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Cover Page Footnote
Vice Dean and Professor of Law, Pepperdine University School of Law. Professor Perrin is grateful to Jay Parmelee and Travis Tidmore for their excellent research assistance and to Pepperdine University School of Law for its support of this essay.
THE PERPLEXING PROBLEM OF
CLIENT PERJURY

L. Timothy Perrin*

INTRODUCTION: THE TRUTHFULNESS DEFICIT

Truth plays a prominent role in every trial. Or, at least it should. Witnesses raise their right hand and take an oath to tell “the truth, the whole truth, and nothing but the truth.”1 Jurors promise that they will fairly and impartially decide the case based upon the facts and the law.2 Judges rule on the parties’ objections based upon the applicable Rules of Evidence, interpreting the Rules in such a way “that the truth may be ascertained.”3 Indeed, the trial itself is typically described as nothing less than a search for the truth.4

But what about the other major participants in the trial—the lawyers? Do they have responsibility to ensure that the truth is discovered? On the one hand, trial lawyers serve as partisan advocates for their clients, and seek to persuade the fact-finder that their clients’ claims or defenses should prevail. Thus, trial lawyers attempt to convince the fact-finder of a certain kind of truth, a “partisan truth,” but they are not responsible for discovery of the truth, at least not in any absolute sense. On the other hand, lawyers are also “officers of the court,” and as such they owe a duty of candor to the court.5 The Model Rules of Professional Conduct specifically preclude lawyers from knowingly presenting false evidence.6 The most difficult ethical questions for lawyers arise when these duties collide—when the duty to the

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1. See Fed. R. Evid. 603 (stating that “every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation”).

2. See Judicial Council of Cal., California Jury Information, http://www.courtinfo.ca.gov/jury/step1.htm (last visited Oct. 27, 2007). Jurors in California state court must take the following oath: “Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?” Id.

3. See Fed. R. Evid. 102, 611(a)(1).

4. See, e.g., Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 849 (5th Cir. 1996).


6. See id. (stating that “[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false”).

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court conflicts with the duty to the client. The question this essay seeks to answer is a particularly perplexing instance of such a conflict: What are the responsibilities of a criminal defense lawyer when his or her client seeks to take the witness stand and testify falsely? Should truth or partisanship prevail?

In the world of public opinion, lawyers suffer from a rather severe "truthfulness deficit." In fact, one poll reveals that only 27% of those asked said that they trusted lawyers, while 68% expressed distrust, a 41-point deficit. By contrast, in the same poll, 83% trusted teachers and 85% trusted doctors. Does this profound level of mistrust simply reflect the popular media's negative portrayal of lawyers and/or perhaps a failure to understand the lawyer's role in our adversary system of justice? Or does the public's opinion reflect a real and serious problem that requires renewed attention to the lawyer's responsibility to uphold the truth?

One thing is certain: the public relations problem is not new. More than 150 years ago, the one American lawyer perhaps most revered for his personal probity, Abraham Lincoln, observed in his *Notes on the Practice of Law*, that "[t]here is a vague popular belief that lawyers are necessarily dishonest," adding that the "impression [] is common—almost universal."  

This widespread, long-standing "impression" is not merely a public relations problem. In recent months, multiple lawyers have faced criminal and professional penalties because of their failures to speak the truth. In June 2007, District Attorney Michael Nifong was found by a North Carolina disciplinary commission to have repeatedly lied and cheated in the course of his prosecution of three former Duke lacrosse players for rape. Nifong lied to the public and to the defendants about the evidence and withheld exculpatory evidence from the defense. In the face of the

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7. Id. pmbl. cmt. 9 ("Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.").

8. See Harris Interactive, Doctors and Teachers Most Trusted Among 22 Occupations and Professions: Fewer Adults Trust the President to Tell the Truth, http://www.harrisinteractive.com/harris_poll/index.asp?PID=688 (last visited Oct. 9, 2007) (Harris Interactive Poll showing that only 27% of respondents trust lawyers compared to 68% who do not, while 85% trusted doctors and 83% trusted teachers).


11. *Nifong Surrenders License*, Baltimore Sun, June 17, 2007, at 3A.

12. See id. Professor Robert P. Mosteller, in his contribution to this Symposium, describes the full extent of Michael Nifong's efforts to deceive during his prosecution of the Duke lacrosse players. He notes that the Disciplinary Hearing Commission panel "found that Nifong made numerous false and deceptive statements to opposing counsel, the court, and the bar grievance committee." Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 Fordham L. Rev. 1337, 1364 n.125 (2007); see also id. at 1339 n.9 (noting that Nifong was found guilty of criminal contempt as a result of false statements he made in court "asserting that he had supplied all DNA results"). Mosteller rightly frames the Nifong prosecution as an
commission's finding, Nifong resigned from his position as district attorney and relinquished his bar card.\(^\text{13}\)

Just a few months earlier, I. Lewis "Scooter" Libby, a lawyer as well as chief aid to Vice President Richard Cheney, was convicted in federal court of obstruction of justice and perjury arising out of an investigation into the disclosure of the identity of Central Intelligence Agency agent Valerie Plame Wilson.\(^\text{14}\) Libby was found to have lied in his testimony before the grand jury about his knowledge of the disclosure of Plame's identity, among other matters, and was sentenced to thirty months in prison.\(^\text{15}\) These two stories grabbed headlines due to their high-profile nature and the explosive combination of law and politics involved, but also because of the sensitive positions of trust held by the offenders.\(^\text{16}\)

Not all trial lawyers are afflicted by the truthfulness deficit to the same degree, and criminal defense lawyers likely suffer from the greatest stigma in the public eye.\(^\text{17}\) This should not be surprising in light of the difficult and often unpopular challenge faced by the criminal defense bar. Their clients are typically guilty of the charged crime,\(^\text{18}\) and the defense lawyer's task is to stand in opposition to the people's representative and to advocate on behalf of the presumed wrongdoer.

Moreover, the popular media contributes to the image of the unethical criminal defense lawyer. For many, their image comes from the television program *Boston Legal* (or perhaps its predecessor, *The Practice*), in which the defense lawyers seek to obtain client victory at any cost, regularly flouting the rules of ethics or accusing a third party of having committed the offense in order to obtain an acquittal of an obviously guilty defendant. Contrast this contemporary image of a criminal defense lawyer with that of only a generation or so ago, formed from watching defense lawyers such as *Perry Mason* or *Matlock* and reading about Atticus Finch,\(^\text{19}\) men of uncompromising integrity and unquestioned skill.

Law professor and prominent criminal defense lawyer Alan Dershowitz has described the plight of the criminal defense lawyer as follows:

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\(^{13}\) See Nifong Surrenders License, supra note 11.


\(^{16}\) District Attorney Michael Nifong was a prosecutor charged with ensuring that justice is done. I. Lewis "Scooter" Libby was a prominent public official who had taken an oath to uphold the U.S. Constitution.


\(^{18}\) See id. at xiv. (concluding from his experience that "the vast majority of criminal defendants are in fact guilty of the crimes with which they are charged"). Dershowitz adds that "[a]lmost all of my own clients have been guilty." Id.

\(^{19}\) See generally Harper Lee, To Kill a Mockingbird (1960).
Attorneys who defend the guilty and the despised will never have a secure or comfortable place in any society. Their motives will be misunderstood; they will be suspected of placing loyalty to clients above loyalty to society; and they will be associated in the public mind with the misdeeds of their clients.... There will never be a Nobel Prize for defense attorneys who succeed in freeing the guilty.... The public sometimes has difficulty distinguishing between the noble and the sleazy; the very fact that a defense lawyer represents a guilty client leads some to conclude that the lawyer must be sleazy. Being so regarded is an occupational hazard of all zealous defense attorneys.  

Misunderstood motives. Misplaced loyalties. Tainted with the misdeeds of the client. While criminal defense lawyers surely maintain vitally important positions in the justice system as loyal defenders of their clients, they also face perplexing and challenging questions about the nature and limits of their partisanship.

Perhaps not surprisingly, most scholarship on the ethical obligations of lawyers comes from the community of legal ethics scholars and not from the world of evidence scholarship. To its credit, this Symposium, *Ethics and Evidence*, seeks to begin to fill that void. It is difficult to imagine a more important topic at the very intersection of ethics and evidence than the ethical obligations of criminal defense lawyers when confronted with false testimony from their own client. The rules of ethics are, of course, critically important in regulating the conduct of lawyers both inside and outside the courtroom, and they provide the minimum standards for criminal defense lawyers. However, the problem of client perjury is not only an ethical dilemma, it also involves the presentation of testimonial evidence. Thus, Part I of the essay turns to the Federal Rules of Evidence to provide some framework for the discussion. How do the Rules resolve the conflicts between the system’s search for the truth and the heightened constitutional protections accorded to criminal defendants? Next, in Part II, the essay considers the role of the criminal defense lawyer in an adversary system. Are lawyers merely “amoral technicians” charged with zealously representing their clients within the bounds of the law, or should lawyers “take those actions that, considering the relevant circumstances... seem likely to promote justice[?]”

20. See Dershowitz, supra note 17, at 417.
Part III then turns to examination of client perjury, a perplexing ethical conundrum for defense lawyers because it squarely presents the conflict between their duty of loyalty to clients and their duty of candor to the court. This part begins with an examination of the Model Rules of Professional Conduct and continues with a discussion of a series of cases representing a wide range of lawyer (and judge) responses to the dilemma. The cases reflect the continuing uncertainty that afflicts courts and lawyers in addressing client perjury. Undoubtedly, the best result when confronted with the dilemma of client perjury is for the lawyer to persuade the client to reverse course and to testify truthfully or not to testify at all. Successful counseling in that situation requires lawyers who take seriously their obligation to the truth and who have built strong relationships with clients based on trust and respect. In those unfortunate circumstances when the defendant insists on testifying falsely, despite the lawyer's best efforts, the lawyer is morally obligated, if not ethically required, to refuse to allow the witness to testify falsely.

I. THE RULES OF EVIDENCE AND THE TRUTH

The Rules of Evidence, which regulate what evidence should be admitted or excluded at trial, are primarily designed to ensure that the fact-finder discovers the truth to help ensure an accurate resolution of the case before it. The Rules make this point explicit from the very beginning, announcing in Rule 102 that the Rules "shall be construed...to the end that the truth may be ascertained and proceedings justly determined." Thus, the Rules, according to their own terms, should be interpreted to accomplish two fundamental objectives: (1) ascertaining truth, and (2) dispensing justice.

A. Ascertaining the Truth

To understand the critical role of the law of evidence in furthering the adversary system's search for the truth, one must begin with the lay jury and, more particularly, with the manner in which jury deliberations and verdicts are treated in the system. The jury's deliberations are hidden behind a dark veil of secrecy. First, jurors are largely prohibited from impeaching their own verdicts; and second, courts are precluded, for the

25. Fed. R. Evid. 102; see also Fed. R. Evid. 611(a)(1) (stating that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to [i] make the interrogation and presentation effective for the ascertainment of truth").

26. George Fisher, Evidence 5 (2002) (noting that the "reluctance to examine what juries do with the evidence they hear perhaps highlights the importance of monitoring what they hear in the first place").

27. See Tanner v. United States, 483 U.S. 107, 121 (1987) (prohibiting jurors from testifying in support of a motion for a new trial about excessive drug use and drinking during a trial based on Federal Rule of Evidence 606(b), which "is grounded in the common-law rule against admission of jury testimony to impeach a verdict"); Fed. R. Evid. 606(b) (precluding juror testimony about deliberations subject to three exceptions).
most part, from reviewing a jury’s decision-making process. In short, courts have only a limited ability to correct erroneous verdicts. The strong policy interest in finality, among other considerations, dictates that verdicts should not be easily overturned.

This inability to monitor the jury’s deliberative process places additional emphasis on the need to regulate what evidence is presented to the jury in the first instance. In many ways, the Rules of Evidence manifest a significant mistrust of the ability of jurors to effectively evaluate certain kinds of evidence, and the Rules seek to enhance their decision making in those areas by regulating the range of information presented to them. It is a specific application of the old “garbage in, garbage out” principle: if jurors receive reliable evidence during the course of the trial, they are more likely to reach an accurate verdict.

Admittedly, not all Rules of Evidence advance this search for the truth, at least not directly. One commentator has suggested that one of the major themes of the law of evidence is that “We Don’t Want the Whole Truth.” Perhaps the most notable example of an area of evidence law that frustrates the search for truth is the law of privileges. The attorney-client privilege, for example, directly impedes the truth-seeking purpose by removing from the jury’s consideration highly reliable and probative evidence that is communicated between lawyers and their clients. The confidentiality of communications between lawyers and clients advances an important public policy interest by encouraging clients to make full and frank disclosures to their lawyers, thus enhancing the ability of lawyers to competently and effectively represent the interests of their clients and to protect their

28. See Fed. R. Evid. 606(b).
29. See Fed. R. Civ. P. 50(a)(1) (providing that a court may grant judgment as a matter of law after “a party has been fully heard on an issue” only if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue”).
30. See Tanner, 483 U.S. at 120 (noting that “[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process”).
31. Fisher, supra note 26, at 5 (noting that “[i]f we are to exercise virtually no review of the jurors’ skill and fairness in evaluating evidence, then perhaps we need to be especially vigilant to ensure that the evidence they hear is useful and fair”).
34. See Fed. R. Evid. 501.
35. See Mueller & Kirkpatrick, supra note 32, § 5.1, at 285 (noting that privileges “impede the search for truth by excluding evidence that may be highly probative”).
rights. There are a number of other Rules of Evidence that primarily advance social and public policy objectives rather than evidentiary ones.

Yet, even in the area of privileges, the overarching concern of finding the truth is apparent. First, the scope and application of privileges are strictly construed by courts to limit their exclusionary impact. Second, the law of waiver applies to privileges such that the excluded evidence may become subject to disclosure if the party holding the privilege fails to maintain its confidentiality or otherwise waives the protection. Third, the protection provided by the privilege does not extend to communications made in furtherance of a crime or fraud.

These exclusionary doctrines and other aspects of the Rules cause some evidence scholars and commentators to question the purpose of the Rules of Evidence and, more broadly, to question the role of the adversary system in general. While some continue to acknowledge the traditional rationale for the Rules as aiding the search for truth, others argue that the Rules are based upon a "best evidence" principle, and others still assert that the Rules have a purely process-based purpose, one that is completely divorced from any futile effort to seek the truth.

The adversary system's ability to produce the truth in any specific case is always at risk due to the fallible nature of the participants in the system. Judges make incorrect rulings; witnesses give testimony that is mistaken,

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36. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

37. See, e.g., Fed. R. Evid. 407 (subsequent remedial measures); Fed. R. Evid. 408 (statements made during the course of failed plea negotiations); Fed. R. Evid. 409 (payment of medical expenses); Fed. R. Evid. 410 (inadmissibility of pleas); Fed. R. Evid. 411 (liability insurance); Fed. R. Evid. 412 (victims' past sexual conduct in sexual assault cases); see Graham C. Lilly, An Introduction to the Law of Evidence § 5.18, at 191 (3d ed. 1996) (noting that "[p]ublic or social policy considerations frequently mold rules of evidentiary exclusion" including privileges and subsequent remedial measures).

38. See, e.g., United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996) (noting that the attorney-client privilege "is not favored by federal courts" and "is to be strictly confined within the narrowest possible limits consistent with the logic of its principle").


40. See McCormick on Evidence § 95, at 147 (5th ed. 1999) (noting that "under modern authority . . . the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud"); see also Model Rules of Prof'l Conduct R. 1.6(b)(2) (2002).

41. See generally Mueller & Kirkpatrick, supra note 32, § 1.1, at 2 (noting that privileges are "the prime example" of evidence rules that are designed to "further substantive policies unrelated to the matter in suit").

42. See id. (referring to the truth-seeking purpose as the "classical account" of evidence law).

43. See Dale A. Nance, The Best Evidence Principle, 73 Iowa L. Rev. 227, 229 (1988) (claiming that evidence law primarily serves "epistemic concerns").

44. See Mueller & Kirkpatrick, supra note 32, § 1.1, at 3 (citing David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. Colo. L. Rev. 1, 3 (1987)).
false, or incomplete; jurors fail to accurately evaluate the facts. Even under the best of circumstances, the “truth” that is discovered during the course of the proceeding is only a partial truth based on the incomplete and limited facts presented in the case.

This account of the adversary system may explain, at least in part, the predominant conception of the lawyer’s role in the adversary system. Under a process-based understanding of the adversary system, lawyers are “neutral partisan[s]” who are expected to zealously advocate their clients’ claims regardless of the circumstances.45 By aggressively representing their clients, lawyers serve the system, and they have little or no responsibility for larger concerns.46 The system is an end in itself.

And yet, an examination of the contents of the Rules of Evidence reveals that they were drafted to account for the perceived strengths and weaknesses of the various participants in the adversary system and of the system itself. The impartial arbiter, the judge, is empowered with the responsibility to use his legal training to assess the correctness of the arguments of the parties, to exercise discretion in making evidentiary decisions based upon the Rules of Evidence,47 and to assert control over the presentation of proof.48 The lay fact-finder, the jury, is given great deference with regard to its evaluation of the witnesses and the facts,49 but is viewed with no small degree of mistrust when it comes to certain categories of evidence that are unreliable or unduly prejudicial.50 And the partisan lawyers are given a significant degree of autonomy to make strategic decisions about the case, but are also viewed with suspicion in certain respects due to their inherent motivation to gain an advantage for their client in any way possible.51

46. Simon, supra note 24, at 53 (describing the traditional view of lawyering as contending that “it produces a higher level of justice in the aggregate and the long run”).
47. See Fed. R. Evid. 403 (entrusting to judges the discretion to exclude evidence when the probative value of the evidence is substantially outweighed by dangers of unfair prejudice).
48. See Fed. R. Evid. 611(a) (stating that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence”).
49. See United States v. Vitillo, 490 F.3d 314, 329 (3d Cir. 2007) (noting that the trial judge instructed the jury as follows: “You are the sole and exclusive judges of the facts” and “[y]ou determine the credibility of the witnesses”).
50. See Fed. R. Evid. art. VIII (providing that hearsay evidence is excluded unless falling within an exclusion or exception to the Rule); Fed. R. Evid. 404(a)–(b) (providing that propensity character evidence is not admissible to prove a person’s conduct in conformity with his character, except in a few circumstances).
51. For examples of Rules of Evidence that reflect suspicion of the role of advocates, see Fed. R. Evid. 611(c) (prohibiting the use of leading questions during direct examination), Fed. R. Evid. 703 (imposing stringent standard of exclusion for inadmissible facts or data relied on by an expert witness as a means of preventing a lawyer from using experts as an end run around the hearsay rule), and Fed. R. Evid. 901(b)(2) (requiring that a lay witness’s knowledge of another’s handwriting must not be obtained in preparation for the trial, thus precluding lawyers from prepping witnesses to offer such testimony).
Thus, the Rules seek to create the right conditions for finding the truth by empowering judges, protecting jurors, and restraining lawyers. That does not mean that the application of the Rules always leads to the discovery of the truth. Despite the remarkable effort of the drafters of the Rules, the Rules of Evidence are not perfect; they are not always interpreted correctly by judges; and, they do not always lead the fact-finder to the right result. No system constructed by frail human beings could perfectly adjudicate every claim. Nevertheless, the system is designed to create the right conditions for finding the truth, and the Rules seek to advance that purpose while serving other beneficial and important policy goals as well.

B. Protecting the Defendant

In addition to the search for the truth, the Rules of Evidence suggest another point of emphasis important to consideration of the conflicting duties of defense lawyers: heightened protection for criminal defendants. Criminal defendants are in a unique position among all litigants due to the heightened constitutional protections they are accorded. The Rules of Evidence include several provisions that seek to conform to the constitutional protections enjoyed by criminal defendants under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution and recognize the uniquely vulnerable position occupied by the accused.

Thus, the Rules of Evidence allow the accused to introduce evidence that no other party is allowed to introduce and to avoid the introduction of


53. See, e.g., Mahlandt v. Wild Canid Survival & Research Ctr., 588 F.2d 626, 630–31 (8th Cir. 1978) (holding that the trial court erroneously excluded hearsay evidence that should have been admitted under the agent admission rule).

54. See, e.g., Fed. R. Evid. 404(a)(1)–(2) (providing that the accused may introduce evidence of a pertinent trait of his own or the victim’s character as propensity evidence of the person’s conduct on the occasion in question); Fed. R. Evid. 412(b)(1)(A)–(C) (providing that the accused in a sexual misconduct case is permitted to introduce certain kinds of evidence in defense); Fed. R. Evid. 803(8)(C) (providing that in criminal cases the defendant is permitted to introduce evidence of factual findings contained in public records, but the prosecution is not); Fed. R. Evid. 804(b)(1) (providing that the government may use “former testimony” evidence against the accused only if the accused was a party in the prior proceeding—greater protection than is afforded to other parties).

55. See U.S. Const. amend. IV (prohibiting unreasonable searches or seizures).

56. See U.S. Const. amend. V (ensuring defendants will receive due process of law); see also Miranda v. Arizona, 384 U.S. 436 (1966).

57. See U.S. Const. amend. VI (providing that the accused has the right to confront witnesses against him and the right to counsel).

58. See Mueller & Kirkpatrick, supra note 32, § 4.12, at 185 (noting that Rule 404(a), which allows the accused to introduce character evidence, “gives a criminal defendant some counterweight against the strong investigative and prosecutorial resources of the government”).
evidence that all other parties must face. For example, criminal defendants are permitted to introduce propensity character evidence about themselves and the victim under circumstances when no other litigant may introduce such evidence. Moreover, the accused is granted more stringent protection against the government’s introduction of public records into evidence and against the use of the accused’s prior criminal convictions for impeachment purposes. These heightened protections are consistent with and follow from the accused’s presumption of innocence. As William Blackstone wrote in his commentary on the common law, “The law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”

This practice of heightened protection for the accused explains in part the sustained opposition to Rules 413, 414, and 415 from evidence scholars and commentators. Those Rules disadvantage sex offenders as compared to all other litigants, allowing the government in rape or child molestation cases (or plaintiffs in sexual harassment cases) to admit the defendants’ past “sex offenses” as evidence of the their propensity to engage in the conduct. These Rules represent a politically motivated detour from the traditional approach to criminal defendants, and are the exception, not the rule.

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59. See Fed. R. Evid. 404(a)(1)–(2).
60. See Fed. R. Evid. 803(8) (accused may introduce public records containing factual findings, but government may not).
61. See Fed. R. Evid. 609(a)(1) (providing that felony convictions may be admitted against the accused for impeachment purposes only if the probative value outweighs the danger of unfair prejudice of the evidence—a standard that favors exclusion of the evidence).
62. William Blackstone, 4 Commentaries *352.
63. See Fed. R. Evid. 413 (allowing the admission of other sexual “offenses” allegedly committed by the defendant in criminal cases involving allegations of sexual assault); Fed. R. Evid. 414 (allowing admission of defendants’ sexual offenses in child molestation prosecutions); Fed. R. Evid. 415 (allowing admission of defendants’ sexual offenses in civil cases involving claims of sexual assault).
64. See, e.g., Katharine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev. 563, 590 (1997) (criticizing Rule 413 because, among other things, the Rule increases “the risk that a jury will punish the defendant for acts other than those for which he is on trial”); Edward J. Imwinkelried, Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot, 22 Fordham Urb. L.J. 285, 298 (1995) (criticizing new Rules because of lack of evidence that sex offenders are more likely to reoffend than other criminals).
65. For example, a defendant charged with burglary or a civil defendant charged with negligence need not be concerned about the admission of their past conduct as evidence of their propensity. Such evidence is clearly excluded. See Fed. R. Evid. 404(a). But under the sex-offender rules, the defendant may well have to respond to such evidence. See, e.g., Fed. R. Evid. 413.
C. Requiring Truthful Testimony, “Regardless of the Consequences”

These two notable hallmarks of the Rules of Evidence—the advancement of the search for the truth and the protection of the rights of the accused—do on occasion collide. For example, what happens when the defendant chooses to take the witness stand and testify, but she does so in a way that contradicts a statement she previously made to the police during an interrogation that was conducted in violation of the Miranda warnings?\(^6\)

Under ordinary circumstances, the exclusionary rule would mandate the exclusion of confessions obtained in violation of Miranda.\(^6\) Yet, such statements may be admitted for impeachment purposes if the defendant contradicts the confession at trial and the confession was obtained voluntarily.\(^6\) The Supreme Court has likewise admitted evidence obtained in violation of the Fourth Amendment\(^7\) and the right to counsel provision of the Sixth Amendment.\(^7\) The Court has repeatedly emphasized the primacy of the truth-seeking function of the trial in justifying the admission of evidence that ordinarily would be excluded.\(^7\)

The case of United States v. Havens\(^7\) illustrates the Court’s balancing of the conflict between the rights of defendants and the search for the truth. In Havens, the defendant was charged with conspiracy to import cocaine, among other charges, and he testified in his own defense, claiming that he was not involved in a scheme to import drugs.\(^4\) The defendant’s testimony directly contradicted evidence the government had obtained from the defendant’s suitcase through a search that was held to have violated the Fourth Amendment. The court had excluded the illegally seized evidence

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68. See Dickerson v. United States, 530 U.S. 428, 435 (2000) (observing that “the admissibility in evidence of any statement given during custodial interrogation of a suspect depend[s] on whether the police provided the suspect with [the Miranda] warnings”).

69. See supra note 67.

70. See United States v. Havens, 446 U.S. 620, 628 (1980) (upholding admission of evidence seized by the government in violation of defendant’s rights under the Fourth Amendment for purposes of impeaching defendant’s trial testimony).

71. See Michigan v. Harvey, 494 U.S. 344, 345–46 (1990) (upholding admission of a statement made by defendant after he had invoked his right to counsel under the Sixth Amendment).

72. See, e.g., Harris, 401 U.S. at 226 (stating that “[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances”).

73. 446 U.S. 620 (1980).

74. See id. at 622–23. The government caught the defendant’s alleged coconspirator with cocaine hidden in makeshift pockets sewed into the coconspirator’s undershirt. Id. at 622. Defendant’s direct testimony was not terribly clear, but he denied having anything to do with importing the cocaine, stating that he “had nothing to do with any wrapping or bandages or anything . . . . I had nothing to do with anything with McLeroth [the alleged coconspirator] in connection with this cocaine matter.” Id.
during the government’s case in chief, but allowed the prosecution to impeach the defendant’s cross-examination testimony by introducing the evidence for impeachment purposes.\(^75\)

In reaching its decision the Court observed that “arriving at the truth is a fundamental goal of our legal system,”\(^76\) a proposition so fundamental that it is beyond dispute.\(^77\) The Court concluded, “It is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.”\(^78\)

Thus, despite the very special status of criminal defendants, both in terms of the constitutional rights they enjoy and the heightened protection they are accorded under the Rules of Evidence, “when defendants testify, they must testify truthfully or suffer the consequences.”\(^79\) The illegally seized evidence is admissible for impeachment purposes only,\(^80\) meaning that the jury may be instructed that it should consider the evidence only in evaluating the defendant’s credibility and not for any bearing the evidence may have on the merits of the case. The effectiveness of such an instruction is the subject of no small amount of skepticism,\(^81\) and yet the Court demonstrates a profound respect for the jury’s fact-finding capacity by admitting the otherwise inadmissible evidence so that the jury may consider the additional facts in seeking to find the truth.

The balancing of the rights of the defendant and the truth-seeking functions of the system is not limited to the Supreme Court line of authority represented by \textit{Havens}. Indeed, the “forfeiture by wrongdoing” exception to the hearsay rule, which is set forth in Rule 804(b)(6) of the Federal Rules of Evidence, provides yet another example of attempting to balance these competing interests.\(^82\) The Rule provides for the admission of relevant hearsay statements made by a declarant when the defendant “engaged or acquiesced in wrongdoing” which led to the declarant’s unavailability at the

\(^{75}\) See id. at 623.
\(^{76}\) Id. at 626 (citing Oregon v. Haas, 420 U.S. 714, 722 (1975)).
\(^{77}\) See id. (noting that “[t]here is no gainsaying” the fundamental importance of finding the truth).
\(^{78}\) Id. at 626–27.
\(^{79}\) Id. at 626.
\(^{80}\) See Mueller & Kirkpatrick, \textit{supra} note 32, § 6.45, at 537 (noting that “[w]hen a court admits otherwise excludable evidence as counterproof tending to contradict initial testimony, . . . the counterproof may have impeaching effect but cannot be taken as positive proof of whatever point it might logically tend to prove”).
\(^{82}\) The Rule provides as follows: “The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Fed. R. Evid. 804(b)(6).
The judge serves as the trier of fact for purposes of determining the preliminary question of whether the defendant is responsible for the declarant's absence, and the judge makes the determination using the preponderance of the evidence standard. The Rule is a straightforward application of basic principles of equity—no party should benefit from their own wrongful conduct. At the same time, however, the Rule implicitly recognizes that the admission of otherwise inadmissible hearsay evidence is preferable to loss of the evidence altogether. Thus, the provision advances the truth-seeking function of the Rules by ensuring that the fact-finder is not deprived of relevant and potentially valuable evidence.

The principle of forfeiture has specific application to criminal defendants in the Confrontation Clause context. In the Supreme Court's most recent decisions on the Confrontation Clause, Crawford v. Washington and Davis v. Washington, the Court held that defendants who engage in wrongdoing for the purpose of precluding a witness from testifying thereby forfeit their rights under the Confrontation Clause. As the Court found in Davis, the defendant's misconduct leads to the admission of evidence that would ordinarily be excluded.

II. THE ADVERSARY SYSTEM AND THE CRIMINAL DEFENSE LAWYER

A. The Adversary System

The adversary system rests on the ideal of opposing advocates, each representing their clients zealously within the bounds of the law before an impartial judge and a lay jury. The inculcation of the values of the adversary system begins early as lawyers are trained from the beginning of their legal education to argue both sides of an issue, implicitly establishing

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83. See id.
84. See id. advisory committee's note (noting that "[t]he usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule . . . seeks to discourage").
85. See Commonwealth v. Edwards, 830 N.E.2d 158, 167 (Mass. 2005) (observing that "the equitable principle, at the heart of the forfeiture by wrongdoing doctrine, [is] that a party may not gain advantage from his own wrong").
86. The hearsay exception extends to all hearsay statements made by the declarant, sworn and unsworn, provided they are relevant and satisfy the other requirements of the Rules, including the balancing test under Rule 403. See Mueller & Kirkpatrick, supra note 32, § 8.78, at 947.
89. See Davis, 126 S. Ct. at 2280 (concluding that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation"); Crawford, 541 U.S. at 62 (observing that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds").
90. See Davis, 126 S. Ct. at 2280.
a normative principle about their work: the lawyer’s task is to advocate for one side or the other (and it does not really matter which side), not to judge the outcome or to ultimately decide the correctness of the argument. Thus, lawyers learn that they are not responsible for the truth in any absolute sense, but rather are responsible for the advancement of their clients’ interests.

The recently released report by the Carnegie Foundation for the Advancement of Teaching about legal education\(^\text{92}\) observes that the intense focus in legal education on learning to think like a lawyer and the tendency to ignore “the ethical-social issues, embedded in the cases under discussion” has the undesirable effect of “teaching students that ethical-social issues are not important to the way one ought to think about legal practice.”\(^\text{93}\) In other words, the structure and pedagogy of the legal education process initiates students into the values of the adversary system, preparing students to become “amoral technician[s]” for their clients.\(^\text{94}\)

One student interviewed by the Carnegie report’s authors made this damning observation: “[L]aw schools create people who are smart without a purpose.”\(^\text{95}\)

Meanwhile, the widely embraced client-centered approach to lawyering contributes to a consumeristic mentality on the part of lawyers.\(^\text{96}\) An advocate’s decisions during the client representation focus on providing the client with “maximum satisfaction.”\(^\text{97}\) Many lawyers would view the question of the moral propriety of the client’s objective as far beyond their concern, provided that the client’s objective is lawful. As one partner reportedly told a young associate, a “lawyer[‘s] job is to say ‘yes’ to the client” and to avoid saying “‘no.”\(^\text{98}\)

In the practice of law this amorality is regularly reinforced. In each case there are at least two sides with often sharply disparate accounts of what happened. It is frequently impossible to “know” what happened with certainty. The truth of any particular case may be unknown and even unknowable. Lawyers learn that truth is elusive.\(^\text{99}\) This uncertainty inherent in the adversary system provides lawyers with a measure of


\(^{93}\) See id. at 140.

\(^{94}\) Wasserstrom, supra note 23, at 6.

\(^{95}\) Carnegie Report, supra note 92, at 142.


\(^{97}\) See id. at 19 (quoting David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach 261 (1991)).


comfort and refuge. They regularly remind themselves (as well as those outside the system) that they are not the judge or jury, and thus are not responsible for the outcomes of cases. They are not charged with finding "the truth" or with ensuring that justice is done.

The ethics rules reinforce the emphasis on client loyalty, directing lawyers to represent their clients "zealously." Thus, lawyers have a certain role to play, and that role is to do everything possible, within the bounds of the law, to advocate their client's position. The lawyer is "an amoral technician whose peculiar skills and knowledge . . . are available [to the client]."

B. The Partisan Advocate

This traditional understanding of the responsibility of the criminal defense lawyer follows directly from the nature and structure of the adversary system. The system preserves the "dignity of the individual," depending on each lawyer's competence, diligence, and commitment to the client's interests, among other features. As noted, the criminal defense lawyer's exclusive concern is for his client and in representing the client's interests as diligently as possible. In fulfilling these responsibilities,

100. See Model Rules of Prof'l Conduct pbl. cmt. 2 (2002) (stating that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"). Gerald Shargel, in his contribution to this Symposium, vigorously argues in favor of zealous advocacy, proudly proclaiming his membership in the "zealous advocate school" and "unabashedly embrac[ing] role morality." See Gerald L. Shargel, Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation, 76 Fordham L. Rev. 1263, 1266 (2007). In Shargel's world, the defense lawyer has no responsibility for the discovery of the truth at trial. He observes that "a trial may be a search for the truth, but I—as a defense attorney—am not part of the search party." Id. at 1267. Shargel's emphasis on the lawyer's duty of candor leads him to conclude that defense lawyers should inform their clients of the operation of Rule 608(b) of the Federal Rules of Evidence, which excludes extrinsic evidence offered to prove the witness's past untruthful conduct. Id. at 1275. While Shargel and I might find ourselves as members of different advocacy "schools," we do find agreement on the importance of lawyers using their power of persuasion with their clients. He identifies himself as a "strong believer in the power of negative persuasion," and he describes how he seeks to "deter [his] client from relying on Rule 608(b) to lie," id. at 1277, while I conclude that the best possible outcome in the client perjury situation is for defense lawyers to dissuade their clients from testifying falsely, see infra notes 245-46 and accompanying text.

101. See Wasserstrom, supra note 23, at 5–6 (opining that "the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it").

102. Id. at 6.

103. See Monroe H. Freedman, Lawyers' Ethics in an Adversary System 2 (1975). "The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination." Id. Additionally, "the Constitution has committed us to an adversary system for the administration of criminal justice. The essentially humanitarian reason for such a system is that it preserves the dignity of the individual, even though that may occasionally require significant frustration of the search for truth and the will of the state." Id. at 8.
lawyers maximize the autonomy of their clients. This is the so-called “Dominant View” of the defense lawyer’s role.\textsuperscript{104}

Perhaps the most noted proponent of this understanding of the defense lawyer’s responsibility is Professor Monroe Freedman. He has written widely and effectively about the virtues of the adversary system as the “most efficient and fair method[,] designed for determining [the truth].”\textsuperscript{105} He maintains that the lawyer’s personal knowledge of the truth in a case is “irrelevant.”\textsuperscript{106} Freedman concludes, “[A]s an advocate . . . you are forbidden to act upon your personal knowledge of the truth, as you might want to do as a private person, because the adversary system could not function properly if lawyers did so.”\textsuperscript{107} Freedman maintains profound confidence in the adversary system, arguing that preserving the dignity of the individual may require, on occasion, “significant frustration of the search for truth and the will of the state.”\textsuperscript{108}

A number of commentators have criticized Freedman’s excessive reliance on the adversary system, including Professor William Simon who espouses what he calls the “Contextual View” of lawyering.\textsuperscript{109} Under Simon’s approach, lawyers “should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.”\textsuperscript{110} “The idea of justice,” Simon notes, “invokes the lawyer’s simultaneous commitments to partisan advocacy and service as an ‘officer of the court’ to both sympathetic identification with clients and detachment from them.”\textsuperscript{111} In Simon’s view the lawyer should “develop a set of practices that tend, in the settings in which she works, to contribute to just resolutions.”\textsuperscript{112}

Resolution of the conflict between the duties owed to clients and the duties owed as officers of the court is heavily influenced by how much confidence one places in the adversary system to produce accurate results. To the extent that lawyers hold a robust confidence in the adversary system, such as the view espoused by Professor Freedman,\textsuperscript{113} they are more likely to emphasize their duty of loyalty to clients as the best means of serving the ends of the system. On the other hand, lawyers who view the adversary

\begin{footnotes}
\footnotetext[104]{See Simon, supra note 24, at 7 (describing the “Dominant View” of lawyering as follows: “[T]he lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim”).}
\footnotetext[105]{Freedman, supra note 103, at 3. Professor Monroe Freedman’s article in the \textit{Michigan Law Review} about the most difficult questions faced by criminal defense lawyers is particularly noteworthy. See generally Freedman, supra note 21.}
\footnotetext[106]{Freedman, supra note 103, at 53.}
\footnotetext[107]{\textit{Id.}}
\footnotetext[108]{\textit{Id.} at 8.}
\footnotetext[109]{See Simon, supra note 24, at 9.}
\footnotetext[110]{Id. Professor William Simon defines justice as including the “basic values of the legal system,” and uses the term justice interchangeably with “legal merit.” \textit{Id.} at 138.}
\footnotetext[111]{\textit{Id.} at 138–39.}
\footnotetext[112]{\textit{Id.} at 140.}
\footnotetext[113]{See Freedman, supra note 103, at 3.}
\end{footnotes}
CLIENT PERJURY

system as imperfect and see the system as merely one means toward the ultimate objective of justice, are more likely to recognize the need for them to act in the interests of justice when the system's core values are threatened.114

These questions are particularly complicated when they are applied to the criminal defense lawyer. For example, in light of the many important constitutional protections enjoyed by defendants, Freedman argues that the criminal defense lawyer should maintain the confidentiality of the defendant's intent to commit perjury and, in fact, should take an active role in eliciting the defendant's testimony even to the point of relying on the client's testimony in arguing the case to the jury.115 This view elevates the adversary system above truth seeking as it requires the lawyer to actively participate in a fraud on the court and relies on the jury to determine that a fraud has been committed, creating the very real risk that the jury may not get it right. Freedman's approach goes well beyond the approach adopted by the Model Rules.116

Thus, the issue is joined: should criminal defense lawyers view their relationship exclusively as one of loyalty to the client such that they act as though they know no one in the world other than the defendant,117 or is there more to the relationship? Make no mistake about it: loyalty to the client is a positive good and necessary for the healthy functioning of the adversary system. But, blind loyalty is a dangerous thing that leads lawyers to deceive, manipulate, and obstruct in the name of zealous advocacy.

One manifestation of the adversary system—reflecting its inherently competitive nature—is that lawyers come to view the client relationship in strictly strategic terms. The client is viewed not as a person, but as an object—a mere means—for lawyers to manage in maximizing their chances for victory. In truth, of course, the client is a person, flesh and blood, who needs an advocate and a friend, a strategist and a listening ear. In that moment of crisis, the lawyer is counselor, social worker, priest, friend, and

114. See Simon, supra note 24, at 140 (stating that under the “Contextual View” the responsibility of the lawyer for “substantive justice” depends on the reliability of the relevant procedures); see also Shaffer & Cochran, supra note 96, at 11–12 (noting that the adversary system does not work well in many cases and that “lawyers have a moral responsibility for what they know and for what they do”).

115. See Freedman, supra note 103, at 31. Freedman’s argument, in his own words, is as follows:

In my opinion, the attorney's obligation in [a perjury] situation would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward. Any other course would be a betrayal of the assurances of confidentiality given by the attorney in order to induce the client to reveal everything, however damaging it might appear.

Id.


117. Lord Henry Brougham of England famously described the lawyer’s “first and only duty” as “to save the client by all means...at all hazards and costs to other persons and to himself.” Monroe H. Freedman, Understanding Lawyer’s Ethics 65 (1990).
lawyer all rolled into one. The lawyer is an advocate, of course, but also a "minister in the temple of justice." The question then is how defense lawyers might go about the task of working out these two competing roles when they confront a client who insists on taking the stand and lying.

III. THE TRUTH AND CRIMINAL DEFENSE LAWYERS

The Model Rules of Professional Conduct, which have been adopted by most jurisdictions, set forth the ethical obligations of criminal defense lawyers. The latest iteration of the Model Rules was published in 2002 and this essay will limit its discussion to that version. Rule 3.3 of the Model Rules is the natural focal point of the lawyer's ethical responsibility when confronted with a client who the lawyer believes will testify falsely on the witness stand.

A. The Model Rules and a Lawyer's Duty of Candor

Rule 3.3 of the Model Rules specifically addresses the lawyer's duty of candor to the court. The Rule contains both mandatory and discretionary standards of conduct, including the following:

- A lawyer shall not knowingly make a false statement, fail to correct a false statement previously made, fail to disclose controlling authority adverse to the party's position, or offer evidence the lawyer knows is false.

- A lawyer may refuse to offer evidence (other than the testimony of a defendant in a criminal case) that the lawyer reasonably believes is false.

Thus, the mandatory prohibition only applies to evidence that the lawyer "knows" is false, while lawyers have discretion to decide whether to rely on evidence that the lawyer "reasonably believes" is false, but does not "know" to a certainty.

Courts disagree about the standard necessary to establish actual knowledge, though most courts have adopted the "firm factual basis"
test, which requires a showing of a "clear expression of intent to commit perjury" on the part of the defendant. The high threshold required to satisfy the actual knowledge standard provides lawyers with the perfect means of avoiding application of Rule 3.3 when necessary. In a litigated matter, what does the lawyer know to a certainty? Defense lawyers who view their role solely in terms of winning and/or who resist any sense of obligation or responsibility for truth or justice, can avoid their client’s perjury by rationalizing that they do not have sufficient certainty of the falsity of the defendant’s testimony.

Nonetheless, the Rules do unequivocally preclude lawyers from offering evidence that the lawyer knows is false. This standard would presumably preclude a defense lawyer from offering his client’s testimony in a narrative format if the lawyer knew the testimony was false. The commentary to the 2002 draft of the Model Rules acknowledges this clear result, while recognizing that lawyers may continue to offer narrative testimony in those state jurisdictions that permit its use.

In those circumstances in which the lawyer reasonably believes the client will lie, but does not “know,” the Model Rules dictate that the lawyer must allow the defendant to testify if the defendant chooses to do so. The Rule dictates that, in light of the vital significance of the defendant’s right to testify, defendants should receive the benefit of the doubt when deciding whether they will be able to exercise that right. Thus, many of the truly perplexing ethical dilemmas encountered by lawyers in cases of possible client perjury arise in the gaps left by the rules of ethics, as lawyers seek to balance their role as advocates and as officers of the court.

B. Client Perjury and a Defense Lawyer’s Dilemma

When criminal defense lawyers are confronted with clients who intend to lie, they face the perfect storm of ethics issues. Defense lawyers have a duty of confidentiality to their clients, which precludes them from disclosing client communications, and simultaneously owe a duty of candor to the court, which forbids them from knowingly offering false testimony at trial. Criminal defendants enjoy a constitutional right to testify and under the Model Rules they control whether or not they testify untruthfully.

124. See Long, 857 F.2d at 445; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353 (1987) (stating that the knowledge requirement in Model Rule 3.3 means “actual knowledge of the fact in question” and “knowledge may be inferred from circumstances” (emphasis omitted)).
125. Model Rules of Prof’l Conduct R. 3.3(a)(3).
126. See id. cmt. 7.
127. See id. R. 3.3(a)(3).
128. Id. R. 1.6.
129. Id. R. 3.3.
Thus, there are direct conflicts between the lawyer’s loyalty to his client (as manifested by the duty of confidentiality) and the lawyer’s duty of candor to the court, as well as conflicts between the heightened protection accorded to criminal defendants and the system’s overarching goal of finding the truth.

1. Convincing the Client to Tell the Truth

a. Remonstration

More than sixty years ago, the Supreme Court noted the severe consequences that may follow from the admission of perjured testimony: “All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.”

Four decades later in *Nix v. Whiteside* the Court faced the question of a defense lawyer’s obligations when confronted with a client who intended to commit perjury on the witness stand. Emanuel Whiteside, charged with murder, told his lawyer, only one week before trial, that he had seen something metallic in the victim’s hand before he stabbed the victim. This new disclosure was not supported by any other evidence in the case and appeared to Whiteside’s lawyer, Gary Robinson, to be manufactured as part of defendant’s effort to bolster his self-defense claim. Whiteside admitted to Robinson, “If I don’t say I saw a gun, I’m dead.”

Robinson’s response to his client’s suspicious disclosure of critically significant information just before trial was to forcefully counsel him about the consequences of testifying under oath in court that he had seen something metallic in the victim’s hand. Consistent with the requirements of the rules of ethics, Robinson attempted to remonstrate with

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131. *See* Model Rules of Prof’l Conduct R. 1.2(a) (providing that, in criminal cases, a “lawyer shall abide by the client’s decision, after consultation with the lawyer... whether the client will testify”).


133. *See* *Nix v. Whiteside*, 475 U.S. 157, 160–61 (1986). Prior to the defendant’s eve-of-trial confession, he had consistently maintained that he did not see a gun but was convinced that the victim had a gun. *Id.*

134. *See id.* at 161.

135. *Id.* The complete statement, according to Gary Robinson, was, “In Howard Cook’s case there was a gun. If I don’t say I saw a gun, I’m dead.” *Id.*

136. *See id.* According to Robinson’s subsequent testimony about his exchange with Emanuel Whiteside, he told the defendant the following: [W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it;... I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony. *Id.*
his client. Instead of viewing his responsibility solely in terms of client loyalty—that his task was to do the client’s bidding and to remove obstacles from the client’s path—Robinson counseled his client, Whiteside, that it would constitute perjury if Whiteside testified to having seen something metallic. He made it clear that if Whiteside insisted on committing perjury Robinson would withdraw as his lawyer, and that if Whiteside actually testified falsely, Robinson would be forced to reveal the perjury to the court. Robinson’s remonstration was successful. Whiteside testified at trial, but he did not claim to have seen something metallic in the victim’s hand. To the contrary, he admitted that he did not see a gun when asked during cross-examination.

The Supreme Court rejected Whiteside’s claim of ineffective assistance of counsel, holding that Robinson’s effort to persuade Whiteside to testify truthfully did not deprive him of his right to counsel or his right to testify truthfully. The Court left no doubt that the defendant’s constitutional right to testify “does not extend to testifying falsely.” And in response to those who might argue that the Court’s opinion puts the lawyer in the position of judge or jury, the Court observed, “The suggestion sometimes made that a ‘lawyer must believe his client, not judge him’ in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.”

b. Respect

Successful remonstration with the client is the “ideal solution” to the client perjury dilemma in that “it involves neither the presentation of perjured testimony nor disclosure of client confidences.” Despite the many areas of disagreement and uncertainty as it relates to the ethical obligations of a criminal defense lawyer faced with a client who intends to

137. See Model Rules of Prof’l Conduct R. 3.3 cmt. 10 (2002) (commenting that when confronted with false testimony from a witness, the lawyer’s “proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence”); see also Panel Discussion, supra note 98, at 985–97. Professor Stephen Carter, discussing what it means to be a “professional,” remarked that lawyers as professionals “assert allegiance to a morally admirable ethic that makes a strong claim on us, that in turn makes us different from other people,” id. at 990, which should include telling a client when necessary, “you are morally wrong,” id. at 996.
138. See Nix, 475 U.S. at 161.
139. See id.
140. Id. at 161–62.
141. Id. at 173–74.
143. Id. at 171.
lie, one thing is clear: lawyers must seek to persuade their clients of the necessity of providing truthful testimony to the finder of fact.\textsuperscript{145}

Atticus Finch is lifted up by many as a virtuous lawyer worthy of emulation in part because of his commitment to truth.\textsuperscript{146} Finch called his client, Tom Robinson, to testify at trial in an effort to rebut the charge that he had raped a white woman.\textsuperscript{147} For an African-American defendant in the 1930s, few charges could be more damning. Robinson could not truthfully deny that he had been with the victim at the time of the alleged rape, but he could truthfully claim that it was the victim who made sexual advances toward him, not the other way around.\textsuperscript{148} Naturally, Robinson was reluctant to tell his story in court in light of the conventions of the day.\textsuperscript{149} Thus, when asked by Finch what had happened, Robinson hesitated, uncertain that he could, or should, reveal the truth.\textsuperscript{150} At that point, Finch reminds Robinson, "[Y]ou're sworn to tell the whole truth. Will you tell it?"\textsuperscript{151}

While the circumstances faced by Finch differ from the typical client perjury scenario, it was no simple matter for Tom Robinson to offer his testimony. His truth placed him in grave peril. Yet Finch had the kind of relationship with Robinson that he was able to persuade the defendant to speak the truth when the moment came.\textsuperscript{152} In one remarkable scene, Finch places his own life at risk by standing guard outside Robinson's jail cell, facing down an angry mob that is out for his client's blood.\textsuperscript{153} This powerful demonstration of Finch's care and respect for Robinson deepened their relationship and enhanced their trust. Thus, when Robinson took the stand later at trial and faced a crisis over whether or not he should tell the truth,\textsuperscript{154} Finch was able to persuade Robinson to tell the whole truth, drawing on the strength of their relationship.\textsuperscript{155}

\textsuperscript{145.} See Model Rules of Prof'l Conduct R. 3.3 cmt. 10 (2002).
\textsuperscript{146.} See generally Thomas L. Shaffer, The Moral Theology of Atticus Finch, 42 U. Pitt. L. Rev. 181 (1981) (arguing that Finch's regard for the truth makes him a hero, because he is not blinded by the prejudices of his community and is able to tell the truth to the people of Maycomb, Alabama).
\textsuperscript{147.} Lee, supra note 19, at 202–07.
\textsuperscript{148.} See id. at 206.
\textsuperscript{149.} See Shaffer, supra note 146, at 184 (noting that in Maycomb, Alabama, in 1935 "[t]here were conventions for—limits on—defenses of black people" and no one anticipated a defense that attacked the defendant's white accusers).
\textsuperscript{150.} See Lee, supra note 19, at 205–06. Upon being asked about the critical events, Robinson came to "a dead stop," looked around the courtroom, and ran his hand nervously over his mouth. See id. at 206.
\textsuperscript{151.} Id. at 206. In response to the prompt from Finch, the defendant reveals that the alleged victim "sorta jumped on me" and "hugged me round the waist." Then he testified as follows: "She reached up an' kissed me 'side of th' face. She says she never kissed a grown man before an' she might as well kiss [me]." Id.
\textsuperscript{152.} See id. at 194.
\textsuperscript{153.} See id. at 161–65.
\textsuperscript{154.} See id. at 206.
\textsuperscript{155.} See id.
An ethic of care and concern should mark a lawyer's representation of every client. Regardless of clients' ability to pay or their current situation in life or the nature of the charges lodged against them by the state, lawyers should demonstrate "a profound sense of respect" for their clients, recognizing each person's human dignity.\textsuperscript{156} As demonstrated by both Atticus Finch and Gary Robinson, the lawyer for Whiteside, care and respect for clients is not the same as blind loyalty to them.

The Court in \textit{Nix} did not specify how to solve the ethical conundrum created when the client insists on testifying falsely, giving to the states that difficult question.\textsuperscript{157} In the years since \textit{Nix} was decided, the complexity of the ethical dilemma has produced disagreements among the ethics codes of the several states on any number of issues, such as whether the defendant can testify in a narrative format\textsuperscript{158} and the amount of certainty required before a lawyer "knows" that the client will testify falsely.\textsuperscript{159} As a result, state courts have upheld a number of different responses to the client perjury dilemma as described below.

2. Refusing to Allow the Client to Testify

Perhaps the most difficult and complicated scenario involving client perjury is when the defendant rejects his lawyer's advice and insists on providing testimony that the lawyer knows will be false. What are the defense lawyer's ethical and moral responsibilities to the client, to the court, and to the cause of justice in that situation?

\textit{a. Control}

In two cases, \textit{United States v. Curtis},\textsuperscript{160} decided two years before \textit{Nix v. Whiteside}, and \textit{Stephenson v. State},\textsuperscript{161} decided six years after, defense

\begin{itemize}
\item 157. Nix v. Whiteside, 475 U.S. 157, 176–77 (1986) (Brennan, J., concurring) ("[T]he court cannot tell the states or lawyers in the several states how" to act because it lacks constitutional or statutory jurisdiction over the matter of ethical standards).
\item 158. The latest version of the Model Rules appears to prefer that states prohibit a lawyer from knowingly putting a client who intends to commit perjury on the witness stand, though recognizing that some jurisdictions require the narrative approach, \textit{see} Model Rules of Prof'l Conduct R. 3.3, cmt. 7 (2002), and the American Bar Association Defense Standards prohibit the narrative approach explicitly, \textit{see} Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-7.5, and related commentary (3d ed. 1993). A number of states continue to allow or require the use of narrative testimony. \textit{See}, e.g., People v. Guzman, 755 P.2d 917 (Cal. 1988); People v. DePallo, 754 N.E.2d 751, 752–53 (N.Y. 2001) (approving of defense counsel's use of narrative testimony for defendant).
\item 159. \textit{See}, e.g., United States v. Long, 857 F.2d 436, 445–46 (8th Cir. 1988) (adopting "firm factual basis" test for attorney's requisite level of knowledge); People v. Calhoun, 815 N.E.2d 492, 499–500 (Ill. App. Ct. 2004) (requiring defense counsel to make "good-faith determination that defendant was going to commit perjury").
\item 160. 742 F.2d 1070 (7th Cir. 1984).
\end{itemize}
lawyers who were confronted with perjurious clients refused to put their clients on the witness stand and in both cases the courts approved of the lawyers’ conduct. In *Stephenson*, the defendant was prosecuted for cocaine trafficking and defense counsel claimed that the defendant admitted to her that the cocaine found in his car in fact belonged to him. Thereafter, the defendant agreed to enter a plea of guilty, but changed his mind on the eve of trial and sought a change of counsel. The defense counsel sought a continuance to accommodate the defendant’s request, but the court denied the motion as well as the request for new counsel upon learning that the reason was that the defendant “wanted to testify falsely.” The case went to trial and the defense lawyer did not call the defendant at trial “because she believed he would commit perjury,” despite the fact that the defendant wanted to testify so that he could tell the jury that the cocaine belonged to a third party. The Georgia Court of Appeals upheld the defense counsel’s decision not to put the defendant on the stand, contrary to the defendant’s wishes, relying heavily on the Supreme Court’s announcement in *Nix v. Whiteside* that a criminal defendant has “no right whatever . . . to use false evidence.”

The circumstances in *Curtis* were substantially similar to *Stephenson*: defendant confessed his guilt to his lawyer, requested that his lawyer assist him in putting on evidence of his innocence (in this case, through defendant’s testimony about an alibi), and disputed after the trial his lawyer’s claim that the defendant confessed his guilt to the lawyer in the first instance. In *Curtis*, the defense lawyer did not introduce the alibi evidence at trial or call the defendant to testify based upon his concern that the defendant would commit perjury if he testified and that he would damage his case if he took the stand.

Despite the fact that the U.S. Court of Appeals for the Seventh Circuit issued its opinion in *Curtis* before the Supreme Court’s opinions in *Nix* and *Rock v. Arkansas*, the court correctly ruled that the defendant enjoyed a

162. See *Curtis*, 742 F.2d at 1076 (holding that because the defendant “would have testified perjuriously, counsel’s refusal to put him on the witness stand cannot be said to have violated Curtis’ constitutional rights”); *Stephenson*, 424 S.E.2d at 818 (concluding that under *Nix* the defendant had no right to counsel’s assistance in committing perjury).

163. See *Stephenson*, 424 S.E.2d at 817.

164. See id.

165. Id. The court’s opinion does not provide any information about the nature of the defense counsel’s revelation of the client’s intention to commit perjury, nor does it discuss the propriety of the disclosure. See id.

166. See id. The defendant denied confessing his guilt to his lawyer. Id.

167. See id. at 818 (quoting *Nix v. Whiteside*, 475 U.S. 157, 173 (1986)).


169. See *Curtis*, 742 F.2d at 1072–73.

170. See id. at 1073. In particular, the defense lawyer was concerned that the defendant’s two prior convictions for armed robbery would be admitted if the defendant testified, thus “irreparably” damaging the defendant’s case. See id.

constitutional right to testify regardless of the defense lawyer’s preferences.\textsuperscript{172} Yet the court in \textit{Curtis} acknowledged that the defendant’s right only extended to truthful testimony, not to untruthful testimony.\textsuperscript{173} Therefore, inasmuch as the trial court had concluded based upon the testimony given at an evidentiary hearing that the defendant had indeed confessed his guilt to his lawyer and that the defendant’s testimony would have been perjurious, “counsel’s refusal to put him on the witness stand cannot be said to have violated Curtis’ constitutional rights.”\textsuperscript{174}

\textbf{b. Autonomy}

The opinions in \textit{Stephenson} and \textit{Curtis} stand out as examples of courts upholding decisions by defense lawyers to preclude their clients from testifying despite the defendant’s desire to take the stand. These cases stand in contrast to cases such as \textit{People v. Johnson}\textsuperscript{175} decided by the California Court of Appeals in which the court overturned the trial court’s decision to refuse to allow the defendant to testify because defense counsel represented that the witness would testify falsely.\textsuperscript{176} In \textit{Johnson}, the court of appeals held that the defendant should have been allowed to testify by narrative. It reversed the trial court for four reasons: (1) the trial court substituted the judgment of “defense counsel for the jury as the judge of witness credibility”; (2) defense counsel’s decision was premature because “there is always the possibility the defendant will change his mind and testify truthfully”; (3) the determination requires a minitrial before the trial judge, which forces the attorney to essentially testify against his client; and (4) the defendant was completely denied his right to testify.\textsuperscript{177}

\textit{Johnson} rests heavily on the principle of individual autonomy. It is the defendant’s choice whether to testify, not the lawyer’s, and thus, only the defendant’s choice counts even if everyone with knowledge of the situation knows that the testimony will be false. The narrative format, which is discussed in more detail below, provides a means of preserving the

\textsuperscript{172.} See \textit{Curtis}, 742 F.2d at 1076. The court held, “If a defendant insists on testifying, however irrational that insistence might be from a tactical viewpoint, counsel must accede. We hold that a defendant’s personal constitutional right to testify truthfully in his own behalf may not be waived by counsel as a matter of trial strategy.” \textit{Id.}

\textsuperscript{173.} See \textit{id.} (noting that the defendant “has no constitutional right to testify perjuriously”).

\textsuperscript{174.} \textit{Id.}

\textsuperscript{175.} 72 Cal. Rptr. 2d 805 (1998).

\textsuperscript{176.} See \textit{id.} at 634. During an in camera hearing with the judge, defense counsel advised the trial judge that he was “ethically barred from calling [the defendant] as a witness under the law as I have come to know it and very specifically researched it regarding this particular issue.” \textit{Id.} at 614. The trial judge, after noting that it was difficult to rule because of the limited information announced that the defendant “will not be called . . . over his objection.” \textit{Id} at 613–14. Despite the appellate court’s determination that the trial judge’s decision violated the defendant’s right to testify, the appellate court ruled that the error was harmless beyond a reasonable doubt. \textit{See id.} at 636.

\textsuperscript{177.} See \textit{id.} at 626.
defendant’s ability to testify while minimizing the defense lawyer’s participation. The court in *Johnson* also rests its decision, in part, on the fact that the defendant never actually took the stand, and thus, was not formally confronted with his obligation to tell the truth.178 Under Rule 603 of the Federal Rules of Evidence witnesses must swear or affirm that they will testify truthfully in order to be competent to testify.179 The oath is intended to “awaken the witness’ conscience” such that the witness will understand the seriousness of the occasion.180 The extent to which the oath effectively deters witnesses from lying when the witness approaches the witness stand with the intent to testify falsely seems questionable at best and this is perhaps especially true with criminal defendants who may perceive that they have little or nothing to lose from testifying falsely.

c. Resistance

Perhaps the most remarkable aspect of *Curtis* and *Stephenson* is that they each involve lawyers who refused to follow the will of their clients, and, in fact, told their clients, “No—you may not testify if you are going to commit perjury.” Contrary to the dominant view of lawyering, under which the lawyer is something akin to a “yes man,” there are circumstances when the lawyer must be prepared to tell the client “no” and to refuse to cooperate in the client’s plans. Professor Stephen Carter notes that lawyers, as professionals, should “assert allegiance to a morally admirable ethic that makes a strong claim on [them], that in turn makes [them] different from other people.”182 Part of that difference, Carter argues, is for lawyers to resist the consumeristic urges that push lawyers to serve the interests of their clients with little question or resistance. One of the most difficult things for a lawyer to do, but nonetheless one of the most vitally important, is to be willing to say to a client, “‘You are wrong’... ‘you are morally wrong.’”183 Carter concludes that, as professionals, “it matters deeply to the lawyer what the client is doing and how the client is doing it.”184

In the client perjury situation, of course, the rules of ethics require the lawyer to seek to dissuade the client from testifying falsely, as discussed earlier.185 But that is one step removed from telling clients that their

178. See id.
180. Id.
181. See Mueller & Kirkpatrick, supra note 32, § 6.6, at 430 (noting that the purpose of the oath is “to impress on the witness the duty to speak the truth”).
182. Panel Discussion, supra note 98, at 990 (claiming that lawyers should be willing to say to themselves, “We are different; being a lawyer makes me a different person than I would be were I not a lawyer” (internal quotation marks omitted)).
183. Id. at 996.
184. Id. Stephen Carter states that he finds unpersuasive “the claim that lawyers have an obligation to participate in the client’s wrongness without speaking up or trying to change it.” Id.
185. See Model Rules of Prof’l Conduct R. 3.3 cmt. 10 (2002).
CLIENT PERJURY

proposed course of action is not only contrary to the law and contrary to the ethics rules, but it is also contrary to basic standards of morality. The former is comparatively easy because the rules require it, but the latter is much more difficult because lawyers do not see it as within their responsibility to critique the morality of their clients' choices.

At the same time, a lawyer's judgments about the moral rightness or wrongness of a client's conduct should not be dispensed with lightly. While lawyers must be willing to speak the truth to their clients, they must also remember that they are fallible and that their judgments are not absolute. Being mindful of their fallibility—maintaining a measure of humility—is essential. Humility does not fit the macho "hired gun" image of lawyers that many seem to want to perpetuate. Yet this trait is of particular importance when determining whether the client's expected testimony is in fact false based on what the lawyer knows. Lawyers should not hide behind a veil of uncertainty as a justification for going along with a client's perjurious plans, but should be appropriately wary of claiming some kind of moral superiority in the representation.

3. Withdrawing to Avoid Participation in the Fraud

Another alternative means of addressing the defendant's schemes of deception and intrigue is to withdraw from the representation altogether, although withdrawal is a remedy of last resort. Ordinarily, withdrawal is not a realistic option because the issue only arises on the eve of or even during the trial as the defendant confronts the reality of his or her circumstances and withdrawal would cause an extreme hardship to the client. Perhaps the more important question is whether withdrawal really solves the problem even in those rare instances when it is allowed. Withdrawal may simply pass the ethical dilemma on to another lawyer (who may never learn that the testimony is false), rather than actually addressing the problem.

a. Abandonment

In Brown v. Commonwealth, the lawyer for Karlos Brown believed that his client, the defendant, who was charged in a Kentucky trial court

186. See William J. Stuntz, Christian Legal Theory, 116 Harv. L. Rev. 1707, 1741, 1745 (2003) (book review) (noting that pride in lawyers leads to certainty, blindness, and self-display, whereas humility "always sees the possibility of its own mistake").

187. See Model Rules of Prof'l Conduct R. 3.3 cmt. 15 (stating that "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" then a request to withdraw may be required).

188. See, e.g., Nix v. Whiteside, 475 U.S. 157, 161 (1986) (stating that the defendant revealed the new (and presumably false) information to his attorney about one week before trial).

189. 226 S.W.3d 74 (Ky. 2007).
with possession and trafficking of cocaine while in possession of a firearm, among other charges, would commit perjury if he testified.\textsuperscript{190} The defense lawyer, after unsuccessfully remonstrating with his client, chose to disclose his concerns to the court. Thus, before the close of the prosecution’s case in chief, the defense lawyer revealed to the court in rather cryptic terms that his client wanted to present evidence “that was not consistent with [the lawyer’s] investigation of the case.”\textsuperscript{191} The lawyer advised the court that the defendant’s plans created a conflict for him such that he could not deliver his planned opening statement\textsuperscript{192} or elicit the defendant’s testimony.\textsuperscript{193}

The trial judge called a recess to consult the Rules of Professional Conduct, specifically Rule 3.3 and its commentary. Afterwards, the judge spoke directly to the defendant (out of the presence of the jury and prosecutors), advising him of his options and directing him to consult with his lawyer before deciding how he would proceed.\textsuperscript{194} The judge advised the defendant that one matter he should consider was whether his lawyer would stay in the courtroom during the defendant’s testimony or would leave the courtroom altogether. The defense lawyer told the trial judge that he had informed the defendant that “it might make things worse” if he remained in the courtroom during the defendant’s testimony.\textsuperscript{195}

After the prosecution concluded its case, the defense lawyer left the courtroom, and remained absent for the remainder of the trial, including the defendant’s testimony and closing arguments, returning only for the sentencing hearing.\textsuperscript{196} The judge advised the jury that the defendant had chosen to represent himself from that point forward.\textsuperscript{197} The defendant testified in narrative format to his version of events and was cross-examined by the prosecutor. He did not call any witnesses in his defense, although he did deliver a closing argument.\textsuperscript{198} Remarkably, the jury returned a verdict of not guilty on four of the six counts, finding the defendant guilty on only

\textsuperscript{190} See id. at 89 (Scott, J., dissenting). The six counts against the defendant included (1) trafficking a controlled substance in the first degree (cocaine) while in the possession of a firearm; (2) trafficking a controlled substance in the first degree (cocaine); (3) illegal possession of a controlled substance in the first degree (cocaine) while in the possession of a firearm; (4) illegal possession of a controlled substance in the first degree (cocaine); (5) tampering with physical evidence; and (6) driving on a permit without a licensed operator. Id. at 90.

\textsuperscript{191} Id. at 77 (majority opinion).

\textsuperscript{192} Id. Apparently, defense counsel had reserved his opening statement until the conclusion of the prosecution’s case as he had every right to do. The ex parte conference with the court took place near the conclusion of the prosecution’s case in chief. See id.

\textsuperscript{193} Id.

\textsuperscript{194} Id.

\textsuperscript{195} Id.

\textsuperscript{196} Id. at 78.

\textsuperscript{197} Id. The defense counsel remained on call nearby in the event he was needed. See id.

\textsuperscript{198} See id.
the counts of illegal possession of a controlled substance and driving on a
permit without a licensed operator.\textsuperscript{199}

Nonetheless, the defendant appealed the conviction based upon his lawyer’s absence from the courtroom during the defense’s case in chief, and the Kentucky Court of Appeals affirmed the trial court’s unorthodox procedure.\textsuperscript{200} The Kentucky Supreme Court, while acknowledging the trial court’s “heroic efforts to guard all parties’ rights in a very difficult scenario,” reversed the lower court because the trial judge had allowed the defense counsel “to completely abandon” the defendant.\textsuperscript{201}

The majority in \textit{Brown} reversed the trial court because the defendant had been deprived of his constitutional right to counsel.\textsuperscript{202} The concurring justices wrote separately to express two points of departure from the majority. First, the concurrence asserted that the majority had erred in approving the defense lawyer’s “cryptic” disclosure to the trial court about the nature of the defendant’s expected testimony. The concurrence asserted that counsel’s disclosure should be full and complete so that the trial judge is not left to guess about the perceived problem troubling the lawyer.\textsuperscript{203} Second, the concurring justices argued that the defense lawyer must actually call the defendant to the witness stand, even though the lawyer believes the defendant will commit perjury, because “[t]here is always the possibility—remote as it may be—that the client will have a change of heart between counsel table and the witness stand.”\textsuperscript{204}

The dissenting justice, on the other hand, found the absence of the defense counsel to be entirely appropriate because the defendant’s conduct, as alleged by the defense lawyer, gave rise to a “limited forfeiture” of the defendant’s right to counsel.\textsuperscript{205} The defense lawyer’s duty to the court as “a minister in the temple of justice . . . [is] to aid [the court] in doing justice and arriving at correct conclusions.”\textsuperscript{206} The dissent emphasized that the paramount role of the trial is truth seeking, which in this case justified the defense lawyer’s temporary withdrawal from representation.\textsuperscript{207}

\textsuperscript{199} See id. at 90 (Scott, J., dissenting).
\textsuperscript{200} Id. at 78 (majority opinion). The court of appeals held that the defendant “waived his right to counsel when he proceeded against his attorney’s advice, and that his attorney had acted properly in not assisting him to present false testimony.” Id.
\textsuperscript{201} Id. at 86 (stating that the trial court’s “only error” was allowing the defense lawyer to leave). The Kentucky Supreme Court seemed to go out of its way to express its appreciation for the trial court’s effort to make the proper decision, stating, “Although valiantly trying, the court did not properly balance all the competing interests in this trial as the process set forth above would have required. Given the complexity of the issues, and the lack of time inherent in the trial process, this is understandable.” Id. at 85.
\textsuperscript{202} See id. at 85–86.
\textsuperscript{203} See id. at 86–87 (Cunningham, J., concurring).
\textsuperscript{204} Id. at 87.
\textsuperscript{205} See id. at 88 (Scott, J., dissenting).
\textsuperscript{206} Id. at 95.
\textsuperscript{207} See id.
b. Forfeiture

The dissenting justice’s use of “forfeiture” language in his opinion evokes the “forfeiture by wrongdoing” provision in the Federal Rules of Evidence.\(^2\) The defendant, by choosing to testify falsely, engages in wrongful conduct, and therefore “forfeits” his right to testify. The defendant has a constitutional right to testify, but no right to testify falsely.\(^2\) Defendants have the right to confidential communications with their lawyers, but not the right to the protection of communications made to advance a crime or fraud.\(^2\) The defendant’s conduct in seeking to enlist the lawyer to participate in his perjurious scheme is the same kind of conduct addressed by the forfeiture hearsay provision. In each instance the defendant seeks to gain an advantage by obstructing justice. Thus, the “forfeiture by wrongdoing” analysis may provide a helpful reference point for analyzing cases involving client perjury.\(^2\)

As evidenced by the Kentucky Supreme Court’s reversal of the trial judge and the court of appeals, defense counsel’s withdrawal from representation during trial, even, or perhaps especially, on a temporary basis, does not comport with principles of good practice for courts.\(^2\) While this approach does have the advantage of ensuring that defense lawyers are completely insulated from participation in the misconduct contemplated by their clients, it results in the total abandonment of the defendant at the moment of greatest need, during the defendant’s own testimony and the presentation of the defendant’s own evidence.\(^2\)

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210. See McCormick on Evidence, supra note 40, § 95, at 147 (noting that “under modern authority . . .the [attorney-client] privilege does not extend to communications between attorney and client where the client’s purpose is the furtherance of a future intended crime or fraud”); see also Model Rules of Prof’l Conduct R. 1.6(b)(2) (2002).
211. See generally McCormick on Evidence, supra note 40, § 1.1 (noting that privileges are “the prime example” of evidence rules that are designed to “further substantive policies unrelated to the matter in suit”).
212. As the majority in Brown v. Commonwealth concluded, the defense counsel’s withdrawal from the courtroom during the defendant’s testimony violated the defendant’s right to counsel. 226 S.W.3d 74, 85 (Ky. 2004). In United States ex rel. Wilcox v. Johnson, the U.S. Court of Appeals for the Third Circuit held that the defendant was denied his right to counsel and his right to testify when the trial judge advised the defendant that, if he chose to testify contrary to the wishes of his lawyer, the judge would allow the lawyer to withdraw and the defendant would be forced to proceed without counsel. 555 F.2d 115, 120 (3d Cir. 1977).
213. See Stuntz, supra note 186, at 1733. Professor William Stuntz identifies empathy as being “most needed” on the part of criminal defense lawyers, but “in shortest supply.” Id. The need may be so great in criminal defense work at least in part because of the excessive case loads handled by appointed counsel and the lack of adequate resources available to them. Stuntz observes, “[A] typical indigent defendant receives not an advocate able and willing to make the best case for him, but an overworked bureaucrat whose only realistic option is to plead the case out as quickly as possible.” Id. at 1731.
4. Participating in the Client’s Perjury

A fourth possible response to client perjury is for the lawyer to put the defendant on the stand, and thus, to participate, either actively or passively, in the scheme. Active participation in presenting false testimony is directly contrary to the rules of ethics, at least when the lawyer “knows” of the falsity. The narrative approach, on the other hand, in which defendants testify without questioning by counsel, is permissible in some jurisdictions and provides a means for lawyers to avoid active participation in eliciting the false testimony, while allowing the defendant the opportunity to testify.214 The defense lawyer, under this alternative, must refrain from relying on or arguing any false evidence to the jury during closing argument.215

a. Narrative Answers

While the use of narrative testimony does minimize the lawyer’s participation in the client’s conduct, it does not completely remove defense counsel from the process. The lawyer remains in the courtroom and is expected to object during the defendant’s cross-examination, at least with regard to matters of form or questions that are unrelated to the false testimony. Moreover, the lawyer continues the representation as to all other matters.216 The narrative approach is approved by the courts of a number of jurisdictions—including California217 and New York218—though courts regularly acknowledge that it is merely the best of several unattractive options.219 In People v. Johnson, the court described the approval of the narrative approach as follows:

[W]e believe the narrative approach represents the best accommodation of the competing interests of the defendant’s right to testify and the attorney’s obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role.220

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215. See id. at 419–20 (noting that counsel is expected to refrain from “referring to the suspected falsehoods” during opening statements and closing argument).
216. See, e.g., Brown, 226 S.W.3d at 84.
220. Id.
The lawyer’s passive participation in the defendant’s testimony is a point of criticism for some.\footnote{221} In fact, perhaps one indication of the genius of the narrative approach is that critics complain that the approach is both unfair to defendants and unfair to the system.\footnote{222} Some commentators, including notably Professor Freedman, argue that the defense lawyer should not use the narrative approach because it requires the disclosure of privileged communications in violation of Model Rule 1.6, and it compromises the lawyer’s representation of the defendant.\footnote{223} Some commentators have suggested that Freedman has not gone far enough.\footnote{224}

At the same time, others complain that the narrative approach compromises the search for the truth in that it allows defendants to gain the admission into evidence of false and perjurious testimony which may lead to an erroneous verdict, and it also places the lawyer in the position of participating in the presentation of the testimony, though in a relatively passive manner. Under the narrative approach, the attorney still calls the witness to the stand and initiates the testimony with some general question. Defense lawyers may, on occasion, stand at counsel table during the testimony, thus enhancing the sense of their participation.\footnote{225} Yet still other critics claim that the narrative approach is unfair to defendants because it sends a clear signal to the jury that the defendant’s testimony is false and should not be believed, thus compromising the defendant’s ability to present its case.\footnote{226}

Considered from an evidentiary perspective, the narrative approach raises a number of interesting questions. Perhaps most notable is the reliance of the narrative approach on the finder of fact—typically juries, of course—to sort out the proper weight that should be given to the defendant’s testimony and to return a true and just verdict. Implicit in the narrative approach is a rather profound measure of trust in the jury’s ability to serve as an evidentiary safeguard. As discussed above, in \textit{Havens} and related cases, the Court has emphasized the need for safeguards to ensure the truthfulness of testimony, including full and vigorous cross-examination, and has heavily relied on the jury’s role as judge of the credibility of witnesses.\footnote{227} Jurisdictions that allow the use of narrative testimony tend to emphasize

\footnote{221. \textit{See, e.g.}, State v. Stephenson, 424 S.E.2d 816, 818 n.1 (Ga. Ct. App. 1993) (noting that allowing defendant to “testify in narrative form would constitute the attorney’s participation in fraud, and thus is no answer”).}


\footnote{223. \textit{See} Freedman, \textit{supra} note 103, at 37, 40–41.}

\footnote{224. \textit{See} Silver, \textit{supra} note 214, at 355 (arguing that “[p]ermitting counsel to call a criminal defendant whom she believes will testify untruthfully may, in the end, actually advance the adversarial search for truth”).}

\footnote{225. \textit{See} Commonwealth v. Mitchell, 781 N.E.2d 1237, 1245 (Mass. 2003) (noting that “[t]he judge instructed the defendant’s trial counsel to remain standing during the defendant’s narrative testimony on direct”).}

\footnote{226. \textit{See, e.g.}, Freedman, \textit{supra} note 103, at 37.}

\footnote{227. \textit{See supra} notes 73–81 and accompanying text.}
that it should not be left up to defense counsel or the court whether the defendant's testimony is false, but rather that the jury should perform that task.\textsuperscript{228}

The concern that jurors may draw negative inferences against defendants because of the narrative format, which is different from other forms of testimony and thus suggests something improper about the defendant, is largely speculative. The Rules of Evidence entrust to jurors decision-making responsibility on issues where their common experiences are best utilized, such as credibility questions, but limit their decision making in other areas where they may be ill equipped for the task, such as with hearsay or character evidence.\textsuperscript{229} When it comes to narrative testimony, jurors have almost no basis for evaluating the significance of the narrative format one way or the other. The form of witness testimony is a matter about which jurors have little preformed knowledge, and thus the most one could say is that the impact of narrative testimony on jurors is unpredictable. A juror might well conclude that the narrative is a special device used for defendants\textsuperscript{230} or might speculate that there is some procedural reason for the format that is unrelated to the defendant's testimony.

The larger point is that the narrative approach is the result of a compromise, an attempt by courts to balance the competing interests of lawyers and defendants. The device of narrative testimony is allowed only in this unique situation, and, in fact, is generally precluded by Rule 611 of the Federal Rules of Evidence.\textsuperscript{231} Moreover, in jurisdictions that approve of narrative testimony, a lawyer’s knowing participation in the presentation of false testimony is limited to this unique situation, and such conduct is otherwise precluded by the rules of ethics, including the lawyer’s duty of candor.\textsuperscript{232}

b. \textit{Perplexing Questions}

The use of narrative testimony is no panacea. The very fact that the narrative approach allows defendants to testify when their own lawyer has concluded that the testimony will be false, rests quite uncomfortably in a system designed to find the truth. This inexorable tension makes any resort to narrative testimony a failure of sorts on the part of all the system’s participants. First, the defense lawyer has failed to convince the client of

\begin{itemize}
  \item \textsuperscript{228} See, e.g., People v. Johnson, 72 Cal. Rptr. 2d 805, 817–18 (1998).
  \item \textsuperscript{229} See Fed. R. Evid. arts. IV (character evidence), VIII (hearsay).
  \item \textsuperscript{230} See Johnson, 72 Cal. Rptr. 2d at 817 (noting that “[b]ecause the defendant in a criminal trial is not situated the same as other witnesses, it would not be illogical for a jury to assume that special rules apply to his testimony, including a right to testify in a narrative fashion”).
  \item \textsuperscript{231} See Fed. R. Evid. 611 (setting forth rules for the questioning of witnesses).
  \item \textsuperscript{232} See Model Rules of Prof'l Conduct R. 3.3 (2002). Under the comments to Rule 3.3 defense lawyers are allowed to offer testimony that they know is false in the narrative format if required by the jurisdiction. See id. cmt. 7.
\end{itemize}
the need to testify truthfully; second, the judge has similarly failed to
dissuade the defendant from testifying falsely; and third, the defendant has
persisted in his obstructionist conduct, contrary to the advice of judge and
lawyer, necessitating the use of the extraordinary procedural tool of
narrative testimony.

Narrative testimony is certainly no panacea, but are there viable
alternatives? Two very basic principles should guide lawyers, courts, and
drafters of the ethics rules in addressing this ethical dilemma. The first
principle is that lawyers should not be required to participate, even
passively, in the presentation of evidence that they know is false. To do
otherwise undermines the truth-seeking purpose of the trial. As recognized
by the 2002 draft of the Model Rules, the defense lawyer’s position as an
officer of the court means that he must be able to exercise control over false
evidence.

The second principle, which is a matter of procedural necessity, is that
defendants must have some opportunity to be heard before the court decides
to exclude their allegedly false testimony. This is a fundamental aspect of
due process and comports with the process followed in deciding
preliminary questions of fact under Rule 104(a) of the Federal Rules of
Evidence. Here, of course, is where things turn particularly perplexing.
The defendant and the defendant’s lawyer are placed in the position of
opposing each other before the trial judge. The defense lawyer must reveal
communications from the client and must argue against the defendant’s
expressed desire to testify. The “cure” of attempting to adjudicate the
defendant’s right to testify may be worse than the disease, though the
disease is nothing less than an affront to the system’s search for the truth.

The hearsay doctrine of forfeiture by wrongdoing provides an example of
a Rule of Evidence that turns on the defendant’s wrongful conduct, and thus
might be a helpful model for addressing client perjury. The defendant’s
effort to enlist his lawyer’s assistance in his scheme constitutes
“wrongdoing” and the defendant should not be allowed to benefit from his
illicit conduct. The dissent in Brown argued that the defendant should
forfeit his right to counsel, thus justifying the defense lawyer’s temporary
withdrawal from the courtroom in that case. In reality, however, the
defendant’s wrongful conduct directly relates to the false testimony he
intends to provide, and therefore the “forfeiture” should relate to the
defendant’s right to testify, not the right to counsel.

While forfeiture by wrongdoing provides a plausible analytical basis for
restricting the defendant’s right to testify, it does not lessen the procedural
awkwardness of the defense lawyer and client opposing each other before
the judge. It raises a whole host of procedural questions about how best to
go about resolving such conflicts. Moreover, other difficult questions

233. See Fed. R. Evid. 104(a).
234. See Fed. R. Evid. 804(b)(6).
remain about the precise scope of the defendant’s “forfeiture.” Should
defendants lose the right to testify altogether or merely the right to testify to
the allegedly false portions of their testimony?

In those states that approve of the use of narrative testimony, one
justification for its use is that it allows for the possibility that defendants
may have a change of heart before they testify, without regard to their
previous interactions with counsel.236 Despite the facial appeal of allowing
for the possibility of redemption, this “wait and see” approach is no less
difficult in application. What happens when the defendant takes the stand
and does in fact begin to testify falsely and the defense counsel knows that
the testimony is false? Presumably, the lawyer must at that point
immediately transition from a traditional question and answer format to the
narrative approach. In its recent decision in McDowell v. Kingston, the
Seventh Circuit rejected a habeas corpus claim of ineffective assistance of
counsel from a defendant whose lawyer switched from question and answer
to narrative during the direct examination.237 The defense counsel in the
case switched after receiving a note from his supervisor in the public
defender’s office during his direct examination of the defendant.238
Although the switch was not deemed to constitute a constitutional violation,
the government conceded that the defense lawyer “rendered deficient
performance at trial when he abruptly directed [the defendant] to testify in
narrative form.”239

In contrast, consider the case of People v. Jennings,240 wherein one can
observe a defense lawyer carefully navigating the way between knowingly
offering false testimony and precluding the defendant from providing
truthful testimony. In Jennings, the defense lawyer explained to his client,
who apparently desired to testify in his own defense, that he would not be
able to ask him about certain matters during the direct examination
presumably because the questions would elicit perjurious testimony from
the defendant.241 As the defense lawyer cryptically explained to the trial
court, “[C]ertain ethical conflicts” with the defendant would “compromise
[his] ability to ask certain types of questions which may assist [the

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236. See, e.g., People v. Johnson, 72 Cal. Rptr. 2d 805, 818 (1998) (concluding that the
court below should not have allowed the defense counsel to refuse to allow the defendant to
take the stand due to his concern the defendant would testify falsely because “there is always
the possibility the defendant will change his mind and testify truthfully”).
Aug. 15, 2007).
238. See id. at *2.
239. See McDowell v. Kingston, No. 05-C-0498, 2006 WL 2289304, at *2 (E.D. Wis.
240. 83 Cal. Rptr. 2d 33 (1999).
241. See id. at 36. The exchange between the defense lawyer and the trial judge is not
explicit about the nature of the lawyer’s concerns, but the appellate court notes that “the
record reflects [ ] that the court and prosecutor treated the matter as one where counsel feared
Jennings would testify falsely if asked certain questions.” Id. at 37.
The defendant in his defense. The direct examination was limited to the circumstances surrounding the defendant's confession. The California Court of Appeals rejected the defendant's claim on appeal of ineffective assistance of counsel and denial of his right to testify, concluding that the defendant agreed to "testify with limited questioning." The defense counsel's approach in Jennings thus suggests perhaps a third way, an approach that enables the defendant to testify (at least to some limited degree), but avoids the lawyer's participation in perjury through the narrative presentation of testimony.

Lawyers face a difficult ethical choice when confronted with a lying client. They can avoid the ethical dilemma altogether by turning a blind eye to the client perjury or, worse yet, by encouraging and facilitating false testimony from their clients. The better answer to the dilemma lies in lawyers, such as the defense lawyer in Jennings, who view their task as more than to win at all costs and as more than to blindly do their client's bidding. The answer lies in lawyers who understand that as professionals in a system of justice they bear profound responsibility for truth. The best outcome is when defendants come to recognize, after counseling from their lawyer, that the better course, the right course, is to testify truthfully or not to testify at all, no matter the cost.

The likelihood that one might be able to engage in that kind of moral conversation with clients is much greater for those defense lawyers who invest in their client relationships by showing genuine care and respect to clients. The remonstration that is required by the Model Rules should not be a pro forma speech about the dangers of perjury, but a serious dialogue about the moral implications of what the client is contemplating. Lawyers who have established that they care about the client and that they deeply appreciate the defendant's difficult, and perhaps even desperate, position may well have more success in avoiding the lawyer-client conflict than others.

CONCLUSION: "HONEST AT ALL EVENTS"

Trial lawyers have long had an uneasy relationship with the truth. Just as the sophists of ancient Greece "boasted of their ability to make the worse appear the better reason, to prove that black is white," contemporary

242. Id. at 36.
243. Id.
244. See id. at 38. Concluding that "[w]e thus assume counsel considered the alternatives, chose the one he could ethically live with and discussed the matter with Jennings before Jennings decided to testify with limited questioning." Id.
245. See id. at 36–39.
246. See Model Rules of Prof'l Conduct R. 3.3 cmt. 10 (2002).
247. See Sophists, The Internet Encyclopedia of Philosophy, http://www.iep.utm.edu/s/sophists.htm (last visited Oct. 3, 2007). For the sophist, "[t]he search for truth was not top priority... [T]he sophists tried to entangle, entrap, and confuse their opponents, and even, if this were not possible, to beat them down by mere violence and
lawyers are perceived as being something less than purveyors of the whole truth. That perception is not easily dismissed. Unfortunately, sometimes lawyers value their relationships with clients above the truth; other times lawyers hide behind the shield of the adversary system as a means of avoiding responsibility for the truth.

In a system that holds as its "sole ultimate objective" to find the truth, lawyers should be known for their truthfulness and for their refusal to accept untruthfulness in their clients or others. Lawyers should be beacons of truth, not obstacles to it. Abraham Lincoln, in his Notes on the Practice of Law, did not espouse a set of new ethics rules to address the perception of lawyer dishonesty, but rather he reminded his listeners of the fundamental importance of honesty for one choosing to practice law. He wrote,

Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.249

Lincoln's advice suggests that the answer to the profession's truthfulness deficit is not to be found in more rules of ethics or in better enforcement of the rules of ethics, but that the answer will be found with individual lawyers who have an unflagging commitment to the truth.

A criminal defense lawyer's commitment to honesty faces one of its most difficult and perplexing challenges in the context of client perjury both because of the difficulty of confronting one's own client about his lack of truthfulness and because of the intense pressure on lawyers to achieve victory. The path to successfully meeting the challenge is neither easy nor even always very clear. Yet the profession would do well to resolve to live up to Lincoln's words.

noise. They sought also to dazzle by means of strange or flowery metaphors, by unusual figures of speech, by epigrams and paradoxes, and in general by being clever and smart, rather than earnest and truthful." Id.
249. Lincoln, supra note 10, at 246.
Notes & Observations