Dilemmas and Disclosures:  
A Comment on Client Perjury  

George Rutherglen*  

Client perjury raises one of Monroe Freedman’s “three hardest questions”: What should a criminal defense lawyer do when her client insists upon giving testimony that the lawyer knows to be false? Various answers to this question have been proposed, the least controversial that the lawyer should try to persuade the client to change his mind. Persuasion, when it is successful, has the obvious advantage of making the problem of client perjury disappear. If the client follows the advice of his attorney and testifies truthfully, no legal rules or rights are violated: neither the legal prohibitions against perjury nor the client's constitutional rights to testify or to receive effective counsel are compromised.

In this comment, I argue that the legal rules governing client perjury and disclosure of client confidences should be structured to facilitate this solution. In particular, these rules should allow an attorney to threaten the client with withdrawal from the case and disclosure of the proposed perjury to the succeeding attorney. This threat, of course, will be taken seriously only if the attorney can actually carry it out. Accordingly, I also argue that the rules should allow—indeed require—limited disclosure to the succeeding attorney when the original attorney withdraws because the client cannot be dissuaded from committing perjury.

On its own terms, limited disclosure would prevent withdrawal from becoming a self-defeating formality in which the client seeks a new lawyer solely in order to conceal the planned perjury. Under the existing rules on withdrawal, a sophisticated client can force his first attorney to withdraw, retain a second attorney (or have one appointed),

---

* John Allan Love Professor, University of Virginia School of Law. I would like to thank Earl Dudley, John McCoid, and Bill Stuntz for their assistance with this article.


reveal nothing to the second attorney, and then freely commit perjury. Limited disclosure would thus increase the effectiveness of withdrawal both directly and indirectly: directly by preventing clients from taking advantage of the succeeding attorney's ignorance, and indirectly by making it easier for the original attorney to persuade the client to testify truthfully.

Limited disclosure, however, is only a limited solution to the problem of client perjury. It will work only when withdrawal works, but not, for instance, when the court does not allow withdrawal or when the client has unexpectedly committed perjury in the midst of trial. Of course, limited disclosure will only make withdrawal more effective when withdrawal is available. Nevertheless, because limited disclosure will make withdrawal more effective, it will also make persuasion more effective and therefore reduce the number of cases in which more drastic steps will have to be taken. Thus, instead of a theoretical solution for all client-perjury cases, limited disclosure provides a practical solution for most cases.

Part I of this comment briefly recounts other solutions that have been proposed for the problem of client perjury. Part II will summarize the existing law on client perjury, and Part III will then discuss some of the practical aspects of disclosure to the succeeding attorney.

I. PROPOSED SOLUTIONS

All the commentators on client perjury, including Monroe Freedman, agree that persuading the client to tell the truth is the best solution to the problem of client perjury. If it works, more drastic steps are not needed. Freedman, however, is unique in not allowing any other solution to the problem; he would allow the lawyer persuasion, but nothing more. If the client insists upon testifying, Freedman contends that the lawyer should examine the client in the ordinary way. Freedman also suggests corresponding restrictions on what the lawyer may


4. Wolfram, supra note, at 857-58 & n.185. Norman Lefstein has made a similar argument that warning clients about the limited scope of the attorney-client privilege will dissuade them from committing perjury. Lefstein, supra note, at 687-91.

Client Perjury

...say to persuade the client. Theories regarding what the lawyer may say when the client is not persuaded to testify truthfully marks the beginning point for controversy among the commentators.

The least drastic and most popular of the remaining responses to client perjury is to require the lawyer to withdraw if she knows that her client intends to commit perjury. Generally, the earlier withdrawal occurs, the less controversial it is. At trial, or on the eve of trial, withdrawal may prejudice the client’s case by signaling that the client will testify falsely or by leaving the succeeding attorney with too little time to prepare. Indeed, trial judges may deny leave to withdraw for either of these reasons.

If the lawyer does not withdraw, the lawyer may allow the client to testify in narrative form. This alternative dissociates counsel from the client’s perjury, but it has the obvious disadvantage of plainly indicating that something is wrong with the client’s testimony.

The last and most drastic response to the problem of client perjury is disclosure to the court. Disclosure can take more or less explicit forms, from a direct statement that the client intends to lie, or has already lied, to oblique references to “ethical concerns” about the client’s testimony. These methods are controversial, however, because they compromise the attorney’s role as an effective advocate for the client.

Although each of these proposals could be elaborated in one way or another, together they make clear that the longer the problem of client perjury persists, the more intractable it becomes. The longer it persists, the more likely it is that any solution will violate one of three independent principles: (1) the attorney’s obligation not to participate in the client’s wrongful act; (2) the right of the client to testify; or (3) the client’s right to effective counsel. An attorney who examines a lying client in the ordinary way violates the first of these principles. An attorney who forbids her client from testifying violates the second. And an attorney who discloses the client’s perjury to the court violates the third. Monroe Freedman correctly notes that it is futile to try to square the circle by attempting to reconcile these principles in every conceivable case of client perjury. He neglects, thought, the possibility

8. ABA STANDARDS FOR CRIMINAL JUSTICE: The Defense Function § 4-7.7 (1980).
of revising the legal rules to prevent the problem from becoming so acute that it defies resolution.

II. THE LEGAL RULES

The attorney’s response to client perjury is governed by a complicated network of legal rules, which operate on several different levels. Rules of professional responsibility, rules of evidence, and constitutional principles of criminal procedure all bear upon the problem of client perjury in criminal cases. Generally, these rules further two related, but distinct, purposes: first, to foster trust between the attorney and client, and second, to preserve the client’s control over major decisions regarding his representation. The rules themselves do not address disclosure to a succeeding attorney, except as an aspect of general disclosure, but the purposes underlying the rules could easily accommodate disclosure by a withdrawing attorney to her successor.

A. Rules of Professional Responsibility

The rules of professional responsibility protect all confidential information about the client, from whatever source, not just from the client himself. These rules of confidentiality encourage the client to disclose all relevant information to his attorney, who will then act as a more effective advocate for the client’s interests. The rules of professional responsibility also require the attorney to act truthfully in dealing with the court and opposing parties. It is, of course, the conflict between the attorney’s ethical obligations to her client and to the court that creates the most perplexing problems surrounding client perjury.

In different states, the rules of professional responsibility take different forms, all based on two models: the older Model Code of Professional Responsibility, adopted by the ABA in 1969, and the newer Model Rules of Professional Responsibility, adopted by the ABA in 1983. The variations from these models are especially frequent on the issue of confidentiality, but the state rules agree in two respects:


11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1(1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) Comment ¶ 1-4(1983).

first, in rejecting Monroe Freedman's position that an attorney can examine a client who intends to commit perjury and can rely upon his testimony in argument to the jury; and second, in favoring withdrawal over disclosure of client confidences as a remedy for perjury.

The disciplinary rules generally prevent an attorney from assisting the client's perjury and fraud. These prohibitions are ancillary to criminal prohibitions against aiding and abetting perjury, suborning perjury, and obstructing justice. Thus, the Model Code specifically prohibits an attorney from knowingly using perjured testimony or false evidence, knowingly making a false statement of fact, and assisting a client in conduct the lawyer knows to be illegal or fraudulent. The more recent Model Rules contain similar provisions.

As a corollary to these prohibitions, the rules of professional responsibility authorize withdrawal in order to avoid illegal or unethical conduct. The rules require withdrawal if the attorney knows of the illegal or unethical conduct and permit withdrawal if the lawyer reasonably believes it will occur. Two qualifications, however, restrict withdrawal: First, withdrawal from ongoing proceedings requires the permission of the court or agency; and second, a lawyer must always withdraw in a manner that does not prejudice the interests of the client.

The disclosure provisions in both the Model Code and the Model Rules been more controversial, and thus more likely to have been modified in the states that have adopted the model codes. Even a brief summary of the model provisions reveals that they endorse disclosure of client confidences only as a remedy of last resort.

18. MODEL RULES OF PROFESSIONAL CONDUCT RULES 1.2(d), 3.3(a)(1),(2),(4)(1983).
19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B),(C)(1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a),(b)(1983).
Under the Model Code, an attorney who receives information "clearly establishing" that her client has committed fraud upon a person or tribunal must reveal the fraud unless doing so would require disclosure of "a privileged communication." The term "privileged communication" in this last clause seems to refer to communications protected by the attorney-client privilege. An ABA opinion, however, has more broadly defined the term to include all confidential information about the client gained in the professional relationship. An exception to the rules on confidentiality allows, but does not require, disclosure of the client's intention to commit a future crime. These provisions make distinctions between past and future wrongful acts and contrast oddly with the restrictions on mandatory disclosure of past fraud, an oddity that the ethics opinions of the ABA have left unexplained.

The more recent Model Rules draw a sharper distinction between disclosure of fraud in court and fraud out of court, expressly allowing disclosure of client confidences to remedy fraud in court, but allowing only very limited disclosure of future crimes outside of court. A lawyer has a duty "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a criminal or fraudulent act by the client." A lawyer also has a duty to rectify fraud if she "has offered material evidence and comes to know of its falsity" by taking "reasonable remedial measures." This duty to rectify fraud continues to the end of the proceeding and applies even if it requires disclosure of otherwise protected confidential information. The Model Rules also allow the attorney to refuse to offer evidence that she "reasonably

24. ABA Comm. on Professional Ethics and Grievances, Formal Op. 341 (1975). In the terminology of the code, the exception extends to "secrets" obtained from sources other than the client, but in the course of the professional relationship, and "confidences" protected by the attorney-client privilege. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A)(1980).
27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a)(1)(1983); see Subin, supra note , at 1150-59.
28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2)(1983). This rule requires knowledge of the crime or fraud through a double negative: "The lawyer shall not knowingly: ... (2) fail to disclose ... ." Id.
30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(b)(1983).
believes to be false,” a broader provision that does not involve disclosure and does not require knowledge, only reasonable belief, on the part of the attorney. The comments to the provisions on mandatory disclosure qualify their terms to a degree, by emphasizing withdrawal as the standard remedial measure and disclosure only as a remedy of last resort. The comments also recognize that the constitutional duty to provide effective representation to a criminal defendant may preclude disclosure of client confidences.

Not only is disclosure to the client’s new attorney fully compatible with rules allowing disclosure to the court or to third parties, it is also a less drastic form of disclosure that keeps the information within the new attorney’s duty of confidentiality. Whenever existing rules require disclosure to the court, disclosure to the succeeding attorney is also necessary, if only to allow the new attorney to represent the client effectively. The same reasoning applies to permissive disclosure. In other situations, in which disclosure is not explicitly authorized by the existing rules, a formal opinion of the ABA has refused to allow disclosure to a succeeding attorney. Neither the rules nor the ethical opinions treat disclosure to a succeeding attorney any differently than disclosure generally.

The provisions on withdrawal, however, presuppose that an attorney’s common practice will be to inform succeeding counsel of all information relevant to the representation. Thus, upon withdrawal an attorney must take steps to protect the client’s interests upon withdrawal and to deliver papers to which the client is entitled. These provisions accord with the more general treatment of disclosures authorized by the client, which may be explicitly authorized by the client after consultation with the attorney, or implicitly authorized as needed in the course of representation. But because implied dis-

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c)(1983).
32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 Comment ¶¶ [7]-[12], Rule 1.6 Comment ¶ 3(1983); see ABA Comm. on Professional Ethics and Grievances, Formal Op. 87-353 (1987).
36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1)(1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a)(1983).
37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (disclosure allowed “when necessary to perform his professional employment”) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (disclosures allowed when “implicitly authorized in order to carry out the representation”) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Comment ¶ [7](1983).
closure is authorized only in the client’s interests, it can be forbidden on the client’s explicit instructions. A client who forces the original attorney to withdraw cannot be assumed to consent implicitly to disclosure to the succeeding attorney. The relevance of the standard practice lies not in ascertaining the client’s attitude towards disclosure—which would probably be negative—but in the protection of confidentiality that routinely arises when one attorney conveys information to a successor.

B. Rules of Evidence

The rules of evidence governing the attorney-client privilege parallel the rules of professional ethics that protect confidentiality. They also share the same justification. The attorney-client privilege extends to any confidential communication made from the client to the attorney for the purpose of obtaining legal advice. The rules of evidence, like the ethical rules, provide for an exception to the attorney-client privilege for communications in furtherance of future crime or fraud. The privilege, however, can be waived, either explicitly by the client or implicitly by the attorney acting in furtherance of the client’s interests. The attorney-client privilege differs from the rules on confidentiality because it is both stronger and narrower. It is stronger because it protects against judicially compelled disclosure. It is narrower, first, because it protects only information gained by the attorney from the client, and, second, because it is invoked only in response to a direct question.

Because the judge seldom directly asks the attorney whether her client intends to or has committed perjury, the attorney rarely can invoke the attorney-client privilege in cases of client perjury. Instead, the attorney must decide whether to take action on her own. But when an attorney is asked, she must reveal confidential communications from the client under the exception for future crimes or fraud. The privilege is usually invoked only to support a later claim under the rules of professional responsibility that the attorney had no duty to disclose. The attorney can invoke the privilege because it serves the same pur-

39. Clark v. United States, 289 U.S. 1, 15 (1933); 8 J. WIGMORE, EVIDENCE 572-73 (J. McNaughton rev. ed. 1961); see Subin, supra note , at 1113-19 (the privilege cannot be used to achieve illegal aims of any kind, past or future).
40. J. WIGMORE, supra note , at 633, 636.
pose as the provisions of the professional rules—both foster a relationship of trust between the attorney and her client.41

C. Constitutional Law

In criminal cases, constitutional law provides further support for the protection of confidential information about the client. The constitutional dimension of the attorney-client relationship also gives independent emphasis to the client’s autonomy in making decisions in the course of representation. This constitutional protection of the attorney-client relationship arises from the right to counsel under the Sixth Amendment and the privilege against self-incrimination in the Fifth Amendment, although it also has some support in the Due Process Clause.

The Sixth Amendment guarantees that every criminal defendant will receive assistance of counsel after formal charges have been filed.42 As a corollary, it also forbids the government from interfering with access to counsel, either directly, by sequestering the defendant from his counsel during trial,43 or by eliciting information from the client outside the presence of his attorney and absent a waiver of the right to counsel.44 Violations of the attorney-client privilege through the use of government informants also constitute violations of the Sixth Amendment.45 The attorney-client privilege also protects incriminating disclosures by the defendant to his attorney. If these disclosures could not be compelled from the defendant under the privilege against self-incrimination in the Fifth Amendment, they cannot be compelled from the attorney.46

41. 8 J. WIGMORE, supra note, at 545.
The Sixth Amendment figured most prominently in *Nix v. Whiteside*, the celebrated decision in which the Supreme Court held that a defense attorney did not render ineffective assistance by persuading his client to testify truthfully. In *Nix*, the defense attorney threatened to disclose and impeach any false testimony by his client. The Court's opinion examined the defense attorney's ethical obligations under state law, but its holding, as the concurring opinions emphasized, was limited to the constitutional issue. As several writers have pointed out, this narrow holding rests almost entirely on the indisputable proposition that a defendant has no right to lie on the stand. A different issue would have been presented if the attorney had actually disclosed client confidences, although the Court probably would have decided this problem the same way, given the Court's broad statements on the ethical issues under state law.

Still another constitutional issue would have been arisen if the defendant had not been allowed to testify at all. The Supreme Court has recognized, although only in dictum, that a criminal defendant has the final authority over "certain fundamental decisions regarding the case," including the right to testify on his own behalf. Although the source of this right remains uncertain, it has been attributed to the Fourth, Fifth, and Fourteenth Amendments and is also reflected in rules of professional ethics. Consequently, the right to testify is in addition to, and partly in competition with, the right to adequate representation through counsel.

Withdrawal accompanied by disclosure to the succeeding attorney does not threaten either the right to effective assistance of counsel or

---

47. 475 U.S. 157 (1986).
48. Id. at 176-77 (Brennan, J., concurring); id. at 188-90 (Blackmun, J., concurring in the judgment). Nevertheless several lower courts have interpreted *Nix* more broadly, to require an attorney to disclose fraud on the court. United States v. Teitler, 802 F.2d 606, 617-18 (2d Cir. 1986); United States v. Henkel, 799 F.2d 369 (7th Cir. 1986), cert. denied, 479 U.S. 1101 (1987).
52. *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* EC 7-7(1980); *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.2(a)(1983); ABA Standards for Criminal Justice: The Defense Function § 4-5.2 (1980).
53. One writer has even argued that it overrides an attorney's authority to prevent the client from testifying to facts that the attorney believes, beyond a reasonable doubt, to be false. Rieger, *supra* note, at 142-43, 146-48.
Client Perjury

the right to testify in one's own behalf. Whenever withdrawal occurs, disclosure of a client's intent to commit perjury leaves the new attorney better off, not worse off, in preparing for trial. Likewise, disclosure does not threaten the defendant's right to testify on his own behalf. He may be able to persuade the new attorney of the truth of his story despite the original attorney's disclosure. And even if the new attorney is not persuaded, disclosure does not add to the problems that arise when the client insists on testifying and the succeeding attorney disagrees. In these circumstances, the succeeding attorney, like the original attorney, must decide whether there are sufficiently strong reasons for concluding that the client intends to commit perjury, and if there are, whether to withdraw or disclose.\footnote{In theory, an infinite regress of withdrawals is possible, but judging from the absence of cases on the issue, in practice, criminal defendants have not tried this tactic, probably because repeated changes of counsel would work to their disadvantage or because courts would not allow it. Whatever the magnitude of this problem, it is not aggravated by limited disclosure. If anything, limited disclosure should convince clients of the futility of repeatedly changing attorneys.}

III. SOME PRACTICAL ASPECTS OF DISCLOSURE

The legal rules regulating the attorney-client relationship support no objection in principle to limited disclosure by a withdrawing attorney to her successor. None of these rules protect confidentiality for its own sake; the rules shield confidentiality in order to guard the attorney-client relationship.\footnote{E.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976); Subin, supra note , at 1160.} If disclosure does not harm this relationship, then there is no reason to prohibit disclosure. There is nothing sacred about confidentiality in itself.

The remaining objections arise from practical concerns about implementation. For example, withdrawing attorneys might disclose too little because they no longer represent the client. Or, they might disclose too much and poison the relationship between the client and his new attorney. Designing rules of professional responsibility, especially in choosing between mandatory and permissive disclosure, also presents practical problems.

Practically, a disclosing attorney should encounter few obstacles in disclosing the information to the new attorney. In litigation, attorneys should have no difficulty in identifying succeeding counsel because the current attorney for the client must enter an appearance or
The original attorney might be reluctant to interfere in the succeeding attorney’s relationship with the defendant, but disclosing her reasons for withdrawing and her doubts about the client’s testimony should take less time than briefing the succeeding attorney on the other aspects of the case. Such disclosure should be required only when the attorney withdraws because of client perjury, which occurs infrequently. Disclosure might be limited to cases of mandatory withdrawal, when the attorney knows of the client’s intent to commit perjury, but the duty to disclose should then turn on the distinction between knowledge of perjury, sufficient for mandatory withdrawal, and reasonable belief of perjury, sufficient for permissive withdrawal. Even permissive withdrawal on grounds of client perjury happens seldomly.

The risk that the disclosure might damage the relationship between the client and the succeeding attorney is also small. The succeeding attorney can evaluate the credibility of the client’s testimony as well as the original attorney, and the new attorney can reach an independent decision without compromising her relationship with the client. In any event, the risk of damage to the attorney-client relationship from limited disclosure must be compared to the risks from more drastic remedies to the problem of client perjury. In particular, disclosure to the court is more likely to disrupt the relationship between attorney and client than any form of limited disclosure to a new attorney. Limited disclosure is also likely to have little effect on the relationship between the new attorney and the client. Like other exceptions to the duty of confidentiality, the effect of limited disclosure is overwhelmed by other factors, such as the extent to which clients understand—and attorneys explain—the duty in the first place.

One might argue that instead of being too effective, disclosure might be ineffective. Even with limited disclosure, clients might still shop around for unethical members of the bar. Whatever the magnitude of this risk, however, limited disclosure would only tend to reduce it, first, by discouraging clients from attempting perjury, and

---

56. Outside of litigation, there remains some risk that the two attorneys might, in fact, work on unrelated matters, but even this risk can be eliminated by a routine inquiry by the first attorney.
57. Model Code of Professional Responsibility DR 2-110(B),(C)(1980); Model Rules of Professional Conduct Rule 1.16(a),(b)(1983).
59. See Subin, supra note , at 1168.
Client Perjury

second, by putting successor counsel on notice that another member of the bar is aware of the problem.60 The principal effect of limited disclosure is to reduce the benefits that clients gain from not disclosing their plans to a new attorney.

The choice between mandatory and permissive disclosure raises a serious issue about the nature and enforcement of rules of professional responsibility.61 The rules now permit disclosure to a succeeding attorney whenever disclosure to a third party or the court is allowed.62 A change in the rules is necessary to provide clear guidance to the bar. Mandatory disclosure, even when withdrawal is permissive, would counteract the natural inclination of a lawyer who has withdrawn to do nothing further in the case. A substantial risk of perjury demands a stronger response than the optional judgment of an attorney to pay attention to a case in which she is no longer involved. A rule that requires an attorney to disclose proposed perjury would also provide a more convincing reason for most clients to tell the truth.

On the other hand, disciplinary actions to enforce a rule of mandatory disclosure would be rare. If the client does not testify falsely, even without disclosure, all of the information would remain cloaked in the attorney-client relationship.63 If the client does testify falsely, the only attorney likely to be disciplined would be his counsel at the time of the testimony.64 But even the theoretical risk of punishment should lead an attorney, who has already decided to withdraw, to protect herself completely by disclosing the reasons for withdrawal to her successor. A rule that clearly requires disclosure would dispel the principal source of reluctance that persuades most attorneys not to disclose at all—duties of confidentiality and loyalty to a former client.

IV. Conclusion

After the problem of client perjury arises, no solution will present a perfect answer. Duties to the client or the court will inevitably clash. The best way to solve the problem of client perjury is to prevent it

60. Members of the bar are under a duty to report unethical conduct. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(1983).
62. See notes - supra and accompanying text.
64. See Wolfram, supra note , at 818-19, 827-31 (discipline most likely when attorney currently representing client fails to take any action at all).

331
from arising, by persuading the client to testify truthfully. The threat of withdrawal won't convince the client to tell the truth, however, if the client is free to obtain another attorney who will then remain ignorant of the planned perjury. The best and simplest solution to this response is to allow the original attorney to disclose to the succeeding attorney what she knows of the client's testimony.