamming the*

client intends to testify falsely before he is allowed to reveal the proposed perjury to the court. If the lawyer decides against pre-trial revelation, presumably the same standard would be applicable for the lawyer's decision either to refuse to call his client to the stand or to question his client about a particular matter. The Model Rules contain two standards regarding the lawyer's obligation not to introduce false evidence. The first contained in Model Rule 3.3(a)(4) mandatorily prohibits offering evidence the lawyer "knows" to be false, and the second, contained in Model Rule 3.3(C) is discretionary, stating that the lawyer "may" refuse to offer evidence that the lawyer "reasonably believes" is false. Professor Carol Rieger argues that the first standard is almost impossible to meet, and that the second standard is insufficient to protect criminal defendants.[24] She proposes a third single standard "one which requires that the attorney be convinced beyond a reasonable doubt that the client's testimony will be perjurious."[25] Rieger's suggestion of adopting a single standard is appealing. Requiring a lawyer to decide whether a client will be called to testify, and if he is called, what questions will be asked, and then demanding that counsel decide what he "may" or "must" do by splitting a very fine hair between "knowing" and having a "reasonable belief" that his client intends to commit perjury is an impossible burden. Rieger's proposed standard would be less likely than the current North Carolina and Model Rules Standards to infringe on the criminal defendants's constitutional right to testify in his own behalf.

3. Summary

Where client perjury looms as a threat before trial, the American Bar Association's Model Rules of Professional Conduct and the North Carolina Rules of Professional Conduct make the same allocations of decisionmaking power. Both retain some power in the state by mandating that the criminal defense lawyer first shall seek to dissuade his client from committing perjury, and if the dissuasion fails, that the lawyer then shall seek to withdraw. However, both sets of rules then allow the lawyer to decide whether to reveal the threatened perjury to the court.

The client has a constitutional right to take the stand and testify truthfully as is reflected in both the Model Rules and the North Carolina Rules. However, if the lawyer "knows" (under the Model Rules) or has received "information clearly establishing" (under the North Carolina Rules) that his client intends to testify falsely, the lawyer must not offer

Lid on Pandora's Box, 23 CRIM. L. BULL. 25 (1987). This subterfuge violates the spirit of the Model Rules as interpreted by *Nix*, even if the letter is obeyed.

24. RIEGER, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 149 (1985).

25. *Id.*

that testimony. Neither the Model Rules nor the North Carolina Rules offer guidance enabling the lawyer to protect his client's right to testify while attempting to avoid the introduction of false evidence. ABA Formal Opinion 87-353 would allow the lawyer to refuse to call the client if the client has no truthful testimony to give, and assuming the client has both truthful and false testimony to give, would allow the attorney to refuse to ask questions which would elicit the falsehood. Formal Opinion 87-353 indicates that the lawyer ordinarily can reasonably believe that his persuasions will be successful, and he therefore "may permit the client to testify and may examine the client in the normal manner."[26]

B. *When Perjury Occurs*

Assume that the lawyer believed his client would testify truthfully, but the client does commit perjury. Under both the comments to Model Rule 3.3 and under North Carolina Rule 7.2(B)1, the lawyer has the duty to encourage rectification by the client, and if that fails, to seek to withdraw. If these measures fail, may or must the lawyer reveal the client's perjury to the court? At this juncture, the Model Rules and the North Carolina Rules diverge.

Model Rule 3.3(a)(4) states that "if a lawyer has offered material evidence and come to know of its falsity, the lawyer shall take reasonable remedial measures." Comment 11 states that where neither remonstrating with the client nor withdrawal has remedied the situation, the advocate should make disclosure to the court. The drafters' intent that the disclosure requirement be mandatory, even in criminal cases, is made clear in comment 12 which states that "[t]he 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 . . . ."

Comment 12 to Model Rule 3.3(a)(4) then acknowledges that the lawyer's ethical duty may be qualified by constitutional provisions for due process and right to counsel. The Supreme Court's reasoning in *Nix v. Whiteside*, however, indicates that a criminal defense counsel's disclosure of his client's perjury will not invade the client's constitutional rights. The Court focused on the comments to Model Rule 3.3 in concluding that the Model Rules *require* disclosure by counsel of client perjury.[27] In *Nix*, the court was not faced with the issue of the constitutionality of the disclosure requirement because Whiteside testified truthfully. However, the court held that counsel's pre-trial threat of disclosing any actual perjury was within the range of reasonable professional responses to threatened perjury and therefore not a denial of his client's right to effec-

26. Lawyers' Man. of Prof. Conduct (ABA/BNA) § 901:106 (1987).
27. Nix v. Whiteside, 475 U.S. 168.

tive assistance of counsel. Such a holding necessarily implies that disclosure of actual perjury is not a violation of a criminal defendant's constitutional rights.

North Carolina Rule 7.2(D)(1) refused to follow the Model Rules and kept the decisionmaking power in the hands of the individual lawyer even when the client actually commits perjury. The attorney's standard of conduct is precisely the same whether the client has threatened, or actually has committed, perjury. North Carolina Rule 7.2(B)(1) states:

> A lawyer who receives information clearly establishing that: (1) His client intends to or has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and, if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw, *but without necessarily revealing his reason for wishing to withdraw.*[28]

In summary, once perjury occurs, the Model Rules grant no decisionmaking power to the individual lawyer. He *must* (1) encourage client rectification and if that fails (2) seek to withdraw and if withdrawal is denied or fails to remedy the situation (3) reveal the perjury if the client has refused to do so himself. In contrast, although the North Carolina Rules also mandate encouraging client rectification and attempted withdrawal, the crucial disclosure - non disclosure decision is given to the individual lawyer.

III. WHO IS THE BEST DECISIONMAKER?

In allocating decisionmaking power, it is important to determine what person or group has the best access to the facts on which the decision will be based. Consideration also should be given to the effect that the decision will have on individuals, on groups and on society as a whole. Decisions which seriously impact on the judicial system and/or the public presumably should be made by some politically accountable person or group.

When a client threatens perjury before trial, the Model Rules and the North Carolina Rules correctly regard the organized bar as the decisionmaker for the bottom line prophylactic rules. The individual lawyer is told he *must* attempt to persuade his client to testify truthfully, and he *must* seek to withdraw if the client refuses. Although some lawyers find it easy to encourage clients toward truthfulness, many who are particularly zealous to protect their clients' interest, and sometimes equally zealous to protect their own track record, incorrectly regard admonishments against perjury and attempted withdrawals as a betrayal on the part of

28. Emphasis added.

the attorney. Such prophylactic actions by the attorney do little or no harm to the individual client and, when successful, greatly enhance the integrity of the judicial process.

Disclosure to the court of the client's threatened perjury is a more radical sanction against the client than remonstrances and attempted withdrawal. Presumably most lawyers will refrain from revealing anticipated perjury unless the client has made it clear beyond a reasonable doubt that he will testify falsely. Although no one can predict with complete accuracy whether the client will be truthful on the witness stand, the individual lawyer is the only person in a position to attempt such a prediction. Therefore, the Model Rules and the North Carolina Rules have correctly allocated to the individual lawyer the decision whether to reveal his client's threatened perjury. If the lawyer mistakenly predicts that his client will testify truthfully, the ramifications to the judicial process will not be serious because the lawyer can reveal the perjury to the court once it actually occurs.

Mandating disclosure of threatened client perjury would be unfair to the client who needs to use his lawyer as an ethical sounding board, and the unfairness might in some circumstances rise to the level of violating a defendant's Sixth Amendment and/or Due Process rights. As Justice Blackmum pointed out in his concurring opinion in *Nix*:

> Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court. Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (CA3 1977), pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.[29]

Assuming that pre-trial disclosure of a client's plan to commit perjury will remain permissive, we also can assume that lawyers in most circumstances will give their clients the benefit of any doubt and not reveal anticipated perjury. This does not mean that a lawyer should be the decisionmaker regarding whether the defendant will testify and the scope of direct examination. Although comment 8 to Model Rule 3.3 mentions the need for the lawyer to exercise control over the proof, neither the Model Rules nor the North Carolina Rules suggest a method of control.

29. *Nix*, 475 U.S. at 157, 188-189 (1986).

To protect the lawyer from a charge of subornation of perjury, and to avoid, if possible, the introduction of false testimony by the criminal defendant, the North Carolina Rules should be amended to incorporate the guidelines found in ABA Formal Opinion 87-353 discussed in Section II(A)(2). If these matters are left within the discretion of the lawyer, many will exercise that discretion by questioning the client in the usual manner, even when such tactics are almost certain to result in false testimony.[30]

Allocation of decisionmaking power to the individual lawyer with respect to threatened perjury by the criminal defendant client has been shown to be proper. Once the defendant has committed perjury, however, the situation changes. The act that was merely a threat has indeed occurred. Before jumping to a conclusion about who is now the best decisionmaker, it should be noted that the relationship between the rules governing threatened perjury and accomplished perjury should fit together logically. If the individual lawyer is deemed to be the best decisionmaker with regard to revealing threatened perjury, it would be illogical to forbid him to disclose the perjury once it has occurred. The lawyer must either retain the decision-making power, as he currently does under North Carolina Rules, or the organized bar must require him to reveal his client's perjury, if that is the only effective remedial measure available, which is the approach taken by the ABA Model Rules. Mandatory disclosure is the better choice for several reasons.

Mandatory disclosure is fairer to criminal defendants because it tends to ensure equality of treatment. Without mandatory disclosure not all lawyers will choose to disclose perjury, thus creating an unequal burden on clients whose attorneys do disclose. Professor Monroe Freedman in 1975 told of a survey of lawyers in the District of Columbia revealing that ninety percent would question a perjurious witness in the normal manner despite the fact that the Code of Professional Responsibility appeared to be unambiguous in prohibiting the knowing use of perjured testimony.[31] This indicates that we need not only a rule mandating disclosure of client perjury, but also vigorous enforcement of the rule against noncomplying lawyers.

Another benefit to criminal defendants from a rule requiring disclosure of client perjury, is that some who initially plan to testify falsely will be "Nixed" into testifying truthfully, thus avoiding a possible conviction for

30. Professors Hazard and Hodes believe that the enactment of Model Rule 3.3(a)(4), which requires whistle blowing on a client only when a court is defrauded, reflects a strengthening consensus that "the line must be drawn at protecting the decision-making process itself . . . ." G. HAZARD AND W. HODES, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (Supp. 1987).

31. FREEDMAN, *Perjury: The Lawyer's Trilemma*, 1 LITIG. 26, 29-30 (No. 1, Winter 1975).

perjury. This also helps the lawyer by removing the risk of a subornation of perjury charge.

The final and most important reason for removing the lawyer as decisionmaker once perjury occurs is that the integrity of the judicial systems is a sufficiently serious matter that decisionmaking should be allocated to politically accountable entities. The North Carolina General Assembly has delegated the power to draft rules of professional conduct governing lawyers to the Council of the North Carolina State Bar,[32] a body which is accountable to all lawyers and to the general public as well.[33] The Council is also accountable to the North Carolina Supreme Court which must approve the rules before they become effective.[34]

In contrast, the individual lawyer making the decision to reveal or conceal his client's perjury is not subject to political accountability. His decision perhaps will not even be subject to visibility because with luck the decision to not reveal will be known only to him and his client. Even if the client is subsequently charged with perjury, since the current North Carolina rule allows the lawyer to conceal client perjury, the lawyer still can escape accountability.

A lawyer deciding whether to reveal his client's perjury may be more swayed by his concern for a particular client, or even concern for the lawyer's win-loss record, than he is by larger concerns about the goals of the legal system. Even if he does consider these goals, the attorney will be affected by his individual views about which is more important: the goal of truth seeking or the goal of protecting client confidences. Most attorneys have a strong visceral bias toward one of these two goals. Thus the individual lawyer, with no political accountability for his decision, is susceptible to both improper motives and unavoidable bias in his decisionmaking. The North Carolina State Bar Council has made an inappropriate delegation of its powers to the individual lawyer.

If the organized bar believes that the goal of protecting client confidences outweighs the search for truth, the logical step is to remove all decisionmaking power from the individual lawyer and promulgate rules which prohibit revealing either a client's intent to commit perjury or his actual perjury. If, however, the State Bar concludes that the integrity of the judicial process takes precedence over the need to protect client confidences, it should follow the lead of the Model Rules and mandate disclosure of accomplished client perjury.

It should be noted that in *Nix*[35] the Supreme Court did not require the

32. N.C. Gen. Stat. § 84-23 (1985).

33. In addition to the 50 attorney councilors, three public members not licensed to practice law are appointed by the governor to the Council of the North Carolina State Bar. N.C. Gen. Stat. § 84-17 (Supp. 1987).

34. N.C. Gen. Stat. § 84-21 (1985).

35. Nix v. Whiteside, 475 U.S. 157 (1986).

states to adopt any particular rule, but merely clarified the constitutionality of the provision in Model Rule 3.3(a)(2) requiring revelation of client perjury. However, if the Council of the North Carolina State Bar continues to delegate to individual lawyers the Bar's responsibility for choosing between two conflicting goals, it will be issuing a clear invitation to the United States Supreme Court to intervene. That body has not been reluctant to employ constitutional analysis to allocate decisionmaking power among those persons, private groups or legislative bodies who might exercise it.[36] In *Panama Refining Co. v. Ryan*,[37] the Court invalidated a statutory delegation of power to the President to prevent transportation of oil production in excess of state permission. Noting that Congress' delegation "has declared no policy, has established no standard"[38] for the President to follow, the Court concluded:

> To hold that he is free to select as he chooses from the many and various objects generally described in the [statute], and then to act without making any finding with respect to any object he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.[39]

Professor Laurence Tribe refers to *Panama Refining* as the type of case which insists on "assurance of a policy's promulgation *by a sufficiently accountable body.*"[40] The Council of North Carolina State Bar, not an individual lawyer, is a sufficiently accountable body to make the difficult policy decision of choosing between protection of client confidences and the integrity of the judicial system when perjury has occurred.

With regard to client perjury, if the North Carolina State Bar Council

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36. *See* TRIBE, *The Supreme Court 1972 Term Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 13 n. 73 (1973-74) stating:

> When the question is whether a certain kind of decision should be made legislatively or judicially, the Supreme Court regularly assumes that the final distribution of roles in accord with the constitutional scheme must be its responsibility— even when the conclusion is that the role should in the end be a legislative one. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973). And within any given part of the public realm, the Court commonly proceeds on a quite explicity role-allocating conception of the nature of its task. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). But the Court has not limited its role-allocating mission to distributions of authority among or within public entities. On the contrary, it has also recognized its role-distributing obligation when the question before it has been whether a particular type of decision must be made privately, by persons and groups free of public regulation with respect to the relevant aspects of their activities, or by publicly controlled, and hence at least partially accountable, entities. For example, in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court described the question for decision as that of "who shall determine what issues are to be discussed [over network television] by whom," *Id.* at 130, and did not doubt its responsibility for resolving the question whether the type of decision there involved had to be made by an uncontrolled group of private individuals or could instead be made by some publicly regulated process.

37. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

38. *Id.* at 430.

39. *Id.* at 431-432.

40. L. TRIBE, American Constitutional Law 1141, ftn. 7 (1978).

continues to delegate the choice of both goals and means to the whims of individual lawyers, it may find that it has forfeited the power to make decisions which traditionally have belonged to a state body. Not only has the Supreme Court struck down delegations of power to insufficiently accountable bodies, in cases such as *Miranda*[41] and *Roe v. Wade*,[42] the Court has "legislated" precise guidelines for handling difficult situations. In *Nix*,[43] the Court stopped short of telling the Iowa Bar how the client perjury problem must be handled, but there is no assurance that the Court will be that restrained in the next case, particularly if it arises in a jurisdiction such as North Carolina which has made a highly questionable delegation of decisionmaking power.

While waiting for further action from the North Carolina State Bar and the courts, North Carolina criminal defense lawyers will do well to follow the advice of Joseph B. Cheshire V and reveal the client's perjury to the court.[44] As Cheshire states:

> "It may cost you a client but it will gain you respect in the eyes of the court and your peers and certainly protect your law license."[45]

41. Miranda v. Arizona, 384 U.S. 436 (1966).
42. Roe v. Wade, 410 U.S. 113 (1973).
43. Nix v. Whiteside, 475 U.S. 157 (1986).
44. CHESHIRE, *General Ethical Considerations in Criminal Cases and the Perjurious Client in Particular*, 20 TRIAL BRIEFS 34, 35 (1988).
45. *Id.*