The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance

Dan Aaron Polster
The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance

Dan Aaron Polster*

The perjurious defendant forces the criminal defense lawyer to choose between silence that preserves the confidential attorney-client relation and disclosure that precludes perjured testimony from affecting the judicial process. Monroe Freedman and The American Bar Association have each prescribed solutions to the attorney's dilemma, both of which the author finds inadequate. After examining recent judicial decisions, the author proposes an alternative which requires the attorney to inform the client of the inception of the attorney-client relation that the attorney will disclose the client's perjury to the court. This solution would provide honesty in the attorney-client relationship while preserving the integrity of the judicial process.

The case of the perjurious defendant is likely to come to mind whenever one discusses the ethical dilemmas which confront a criminal defense lawyer. It seems to present in the starkest fashion the fundamental tension between the lawyer's duty to his client and his duty to the court and the community. Not only are the stakes in the immediate outcome very high for the client, but the resolution has long-range significance for the integrity of the legal profession and the judicial process.

The common hypothetical is that of the criminal defendant who, after confessing his guilt to his lawyer, disregards the advice of his lawyer and insists upon taking the stand to proclaim his innocence.1

* A.B. (1972), J.D. (1976), Harvard University. The author is an attorney with the United States Department of Justice, Antitrust Division, Cleveland, Ohio. He is admitted to the Ohio Bar. The opinions expressed herein are those of the author and not necessarily those of the Department of Justice.
1. See text accompanying note 97 infra.
The issue is often seen as pitting the client’s quasi-constitutional right to testify,2 his sixth amendment right to full and effective counsel, and his interest in protecting the attorney-client privilege, against the client’s legal obligation to tell the truth, the lawyer’s ethical and professional duty not knowingly to introduce false or perjured evidence, and the need to preserve the integrity of the legal process.

Monroe Freedman set off a storm within the legal community when he resolved the dilemma without qualification in favor of the lawyer’s obligation to his client.3 According to Freedman, the attorney is ethically forbidden to breach the attorney-client privilege explicitly or implicitly or to use the attorney-client privilege as a wedge against the client. He must put the perjurious client on the stand and remain an ardent and resourceful advocate: he must not amend his trial tactics or reveal the perjury to the court. The client deserves, and the preservation of our judicial system demands, a defense attorney who will serve as his client’s alter ego.

In what the consultant to the drafting committee saw as a rejection of the Freedman position,4 the American Bar Association in 1971 adopted Defense Function section 7.7 of the Standards Relating to the Prosecution Function and the Defense Function. The thrust of this section is that the lawyer must seek to withdraw from the case if the dilemma arises before trial. If permission to withdraw is denied, or if the dilemma arises during trial, the attorney must alter his trial tactics so as to dissociate himself from the perjured testimony. The lawyer may not engage in normal direct examination of his client, but must limit his examination to identifying the witness as the defendant and permitting him to make a statement to the court. In addition, the lawyer is prohibited from later arguing the defendant’s false version of the facts to the court as worthy of belief, or reciting or relying upon the false testimony in his closing argument.5 The Commentary to this

2. See text accompanying notes 7–21 infra.
5. Defense Function § 7.7 of the ABA Standards Relating to the Prosecution Function and the Defense Function (Approved Draft, 1971) [hereinafter cited as § 7.7 or Defense Function § 7.7] provides that:
   (a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer’s independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.
   (b) If, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.
section reveals that the standard was conceived by the drafters as "the most reasonable accommodation of the competing demands of the lawyer's absolute obligation to refrain from introducing or aiding presentation of false testimony, on the one hand, and the defendant's absolute right, on the other hand, to testify in his own behalf, however ill-advised that course." 6

It is the purpose of this article to demonstrate that the well-intentioned ABA compromise "accommodates" neither the interests of the client nor the interests of the court and the judicial process, but in fact sacrifices both to enable the attorney to extricate himself from an awkward position. The discussion of the flaws in the ABA position follows a short historical summary of the defendant's right to testify. Understanding the history of this right lies at the heart of understanding the dilemma of the perjurious defendant. It will be shown that the dilemma cannot be resolved merely by answering in the affirmative two questions which might appear to be dispositive: is the defendant's right to testify a constitutional one, and does the ultimate decision of whether or not to testify belong to the client? Even if one assumes that the client has a constitutional right to testify which he may exercise over the strenuous objection of his attorney, one must ask a further question: how much is an attorney permitted, or even obligated, to fetter that right in light of his client's legal obligation to testify truthfully, and in light of the attorney's own independent commitment to preserve the integrity of the criminal justice process?

After an examination of the recent case law bearing on this ultimate question, and following a critique of the ABA position as expressed in Defense Function section 7.7, a principled alternative to Freedman's theory is proposed. Hopefully, this alternative will be of use to those who agree with Freedman that this dilemma must be confronted and not avoided, but disagree with his conclusion that the integrity of the process must be subordinated to the client's wishes.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, it is unprofessional conduct for the lawyer to lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make a statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant in a conventional manner and may not later argue the defendant's known false version of the facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

6. Section 7.7, supra note 5, at 275.
I. THE RIGHT TO TESTIFY: WHERE DOES IT COME FROM AND WHO MAKES THE ULTIMATE DECISION?

At common law, the accused was not competent to give sworn testimony in his own behalf. It was thought that competency would be more harmful than helpful to the accused since the jury might infer guilt if he failed to take the stand, while cross-examination might place him in a situation where even an innocent man who chose to testify would appear at a disadvantage. It was also thought that due to the overwhelming interest of the defendant in the outcome, his testimony would not and could not be believed. Indeed, it was considered certain that the fear of punishment, whether or not the defendant was guilty, would cause him to perjure himself. For these reasons, a general disqualification appeared to be the best solution.

Reformers found this solution unsatisfactory, however, so the rule began to break down during the nineteenth century, most quickly in civil cases. In England, the reformist movement, spearheaded by Jeremy Bentham, culminated in 1843 with Lord Denman's Act which abolished the incompetency of interested parties in civil litigation. In America, an 1846 Michigan statute was the first to remove disability of interested nonparty witnesses, and an 1849 Connecticut statute was the first to abolish the general incapacity of parties in civil cases. It was not until 1864, however, that Maine enacted the first general competency statute for criminal defendants in the English-speaking world. Before the end of the nineteenth century, every state except Georgia had enacted statutes abolishing the disqualification. The original federal statute abolishing the incompetency of criminal defendants was enacted in 1878, and the current statute was enacted in 1948:

In the trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own

10. Popper, supra note 8, at 458.
11. For a brief history of these developments, see Ferguson v. Georgia, 365 U.S. at 576 n.5.
12. Id. at 577. GA. CODE § 38-415, adopted in 1962, removed this disqualification.
13. 20 Stat. 30 (1878):
request, be a competent witness. His failure to make such request shall not create any presumption against him.14

Although this right to testify is granted by statute, it has been characterized as being one of "inestimable value"15 and as having an importance similar to that accorded the right to be present at one's trial and to present a defense.16 The Supreme Court had an opportunity to elevate this right to constitutional dimensions in Ferguson v. Georgia,17 but despite the urgings of Justices Frankfurter and Clark18 it declined to do so, holding that the question was not properly before the Court.19 As noted above, Georgia had long since been the only state which retained the common law disqualification; and this case involved a challenge to Georgia's treatment of criminal defendants who wished to testify. A state statute permitted the defendant to make an unsworn statement to the court, but prohibited defense counsel from providing any assistance while the defendant spoke.

The Court held that this prohibition operated to deprive the defendant of his rights under the sixth amendment, as incorporated by the fourteenth amendment, by denying him the effective assistance of counsel at this crucial stage of his trial. The Court noted that the tensions of a trial, with life or liberty at stake, might render a defendant "unfit to give his explanation properly and completely. . . . [H]e might fail properly to introduce, or to introduce at all, what may be a perfect defense."20 Thus, even if the Constitution did not require Georgia to permit the defendant to give sworn testimony in his own behalf, it did preclude the state, once it had adopted a "compromise" procedure, from depriving the defendant of his lawyer in the middle of trial.

In response to Ferguson, the Georgia legislature elected to abolish the disqualification rather than modify its procedure. This action seems to have permanently mooted the question of the constitutional status of the right to testify.21 Still, there remain several questions whose answers are crucial to resolving the dilemma of the perjurious defendant. Must the lawyer acquiesce in his client's decision as to whether or not the client will testify, or is this decision more properly allocated to the

---

15. Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955).
18. Id. at 603 (concurring opinion).
20. 365 U.S. at 594-95.
lawyer in his capacity as manager of the trial? If this is a decision to be made by the lawyer, it would seem that as long as he rejected the Freedman position, which defines his role as that of the client's alter ego, he is bound by his general professional obligation not deliberately to introduce false testimony or evidence. If the decision is the client's, should there be any restrictions on it?

Although there is a difference in opinion among courts, the prevailing view is that the ultimate decision to testify rests with the client. The lawyer, however, is obligated to advise his client whether or not to take the stand, and may urge upon the client a particular course of action. The issue, though, is cloudy for two reasons. First, the right to testify does not fall clearly within one of the two categories the Supreme Court has established to determine the allocation of authority between attorney and client. Secondly, since the client may attach greater significance to the exercise of this right, the attorney may not be equipped to make what is, at least partially, a nonlegal decision.

Distinctions have been drawn by the Court between constitutional rights which are so fundamental that only the client can waive them, and constitutional rights which fall within the rubric of trial tactics which may be waived by counsel. The former group includes the right to a jury trial, the right to forego trial by entering a plea of guilty, the decision to plead nolo contendere, and the decision whether or not to appeal a guilty verdict. In contrast, there are a number of constitutional rights whose exercise or waiver must sometimes be made quickly in the middle of trial. These include the decision whether to forego cross-examination of certain state witnesses, the decision whether to forego confrontation by not raising hearsay or confrontation clause objections, and the decision to forego objection to illegally obtained evidence (assuming some tactical benefit might be extracted from its admission into evidence). Subject to the overarching limitation imposed by the duty to provide competent representation, and the

22. ABA Code of Professional Responsibility, DR 7-102(A)(4) (1975). As there is no exception for a situation where a client asks his attorney personally to make a false representation to the court, or where the client asks the attorney to put a friend on the stand who will lie on the client’s behalf, there would seem to be little justification for the exceptional procedure authorized by the ABA Standards for the case of a defendant who sought his attorney’s assistance in delivering perjured testimony.
23. See text accompanying notes 33–44 infra.
24. See text accompanying notes 41–44 infra.
related, but not identical, "exceptional circumstances" doctrine, these decisions are to be made by the attorney notwithstanding the wishes of his client. The rationale for this allocation was expressed by the Ninth Circuit in Nelson v. California when it upheld the unfettered right of the attorney to forego objection to the introduction of physical evidence, despite the client's strenuous disagreement:

Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the lawsuit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guarantee of the right to counsel. . . . One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964 to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right.32

The Supreme Court has not had occasion to classify the right to testify in one group or the other. Left with a difficult choice, various lower courts have come to different results. The leading case classifying the decision under the rubric of "trial tactics," and therefore one to be made by the attorney, is United States v. Poe. The court of appeals reversed Poe's conviction, but not because the attorney refused to put his client on the stand. The grounds for reversal were that the attorney had advised Poe not to take the stand, despite Poe's wishes to do so, on the legally incorrect theory that if Poe took the stand the government might then be able to use Poe's otherwise inadmissible confession for impeachment purposes. In confining its opinion to this extraordinary fact situation, the court said:

29. See Brookhart v. Janis, 384 U.S. 1 (1966), where this doctrine was applied to overturn a conviction. In Brookhart, the defendant was charged with several counts of forgery and uttering forged instruments. Defense counsel stipulated that he would not cross-examine the prosecution witnesses and that the state would only be required to make out a prima facie case. The trial judge stated that this stipulation meant in effect that the defendant "admits his guilt and wants the State to prove it." Id. at 6. After defense counsel acquiesced in this statement, the defendant firmly declared that he was in no way pleading guilty to the charge. When the judge responded that the defendant could have a jury trial if he wanted one, defense counsel reiterated that the case would be tried on the basis of the stipulation. The Supreme Court held that in these circumstances the attorney's waiver would not bind the defendant.


31. 346 F.2d 73 (9th Cir. 1965).

32. Id. at 81.

33. 352 F.2d 639 (D.C. Cir. 1965).

34. Ironically, the attorney may have been correct. See text accompanying notes 77–81 infra.
If . . . [defense counsel] had not disclosed . . . [his reason for urging Poe not to take the stand], or if he had indicated that his reason was a weakness in Poe's personality or a bad record, neither the District Court nor this court suggests that counsel's decision could have been questioned in any proceeding in any court. Counsel therefore remain free to keep defendants from testifying whenever counsel see fit. Any suggestion to the contrary is chimerical.35

This dicta was quoted and followed by the Seventh Circuit in the case of Sims v. Lane,36 a federal habeas corpus proceeding in which petitioner claimed that his trial counsel was incompetent for failing to place him on the stand:

No case has been brought to our attention to support petitioner's contention that the Fourteenth Amendment accords a defendant in a state court a federal constitutional right to testify. To the contrary, the federal rule seems to be that the exercise of this right is subject to the determination of competent trial counsel and varies with the facts of each case.37

The Maryland Court of Appeals, in the case of State v. McKenzie,38 reached the same result by drawing a somewhat different distinction. Expressly relying upon a theory propounded by Professor White,39 the court drew a line between a decision by defense counsel to relinquish a constitutional right as a stratagem calculated to obtain acquittal, (i.e., foregoing objection to hearsay evidence), and a decision to waive a claim that enhances the chance of acquittal in the hope that a lighter sentence will be imposed should the defendant be convicted (i.e., foregoing trial altogether by pleading guilty to a lesser offense). The distinction is between a decision which involves a choice between alternative means to an agreed-upon end, and a decision which involves a choice among different ends themselves. In the first case, the attorney and the client are both working toward a clearly defined end, namely acquittal; and the choice to be made relates to the means by which that end may best be achieved. Since the attorney is in a better position to make what is in essence a legal judgment—how best to present the client's case—he should be authorized to make a final and binding decision.

In the second case, what is involved is a decision to accept a conviction without requiring the state to meet its constitutional burden.

35. 352 F.2d at 641 (emphasis added).
37. Id. at 664.
of proof in return for a lighter sentence. Although it will be influenced by a legal assessment of the relative strengths and weaknesses of the prosecution and defense cases, this is not a legal choice. It is at bottom a choice as to how much is to be risked to preserve a quantum of liberty, perhaps even a life. Since it is the client's life and liberty, it must be the client's decision as to how much he wants to risk.

The McKenzie court found no difficulty in applying either the fundamental right/trial tactics or the means/end distinction to the client's right to testify:

Under either analysis, it is clear that the decision made by counsel in the present case to place McKenzie upon the witness stand was a tactical one. It related not to the end sought by McKenzie— an acquittal— but rather to the most efficacious means to that end. It was a constitutional right properly falling under the head of 'trial decision.'

This is probably a correct classification from the attorney's perspective, since he will likely perceive it as a tactical choice which can be resolved by estimating the chances of acquittal if each choice is pursued. On one hand, he can put the state to its proof and argue a reasonable doubt theory to the jury. On the other hand, he can shift the focus of attention from the prosecution's case to the credibility of his client. This decision will be influenced by such factors as the strength of the prosecution's case, the physical appearance of his client, his client's ability to withstand cross-examination, and any past criminal record which will become admissible only if the defendant testifies. The plausibility of the defendant's version of the facts and the presence or absence of corroborative testimony will also affect the decision.

Nevertheless, several state courts have recently been just as certain that the client must make the ultimate decision as to whether or not to take the stand. The leading cases are Hughes v. State, Taylor v. State, and People v. Guillen. In Hughes, the court said:

Despite the dictum of Poe, we believe that it is preferable that a defendant be permitted to testify if he so requests. The right to testify in one's behalf is often of vital importance in a trial. No defendant requesting to testify should be deprived of exercising that right and conveying his version of the facts to the court or jury, regardless of competent counsel's advice to the contrary. As in the decision to plead guilty or not guilty,

40. 17 Md. App. at 589, 303 A.2d at 420.
the ultimate decision should be that of the defendant, made with advice of counsel.\textsuperscript{44}

The \textit{Taylor} court reached the same result despite conceding that defendant's FBI record was a "red flag" to defense counsel to keep Taylor from testifying.\textsuperscript{45} In \textit{Guillen}, the court held that while normally the decision as to whether the defendant should testify is within the competence of the trial attorney, where the defendant insists that he wants to testify, he cannot be deprived of that right.

Beyond the rules announced in cases such as \textit{Poe} and \textit{Hughes}, certain courts have indicated that clients will lose whatever right they may have to decide whether to testify when it cannot be shown that a contemporaneous request was made either to the attorney or to the trial judge. For example, in \textit{Sims v. Lane},\textsuperscript{46} noted above, the court found that the statute\textsuperscript{47} which made Sims a competent witness "at his own request" had not been violated in Sims' trial where Sims had made no such request to the court. Accordingly, the \textit{Sims} court distinguished \textit{United States v. Bentvena}\textsuperscript{48} which reversed a conviction where the defendant, after requesting to testify once through his attorney and a second time directly to the court, was prohibited by the judge from taking the stand because he refused to assure the court that there would be no repetition of his earlier outbursts and disorderly conduct. As a result of this "contemporaneous request" standard, even where the decision is to be made by the client, acquiescence in the advice of counsel not to take the stand will meet the standards of a knowing and voluntary waiver. Absent a showing like the one made in \textit{United States v. Poe}\textsuperscript{49} that the advice was faulty,\textsuperscript{50} the defendant's failure to make a contemporaneous request to testify, either to his attorney or to the court, appears in these few cases to bar subsequent relief for the deprivation of the right.\textsuperscript{51}

In looking to these opinions for guidance on how to regulate the attorney-client relationship, it is essential to realize what the courts in

\begin{itemize}
\item \textsuperscript{44} 513 P.2d at 1119.
\item \textsuperscript{45} 51 Ala. App. at 578, 287 So. 2d at 894.
\item \textsuperscript{46} 411 F.2d 661 (7th Cir. 1969). \textit{See} text accompanying note 36 supra.
\item \textsuperscript{47} 18 U.S.C. \textsection 3481 (1970). \textit{See} text accompanying note 14 supra.
\item \textsuperscript{48} 319 F.2d 916 (2d Cir. 1963).
\item \textsuperscript{49} 352 F.2d 639 (D.C. Cir. 1965).
\item \textsuperscript{50} \textit{See also} State v. Noble, 109 Ariz. 539, 514 P.2d 460 (1973).
\item \textsuperscript{51} \textit{See also} People v. Brown, 54 Ill. 2d 21, 294 N.E.2d 285 (1973), where the Supreme Court of Illinois adopted the "contemporaneous request" standard in refusing to overturn Brown's conviction notwithstanding evidence that near the close of the prosecution's case the defense attorney told two of defendant's relatives, "I think the prosecuting attorney would murder him on cross-examination, so I won't put him on the stand even though Charles insists upon testifying." 54 Ill. 2d at 23, 294 N.E.2d at 287.
\end{itemize}
all of the above-cited cases were dealing with. They were not address-
ing the issue of whether, in the first instance, it is the better practice to
leave the ultimate decision to testify to the client. The issue before the
courts was whether the attorney's refusal to honor the defendant's wish
to testify was such a serious deprivation of constitutional and/or statu-
tory rights that fundamental due process requirements dictated a new
trial. The autonomy and integrity of the client is at stake. The due
process issue is how much of the primary decision-making authority
can be left with the person whose life and liberty is at stake consistent
with the effective performance of the attorney in a legal proceeding,
the complexities of which the client generally cannot hope to under-
stand. Because they do not balance the autonomy of the client against
the effective performance of the attorney, solutions which hinge upon
mechanical distinctions between "fundamental rights" and "trial tac-
tics", or between "alternative means to an agreed-upon end" and
"different ends themselves" cannot conclusively resolve the dilemma
of autonomy when the defendant's right to testify is involved.

The other factor clouding the issue of control over the decision to
testify, is the importance a client may attach to his opportunity to take
the stand. The mechanical solutions courts have developed will be of
little help where the client's desire to testify transcends tactical con-
siderations. He may be seeking vindication, rather than a dismissal on
a technicality, or he may not be satisfied with what he views as the
pyrrhic victory of winning an acquittal because the state, while proving
his guilt by a preponderance of the evidence, has not proved it beyond
a reasonable doubt. He may feel strongly that if he is to be sent to
prison, it should be because the jury did not believe him and not
because the jury heard only a policeman's version of the facts. And of
course there is the political trial, where, from the defendant's stand-
point, the main purpose of the proceeding is to publicize certain ideals
and to make it appear that the state is trying to punish him for the

52. A "standard," by definition, should not be set at the very limit of permissible
domination by the attorney—a limit beyond which such domination will be considered
offensive enough to warrant the reversal of a conviction. This same point can be made in
the sixth amendment "effective assistance of counsel" area. The common test for
reversible error for violation of sixth amendment rights in regard to effectiveness of
counsel, is whether the defense was so inadequate as to shock the conscience of the
court or make the proceeding a farce or a mockery of justice. United States ex rel. Jones
v. Vincent, 491 F.2d 1275 (2d Cir.), cert. denied, 419 U.S. 877 (1974); Johns v. Perini, 462
F.2d 1308 (5th Cir.), cert. denied, 409 U.S. 1049 (1972). For an explanation of the
reason for such a heavy burden on the appellant, see the court's discussion in Thornton
would certainly require a much higher minimum standard of representation. See ABA
CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1975).
expression of those ideals. Without any empirical data it is difficult to determine in what percentage of cases the defendant’s decision whether or not to testify is not a purely tactical one, or indeed not a tactical decision at all. Yet it seems reasonable to assume that it is in precisely those cases where the attorney and the client disagree over this issue (excluding cases where the client announces his intention to commit perjury), that the client’s desire to testify stems from non-tactical considerations. If the client’s goal is vindication, the mobilization of political sentiment, or simply the opportunity to have his say in court, it is not likely he will view his right to testify in the same light as an attorney whose goal is his client’s acquittal.

It would appear that those courts and commentators who have labeled the decision whether or not the defendant testifies as one involving solely tactics, or a choice of means to an agreed-upon end, have overlooked the added importance that the right to testify may have for a significant number of defendants. Although the attorney may and should attempt to dissuade the client from testifying if the attorney thinks that such action will lessen the chances for acquittal, the nontactical dimension of the defendant’s testimony leads to the conclusion that the client should make the ultimate decision. If one must err in formulating a rule that covers a wide spectrum of cases, it seems better to err on the side of client autonomy when it is quite possible that the client and the attorney will view a crucial issue in the trial from markedly different perspectives. Section 5.2 of the ABA Standards Relating to the Prosecution Function and the Defense Function adopts this approach.53

53. The full text of this section is as follows:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for the defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

(b) The decision on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

(c) If a disagreement of significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the attorney-client relationship.

Although there is nothing in the Standard which specifically deals with the question of when the client is supposed to make the decision whether or not to testify, the only logical inference is that the lawyer is required to explore the issue with the client in depth before trial and is then required to honor the client’s decision rather than forcing the client to make a personal request to the judge at trial. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2 (Approved Draft, 1971).
Although it is interesting to debate the question of who should have the last word on whether or not the client takes the stand, it is crucial to understand that the resolution of this controversy, like the resolution of the controversy over whether the right to testify is constitutional or merely statutory, will not by itself solve the dilemma of the perjurious defendant. As noted above, even if the right is constitutional, the Supreme Court has asserted that certain constitutional rights may be exercised or waived by the attorney as part of his trial strategy, notwithstanding the protestations of his client.4 Although the decision to exercise or waive the right to testify rests ultimately with the client, thereby preventing the attorney from resolving the dilemma simply by refusing to put his client on the stand, there remains the question of how, and to what extent, the attorney, the judge, and the judicial process may permissibly influence or pressure the client to act in a certain manner. Even assuming that no lawyer or judge can prohibit a defendant from exercising his constitutional right to testify, the characterization of that right in Defense Function section 7.7 as "absolute," while purporting to end the issue, serves only to raise it to another level.

II. How Absolute is Absolute?

The prevailing opinion is that once a criminal defendant makes a demand during trial that he be permitted to testify in his own behalf, that demand must be honored. The case law makes it clear, however, that the path from request to witness stand need not be an unfettered one. Although neither defense counsel nor judge nor prosecutor may prohibit the defendant from testifying, any one or all of them may act in a manner which at least forces the defendant to reconsider his decision and may in fact induce him to forego his right entirely.

*United States v. Gonzales*55 involved a client's postconviction challenge to the manner in which his attorney resolved the dilemma of the client's perjury. Shortly before he rested his case, and at a time when he had offered no evidence whatsoever, the defense counsel "approached the bench and informed the trial judge that his client wished to take the stand." Counsel told the "judge that he could not 'in good conscience as an officer of this court put him on the stand. I don't know what he would testify.' Furthermore, counsel asked to be allowed to withdraw if defendant took the stand."56 Although nothing was said in the opinion, it seems clear that this was defense counsel's

---

54. See notes 30-35 supra and accompanying text.
55. 435 F.2d 1004 (10th Cir. 1970).
56. Id. at 1008.
euphemistic manner of informing the judge that he believed his client would commit perjury. Immediately denying the motion to withdraw, the judge held a hearing out of the jury’s presence to pursue the issue with the defendant. In this hearing, the judge informed the defendant that he had a right not to testify and that his failure to testify could not be used against him. He then advised the defendant of the dangers of cross-examination and perjury. When the defendant reiterated his demand to testify, the judge informed him of his attorney’s wish to withdraw. The defendant then conferred with his attorney, and informed the judge that, solely because he did not wish to harm his co-defendants by taking the stand, he would waive his right to testify. 57

Although it was evident that the actions of the trial judge and the defense attorney, upon perceiving that the defendant was about to commit perjury, had induced the defendant to waive the right which he had unequivocally asserted, the court of appeals held that the attorney’s actions did not constitute incompetent representation and that the judge’s actions did not constitute impermissible coercion. 58 The court found that the record showed a complete examination of the issue, that the defendant was then satisfied with his decision, and that it was arrived at only after proper consideration. Far from condemning the trial judge, the court praised his comments to the defendant: “They were carefully made and understood, and a complete explanation was in order.” 59

McKissick v. United States 60 presented a variation of the dilemma of the perjurious defendant. In the middle of his trial the defendant informed his attorney that he had committed perjury during an earlier stage of the proceedings. The attorney informed the judge of his client’s statement and asked permission to withdraw from the case. The judge felt he had no choice but to grant counsel’s request and order a mistrial. 61 Defendant appealed on two grounds: that he had been denied effective and competent assistance of counsel when his attorney sought to withdraw and to seek a mistrial without consulting him, and that a second trial would place him in double jeopardy. The court rejected all of defendant’s contentions and remanded the case for the sole purpose of allowing the district court to determine whether defendant actually made the statement in question to his attorney. 62 The

57. Id.
58. Id. at 1010.
59. Id. at 1009–10.
60. 379 F.2d 754 (5th Cir. 1967).
61. Id. at 756.
62. Id. at 762–63.
district court found that the statement had been made, and on appeal from that decision the court of appeals reiterated its approval of the trial judge's decision to order a mistrial.

In the first appeal, the court was emphatic in its endorsement of defense counsel’s behavior:

If appellant told his attorney that he had committed perjury, that offense was in effect a continuing one so long as allowed to remain in the record to influence the jury’s verdict. . . . [Appellant] could not abrogate the attorney's discharge of his professional, ethical and public duty to report it. . . . The attorney not only could, but was obligated to, make such disclosure to the court as necessary to withdraw the perjured testimony from the consideration of the jury. This was essential for good judicial administration and to protect the public.

It is noteworthy that the ABA has adopted a markedly different view of the attorney’s public duty. Although the Commentary to section 7.7 in the Tentative Draft of the Standards Relating to the Prosecution Function and the Defense Function indicates that there is a difference of opinion over whether the attorney has a duty to inform the court of his client’s impending perjury (and arguably a similar duty to inform the court in a McKissick situation), the Commentary to section 7.7 of the approved draft concludes: “It should be noted that DR 7-102(B) of the Code of Professional Responsibility, which requires a lawyer to reveal a ‘fraud’ perpetrated by his client on a tribunal, is construed as not embracing the giving of false testimony in a criminal case.” When this draft was written and adopted by the ABA in the spring of 1971, there was nothing in the Code of Professional Responsibility which suggested the above-mentioned limitation upon the reach of DR 7-102(B). However, a small but significant

---

63. Findings of district court reported in McKissick v. United States, 398 F.2d 342, 343 (5th Cir. 1968).
64. Id.
65. 379 F.2d at 761.
66. On one hand, some lawyers hold that the lawyer's general obligation to protect the court from fraud in its processes and the exception to the attorney-client privilege for statements of intention to commit a crime may place the lawyer in the position of being required to disclose the fact of perjury. . . . On the other hand, there are lawyers who take the view that the lawyer's obligation of confidentiality does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself. . . .

change in the text of the 1974 version of the Code provides support for this interpretation.

The attorney no longer has an affirmative duty to disclose information which reveals his client's perpetration of a fraud upon a tribunal "when the information is protected as a privileged communication." This clause can be interpreted in two different ways. It can be read as a Freedman-like expansion of the scope of the attorney-client privilege, meaning that the attorney is never required to disclose anything his client reveals to him about present or future criminal activity. Alternatively, it can be read as relieving the lawyer of his duty of disclosing information which is protected by another privilege, i.e., husband-wife or physician-patient. Neither interpretation of the recent amendment to DR 7-102(B) is consistent with the conduct mandated by section 7.7. The expansive reading of DR 7-102(B) seems to indicate that section 7.7 overstates the attorney's duty to the court and the public, since section 7.7 requires the attorney to curtail his advocacy in an extraordinary manner that is likely to warn the court of his client's perjury. On the other hand, if the amendment to DR 7-102(B) was intended merely to insure that an attorney respect communications protected by some other substantive privilege, section 7.7 may have understated the attorney's obligation to the court.

The highest courts of at least two states have referred explicitly to Defense Function section 7.7 in deciding cases which involved the actions of an attorney faced with the dilemma of what to do with his perjurious client. In *People v. McCalvin*, petitioner argued that he was entitled to a reversal of his conviction because his attorney had manifested a conflict of interest by informing the trial judge (out of the presence of the jury) that the attorney had advised his client not to take the stand. Although McCalvin's trial had occurred before the adoption of the Standards Relating to the Prosecution Function and the Defense Function, McCalvin cited section 7.7 and argued that his attorney should have made a confidential record of the disagreement rather than informing the judge. The court, although conceding that it might have been preferable for the attorney to have followed the procedure described in section 7.7(c), held that the attorney's decision not to

68. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B)(1) (1975).
69. In an effort to resolve this ambiguity, the author contacted the ABA Standing Committee on Ethics and Professional Responsibility. The Committee's response was both cryptic and inadequate: "All questions of 'lawyer-client privilege' are questions of state law about which this Committee will not comment." Letter from C. Russell Twist, Staff Director, to Dan Polster (March 5, 1975).
70. 55 Ill. 2d 161, 302 N.E.2d 342 (1973).
71. For the complete text of § 7.7, see note 5 supra.
follow that course of action did not operate to deprive the defendant of his right to a fair trial.

In *State v. Lowery*, the court was required to pass upon an even greater departure from the mandate of section 7.7. In the middle of his client's direct testimony, and immediately after the client had responded in the negative when asked if she had shot the victim, the attorney requested a brief recess. In chambers, the attorney sought permission to withdraw from the case. When asked to explain why, the attorney responded, "I cannot state the reason." The judge then denied the motion to withdraw. On appeal, the defendant contended that, by seeking permission to withdraw at this key juncture in the trial, her attorney was indicating to the court that his client had lied when she denied shooting the victim. As the case was tried to the court without a jury, the defendant argued that the judge could not help but be prejudiced against the defendant by reason of this innuendo. Unlike the situation in *McCalvin*, the court could not evade the issue on the grounds that the ABA Standards had been adopted after defendant's trial. Nevertheless, the court adopted a similar compromise holding. Although there was no prejudice in her attorney asking for a recess and thereafter moving to withdraw, the court said it would have been better practice, where the defendant begins to testify falsely, for the defense attorney "to have refrained from further questioning in areas of possible perjury and make a record 'in some appropriate manner.'"

Bearing in mind the caveat against automatically turning a line of habeas corpus holdings into a standard for regulating primary conduct, the opinions in these two cases are as noteworthy for what they omit as for what they say. Although the courts are willing to advise that it would have been "preferable" or "better practice" for the attorney to have followed the procedure described in section 7.7, they are unwilling to say that anything in the Constitution required him to do so—neither his client's right to effective counsel nor his client's right to testify. The *Lowery* court implicitly held that a defendant has no right to commit perjury and then to compel his attorney to stay on the case, even if the timing of the attorney's motion to withdraw severely prejudices the defendant's case. These opinions seem to assume that although an attorney may not resolve the dilemma of the perjurious defendant merely by disregarding the client's demand to testify, the attorney is not constitutionally required to remain on the

73. Id. at 28, 523 P.2d at 56.
74. Id. at 29, 523 P.2d at 57.
75. See text accompanying notes 48-52 supra.
case, to keep his objections to his client testifying from the court, or to refrain from notifying the court, at least indirectly, of his client's recent or imminent perjury. In short, even an "absolute" right is not violated when its exercise may result in unpleasant consequences.

This appears to be the view of the defendant's right to testify adopted by a majority of the Supreme Court in the case of Harris v. New York. The precise holding was that a statement rendered inadmissible against the defendant in the prosecution's case-in-chief because it was obtained without the procedural safeguards required by Miranda v. Arizona, may be used to impeach the defendant's credibility should he elect to testify—if the trustworthiness of the statement satisfied legal standards. Harris can therefore be seen as a reduction in the scope of a key Warren Court precedent which might not command a majority were it to be argued today. But the language of both the majority and dissenting opinions makes it hard to regard Harris as merely an expression of disenchantment with Miranda. Unless one views most of the language as a smokescreen for a battle over the continued value of Miranda, Harris must also stand (albeit by a slim 5-4 majority) for the proposition that a defendant's right to testify is conditioned by his obligation to tell the truth:

Every criminal defendant is privileged to testify in his defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . .

The shield provided by Miranda cannot be perverted into

76. In Thornton v. United States, 357 A.2d 429 (D.C. 1976), the court held that the appellant's constitutional rights had not been violated when his trial counsel followed the procedure mandated by § 7.7, and in addition, announced to the court that his client was testifying against his advice. The court did not address the Ferguson v. Georgia problem discussed above. See text accompanying notes 17-19 supra. When confronted with the dilemma of the perjurious defendant, counsel's obligation is "to use all honorable means to see that justice is done," rather than to go to any lengths in an effort to see that a defendant is acquitted." 357 A.2d at 438.

In Thornton the appellate court held that the trial judge erred both in failing to rule on defense counsel's motion to withdraw and in certifying the case to another trial judge with instructions to the judge not to ask defense counsel the reasons behind his motion to withdraw. This points out one of the problems with § 7.7, since it is conceivable that a defendant could delay his trial indefinitely while a series of defense counsel and judges are required to withdraw, the latter because their knowledge of the defendant's perjury could prejudice their sentencing decision.

77. 401 U.S. 222 (1971).
a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.\textsuperscript{79}

Under the majority opinion, therefore, the obligation to testify truthfully is so important to the fair and effective functioning of the judicial process that the prosecution may enforce that obligation through the introduction of an illegally obtained confession.

To the dissenters, however, no interest in removing a "license to use perjury"\textsuperscript{80} could justify the imposition of such a heavy burden upon the defendant's right to testify:

It [the privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right "to remain silent unless he chooses to speak in the \textit{unfettered} exercise of his own will," . . . The choice of whether to testify in one's own defense must therefore be "unfettered," since that choice is an exercise of the constitutional privilege, \textit{Griffin v. California}, 380 U.S. 609 (1965). \textit{Griffin} held that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it "fetters" that choice—"[i]t cuts down on the privilege by making its assertion costly." . . . For precisely the same reason the constitutional guarantee forbids the prosecution to use a tainted statement to impeach the accused who takes the stand: The prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly." . . . Thus, the accused is denied an "unfettered" choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.\textsuperscript{81}

To say that the majority holding "fetters" a defendant's right to testify is a polite understatement. It eliminates that right for anyone in Harris' situation. Never is the academic distinction between a statement admissible to prove the truth of its contents, and a statement admissible solely to prove that it was uttered, more ridiculous than when the statement is "I did it." If one views the exclusionary rule as the product of a judgment that the criminal justice process is corrupted by the introduction of evidence obtained through illegal police conduct, \textit{Harris} may be seen as the product of a judgment that a defendant's perjurious testimony corrupts the process even more than the illegal police conduct. In essence, the defendant, by choosing to lie on the stand, has waived his constitutional rights in the same manner as if he had consented to an otherwise illegal search or had made in-

\textsuperscript{79} 401 U.S. at 225-26.
\textsuperscript{80} Id. at 226.
\textsuperscript{81} Id. at 230 (citations omitted) (Brennan, J., dissenting).
criminating statements after being apprised of his right to remain silent.

But the holding in *Harris* does much more than provide a vehicle to punish perjurious defendants. It also serves to punish defendants who testify truthfully under oath but who lied to the police during the illegal out-of-court examination. A defendant’s first story is not necessarily the true one; and it is sometimes the case that the story which a frightened individual invents to explain his suspicious conduct will nevertheless contain incriminating statements. Even if the defendant’s out-of-court statement is wholly exculpatory, the prosecution will be able to destroy the defendant’s credibility by showing that the defendant said different things on different occasions. In this situation, the holding in *Harris* means that the illegally obtained confession will be admissible not if the defendant commits perjury by reiterating his out-of-court statements but only if he testifies truthfully. Unless one assumes that the Court overlooked this perverted result, the majority opinion must be read as a decision that an unfair result in an undetermined percentage of cases, coupled with the introduction of illegally obtained evidence, is not too great a price to pay to prevent the defendant from deceiving the judge and the jury. It is hard to imagine a more ringing condemnation of perjury.

In summary, because of the judiciary’s aversion to perjury, the case law has allowed the right to testify to be fettered in two major ways. First, defense counsel may seek to withdraw from the case or otherwise inform the court of counsel’s fear that defendant will perjure himself. Second, evidence of illegally obtained prior inconsistent statements may be introduced to impeach the defendant’s credibility.

### III. A Critique of the ABA Solution

The preceding discussion illustrates that in Defense Function section 7.7, the characterization of the defendant’s right to testify as “absolute” is misleading if it implies that defense counsel, judge, or prosecutor may not, in the interest of preserving the integrity of the judicial process, burden or fetter that right by pressuring the defendant to testify truthfully or not at all. In fact, by requiring the defense attorney to curtail his advocacy, section 7.7 itself sanctions the imposition of just such a burden. The provision purports to place the lightest possible burden on the defendant’s right to testify consistent with the attorney’s obligation to preserve the integrity of the process. However, its application will actually impose a heavier, and arguably unconstitutional burden on the defendant who elects to testify, while at the same time allowing the process to be corrupted.
If the defendant takes the stand, section 7.7 obligates the attorney to do precisely what the Supreme Court, in *Ferguson v. Georgia*,82 told the state it could not do: deprive the defendant of his lawyer during one of the most crucial phases of the trial. The Georgia statute struck down by the Court permitted the defendant to take the stand and deliver an unsworn statement without the assistance of his lawyer. What was unconstitutional about the statute was not that it deprived the defendant of the opportunity to give sworn testimony, but that it deprived him of his lawyer when he voluntarily addressed the court.83 Section 7.7 obligates the attorney to place his client in the same position: "The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make a statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant in a conventional manner. . . ."84

Indeed, section 7.7 may operate to work an even greater deprivation than did the Georgia statute, which did not prohibit the attorney from instructing his client on precisely what to say in his address to the court. Although section 7.7 is silent on the subject, it must be inferred that the spirit of the provision which requires the attorney to dissociate himself as much as possible from the perjured testimony, also forbids him from assisting his client in the pretrial preparation of this statement in any way. Moreover, knowingly to assist a witness to prepare perjured testimony and to meet cross-examination on that testimony would probably leave the attorney open to a criminal charge for suborning perjury.

It must be remembered that the Supreme Court held the Georgia statute unconstitutional because "[t]he tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely."85 It is no answer to say that the section 7.7 procedure results from the client’s, and not the lawyer’s, choice. In the first place, the same could have been said about the Georgia statute which expressly permitted the defendant to remain silent without fear of adverse prosecutorial comment. But more importantly, our legal system permits a defendant to appear *pro se* or with the assistance of an attorney.86 One cannot do both simultaneously. As this discussion has illustrated, the decision to accept the assist-

83. See notes 17–20 supra and accompanying text.
84. For the complete text of § 7.7, see note 5 supra.
86. The Supreme Court recently held that a defendant has a constitutional right to appear *pro se*. *Faretta v. California*, 422 U.S. 806 (1975).
The defendant must make a choice between turning over the management of a proceeding upon which his life or liberty hinges to an individual whom he may not know and whose competence he will not be able to judge until it is too late, or retaining control of a proceeding whose intricacies he cannot hope to master. (Even if the court appoints an attorney to serve as adviser to a *pro se* defendant, the defendant will be the only one permitted to speak in court. He, and not his adviser, must make the opening and closing statements and conduct all direct and cross-examination.) Neither alternative is particularly appealing, but at least a defendant can theoretically calculate the tradeoffs.

Section 7.7 is offensive because it changes the rules on the defendant by throwing him back into a *pro se* position at the point when he most needs his lawyer. The result is that the client, after voluntarily and knowingly sacrificing control of his case in return for the benefits of counsel, is deprived of those benefits at a crucial juncture because he chooses to exercise his right to testify. Consequently, since section 7.7 operates to require the same deprivation of counsel as did the Georgia statute, it would appear to be unconstitutional under the express holding in *Ferguson*.

One response to this argument relies on the "implied waiver" theory of *Harris v. New York*. The Court's decision in *Harris* may be seen as being based on a judgment that a defendant, by electing to commit perjury (or at least to give testimony which conflicts with his earlier statements), thereby waives his right to object to the introduction of his illegally obtained out-of-court statements. So, the argument continues, the defendant, by electing to commit perjury, similarly waives his right to the assistance of counsel while he commits that perjury and, to a limited extent, for the duration of the trial.

The fallacy of this argument is that it equates a constitutional right—the privilege against self-incrimination or the right to be effectively represented by counsel—with a particular remedy for enforcing constitutional rights, namely the exclusionary rule. Even if one accepts the implied waiver theory, all *Harris* says is that the defendant has waived his right to have his out-of-court statements excluded. The primary conduct which is involved—the illegal police action—is neither legalized nor forgiven; the defendant remains free to vindicate his

---

87. See text accompanying notes 24–34 *supra*.
constitutional right through a direct suit for damages. By contrast, the primary conduct condemned in Ferguson—the withdrawal of counsel—is expressly authorized by section 7.7. The Standard purports to define the right itself, by imposing an intermediate arrangement between pro se and representation by counsel, which leaves the defendant with the worst of both worlds: loss of control and loss of counsel.

In addition to this overriding constitutional objection to section 7.7, there are a number of practical problems with its application which undercut the theoretically commendable compromise between the rights of the defendant and the interest of the community in having a guilty defendant punished. First, one must assume that within a reasonable time most judges will become familiar with the ABA Standards in general, and section 7.7 in particular. The procedure whereby the attorney does not ask his client any questions, does not argue his client’s version of the facts to the court as worthy of belief, and does not recite or rely upon his client’s testimony during closing argument will come to be regarded not as a peculiar, albeit legitimate, trial strategy, but rather as a not-so-subtle announcement by the lawyer that his client is committing perjury. This undermines the purpose of the Standard, which ostensibly was to safeguard the attorney-client privilege by keeping from the court both any knowledge of the lawyer’s disagreement with his client and any knowledge of the contents of privileged communications. The Commentary to section 7.7 realistically acknowledges the substantial probability that the defendant would be unduly prejudiced, especially at sentencing, if the judge were apprised of the situation. It is naive to think that the defense attorney’s extraordinary conduct will be any less revealing to the judge.

It is not clear what impact the attorney’s curtailment of his advocacy will have upon the members of the jury. Yet it is quite possible that they will be the only participants in the trial who will remain ignorant of the true situation. Unlike the judge, members of a jury may not be tipped off by the defense counsel’s conduct. Notwithstanding the lawyer’s attempt to reduce the impact of his client’s perjury by not referring to it in closing argument, the jury may believe the false

90. If the case is tried without a jury, § 7.7 probably accomplishes nothing. Not only is the judge likely to take account of the defendant’s perjury in determining the sentence but subconsciously he may also consider it in determining the defendant’s guilt or innocence.
testimony and erroneously acquit the defendant. Maybe this is a sop to the defendant, who has already been deprived of his lawyer and subjected to the risk of a stiff sentence should he be convicted; but the introduction of perjured testimony not only prejudices the rights of the community but undermines the integrity of the judicial process. The message section 7.7 sends to the defendant runs something like this: "No one can prevent you from testifying if you insist loudly enough that you wish to do so. However, if you take the stand and lie, your lawyer will totally desert you while you are on the stand and to a lesser degree thereafter. The jury won’t know that you are lying, so you might be acquitted if they believe you; but the judge will know that you are lying and will probably give you a heavy sentence should you be convicted."

In addition to the problematic impact of section 7.7 upon the judge and jury, there are also a number of ambiguities pertaining to the courtroom conduct of the defense attorney and the prosecutor. First, it is unclear whether it is possible for the defense attorney to deliver anything more than a perfunctory closing argument without either referring to or relying upon the defendant’s testimony, or arguing the defendant’s version of the facts. In some cases it may be possible to draw a formalistic line between arguing that the prosecution has not proven beyond a reasonable doubt that the defendant was the man observed by the police, and arguing that the defendant was in fact several miles away. However, this distinction is virtually nonexistent where the only evidence which casts doubt on the officer’s testimony is the defendant’s testimony. If, as is quite likely, the defendant is the only witness, section 7.7 requires the attorney to present a defense and then make a closing argument as if he had not presented a defense at all. The only other interpretation rests upon the literal language of the Standard and would permit the attorney to use the nonperjurious portions of the defendant’s testimony. This assumes that there has been some important truthful testimony. The problem with this approach is that it implicitly involves the use of a common technique of argumentation; namely, that since the witness has testified truthfully about facts A, B, and C; the witness must be telling the truth about fact D, the ultimate issue in the case. Although this argument is inherently fallacious, it can be quite effective before a jury. By relying upon portions of the defendant’s testimony, the attorney is by implication arguing the believability of all of it. All that is necessary is a quick shift of gears from "we have presented clear and convincing evidence of A, B, and C," to "the prosecution has not satisfied its constitutionally imposed burden of proving D beyond a reasonable doubt." If one of the purposes of the Standard was to minimize partially the impact of the
defendant's perjurious testimony upon the members of the jury by insuring that they heard it only one time and without embellishment, this reading of section 7.7 would defeat that purpose.

An additional practical problem is that section 7.7 does not address the question of how the prosecutor should react when he observes a defendant testifying without being questioned by his counsel. Is he supposed to play along with the minuet, leaving only the jury ignorant of the defendant's perjury, or is he permitted to unleash a vigorous cross-examination which will enlighten the jury as to why the defense attorney did not ask his client any questions? A possible sequence of questions could be as follows:

1. Mr. Smith, when you took the stand you swore to tell nothing but the truth, correct?
2. Before I ask you any questions, is there anything which you have just said which, remembering your oath, you would like to correct?
3. You have been sitting in this courtroom for the past few days, have you not?
4. And you have observed me call a number of witnesses to the stand to tell the jury about the facts of this case, correct?
5. And you have observed that the manner in which these witnesses testified is that I asked a question; the witness responded; I asked another question; the witness responded, and so forth?
6. But the testimony you just gave was not presented in this manner, was it?
7. In fact, what happened is that your attorney after asking you to identify yourself to the jury, simply asked you to tell the jury what happened on the evening of September 25, correct?
8. Mr. Smith, did you speak with your attorney in preparation for your testimony?
9. Do you know why he did not ask you a series of questions as has been done with every other witness in this trial?
10. Isn't it because you insisted upon testifying falsely and your attorney did not want to assist you in deceiving the court and the jury?

Even if some of the more pointed of the above questions would be properly excludable as requiring the defendant to divulge confidential communications between himself and his attorney, the damage would be done. Furthermore, there is nothing in section 7.7 which would prevent the prosecutor from devoting a portion of his closing argument to an explanation of the Standard and then asking the jury to infer from the unusual mode of examination coupled with the professional restraints placed upon the defense attorney that the defendant had in-
sisted on perjuring himself. At this point the defendant would almost certainly be in a worse position than had he not taken the stand. The weaknesses which previously existed in the state's case will now be overshadowed by the jury's knowledge that the defendant has lied under oath.

The obvious question to be asked is who would ever follow this procedure; the answer may be no one. Indeed, a reading of the Commentary to section 7.7 points to just such a conclusion. The Commentary concedes that experienced lawyers rarely face the dilemma of the perjurious defendant in private criminal practice. This is partially explained by the fact that a defendant who is paying a lawyer a large sum of money to defend him is likely to do what the lawyer tells him to do. But another explanation, as the Commentary indicates, is that a client will infrequently admit to his lawyer facts constituting guilt and then insist upon testifying falsely. The more likely situation is that which may have arisen in State v. Lowery, where the defendant, without prior warning to the attorney, took the stand and began to testify falsely about key events in a manner which contradicted earlier statements made to the attorney. Although the Lowery court indicated that section 7.7 by implication required the attorney to refrain from asking further questions in areas of possible perjury, the difficulty in effecting this suggestion argues against extending the Standard beyond the narrow scope defined by the Commentary. How is the lawyer to guess which facts his client will lie about? If he feels that his client is likely to lie about all the important facts, is he required to excuse his client from the stand? It appears that section 7.7 was carefully drafted to deal exclusively with Freedman's hypothetical, and it therefore provides little or no guidance to a lawyer confronted by a Lowery situation. Notwithstanding its commendable objectives, the ABA has

91. The only reported case found where defense counsel followed the procedure of § 7.7 is Thornton v. United States, 357 A.2d 429 (D.C. 1976). The attorney acted in accordance with the Standard but went beyond its directives by announcing to the court that his client was testifying against counsel's advice. This focused attention on the fact that the defendant was about to commit perjury.


93. Section 7.7(a) begins: "If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true . . . ." The Commentary contains the following statement: "The existence of this dilemma is predicated upon the defendant's admitting incriminatory facts to his lawyer which are corroborated by the lawyer's own investigation." ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Tentative Draft, 1970).

94. See note 3 supra and accompanying text.

95. Although this would seem to be a major weakness in the Standard, Chief Justice Warren Burger, did not seem to think so. Instead, he chose to emphasize the necessity for the Standard: "Fortunately, and this is something that should be mentioned, the five
enacted an unworkable and arguably unconstitutional standard which covers only the rarest variation of the dilemma.  

IV. A RESPONSE TO FREEDMAN

The dilemma of the perjurious defendant flows from the inherent conflict between the attorney's obligation to safeguard the integrity of the judicial process and his obligation to safeguard the attorney-client privilege. It is fair to say that Freedman's position is based upon the premise that the systemic importance of the attorney-client privilege renders intolerable any impairment of that privilege, either explicitly by exposing the client's perjury or implicitly by curtailing one's advocacy. However, he gives little attention to the manner in which his position undermines both the assumption of good faith upon which our adversarial system rests and the moral autonomy of the defense attorney.

If one agrees with Freedman, even the defense attorney's ethical standards must yield to his client's lack of principles. He must do exactly what his client demands, including putting his client on the stand knowing his client will lie, shoring up the perjured testimony with incisive questions on redirect, and then vigorously arguing that the jury must acquit based upon facts which he knows to be untrue. In short, he must use every ounce of skill he has to perpetrate a fraud upon the men and women who sit as the conscience of the community. He is required to perpetrate this fraud because his client refuses to

or six nationally well-known criminal defense lawyers we consulted said that never in their own practice have they been confronted with the problem concerned, but they agreed we ought to have a standard on it." Burger, Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards, 8 AM. CRIM. L. Q. 2, 7 (1969).

96. It is interesting to note that the most recent pronouncement on the subject by the ABA Committee on Professional Ethics and Grievances completely ignores the conduct required under § 7.7 as a permissible alternative for an attorney confronted with the dilemma of the perjurious defendant:

It is the view of this Committee that DR 7-102(A) and more particularly subpoints (4), (6), and (7) thereof prevent an attorney from knowingly using perjured testimony or false evidence or participating in the creation or preservation of evidence when he knows or it is obvious that the evidence was false. This, of course, means that if the attorney knows in advance that his client intends to use false or perjured testimony, it is his duty to advise the client that the lawyer must take one of two courses of action:

(1) Withdraw at that time in advance of the submission of the perjured testimony or false evidence; or

(2) Report to the court or tribunal the falsity of the testimony or evidence, if the client insists on testifying.

It is axiomatic that the right of a client to effective counsel does not include the right to compel counsel knowingly to assist or participate in the commission of perjury or the creation or preservation of false evidence. ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, INFORMAL OPINION NO. 1314 (MARCH 25, 1975).
follow his advice to obey the law by answering truthfully under oath. The client’s decision to commit the crime of perjury compels the attorney to assist in the commission of that crime, to use his years of legal training to help prevent that crime from being uncovered in court, and to delude the members of the jury into acquitting his client based on that false testimony.

Freedman’s position is not an automatic or inconsequential by-product of a criminal adversarial process which permits numerous guilty defendants to go free to assure that the innocent are not wrongfully convicted. The defendant need not speak at all; he has a constitutional right to remain silent. If the prosecution does not prove the defendant’s guilt beyond a reasonable doubt the judge or jury must vote to acquit, even if the defendant has not offered one word of evidence on his behalf. We have never adopted the practice employed in many civil law countries of requiring the defendant to answer questions posed by the judge and the prosecutor at trial. The defendant is not required to prove his innocence. That is the framework within which we have elected to operate; and unless it is changed by constitutional amendment every defendant is entitled to avail himself of its advantages.

While there is nothing fraudulent or criminal in an attorney arguing a “reasonable doubt” defense even where the attorney knows that the defendant committed the crime for which he is charged, perjury has always been treated as a serious offense. It seems particularly objectionable for the defendant to commit perjury in a system which affords the defendant the right of remaining silent. It is difficult to argue that anything in the “presumption of innocence” entitles a defendant to compel his lawyer to assist him. Also, it would be inconsistent for the attorney first to make every effort to dissuade his client from committing perjury and then, once the client has deliberately flouted that advice, for the attorney to use every effort to help the client do exactly what he advised the client not to do. If Freedman’s position requires the attorney to do both, how hard must he argue with his client and how soon must he reveal to the client that he will yield if the client insists on testifying? What does the attorney say in response to the


98. It is interesting to note that even if an attorney’s use of his client’s perjured testimony does not violate ABA Code of Professional Responsibility DR 7-102(A)(4), so as to indicate mandatory withdrawal under DR 2-110(B)(2), a client’s insistence upon testifying falsely clearly gives the attorney the option of permissive withdrawal under DR 2-110(C)(1)(b) if “[h]is client personally seeks to pursue an illegal course of conduct.”
inevitable question, "What are you going to do if I take the stand?" Suppose the client asks this question at the outset of the discussion. Further, suppose that in fact the client stands a better chance of acquittal if he perjures himself and the attorney then makes a skillful closing argument than if the client remains silent and his attorney is left with a "reasonable doubt" defense. Must the attorney, consistent with his obligation to urge his client to obey the law by testifying truthfully, lie to his client by telling him that he will destroy his case if he perjures himself?

If the attorney must use artifice to persuade his client either to testify in a truthful manner or not to testify at all, he is undermining the relationship whose preservation was the very reason for his ultimate willingness to use the perjured testimony. Conversely, if he is not going to make an earnest effort to dissuade his client from breaking the law—and such an effort may not be possible if the attorney is neither willing to lie to his client about the tactical effect of perjury nor to make threats (i.e., withdrawal or disclosure) which he does not plan to carry out—the attorney is more of a hired gun than it first appeared. And if the attorney takes the next step, which seems inevitable given Freedman's premise, of preparing his client to phrase his responses so as to give tight, cogent testimony and to withstand vigorous cross-examination, the attorney is guilty of suborning perjury. The transformation to hired gun is complete.

There is a further argument why the knowing use of perjury is particularly offensive in our system. Most notably in the last fifteen years, the courts have made a deep commitment to procedural due process in the criminal trial. The advent of the exclusionary rule and the remedy of dismissal with prejudice when evidence of prosecutorial misconduct is uncovered indicate that the fairness of the criminal process is sometimes more important than the determination of whether or not the defendant committed the crime. In contrast to most European countries, we have made a conscious sacrifice in accuracy in order to protect the integrity of the process. It is this constitutional commitment to the fairness and integrity of the process which enables the criminal defense attorney to give vigorous advocacy to the most despicable defendants. This constitutional commitment not only permits but requires the attorney to argue technical grounds for acquittal.

101. See Damaska, supra note 97 at 527-28.
The defense counsel is constitutionally compelled to argue that a heroin pusher should go free, despite the fact that he probably will be pushing heroin tomorrow, because the crucial evidence was obtained in a search that exceeded lawful bounds.

In light of this extraordinary commitment to fairness and good faith it is hard to defend the position that a defense attorney is at times obligated to introduce and argue perjured testimony. If our notions of procedural due process forbid the prosecutor from introducing highly probative and unquestionably accurate evidence because of the illegal, but possibly innocent manner in which it was obtained, it would seem that the same commitment to fairness and to the integrity of the process should forbid the defense attorney from introducing unquestionably false and misleading evidence produced through a conscious and deliberate violation of the law.

It is not enough, however, simply to recognize the existence of our systemic commitment to fairness and procedural integrity. It is also essential to realize that the burden of insuring the preservation of that commitment rests largely with the individual attorneys who try cases. Although certain abuses will be uncovered in court, the judicial machinery is not equipped, for example, to police every case for instances of witness tampering or secreting evidence or perjury. It is largely an honor system where each attorney must faithfully observe certain limitations on his advocacy, even if it is clear that his client’s interests would be better served by exceeding those limitations. In light of this, it is difficult to see what gives a defendant the right to compel his attorney to corrupt that process by deliberately introducing perjured testimony. And how can the attorney, who can often morally justify his courtroom conduct only by arguing that he is helping to preserve the integrity of the criminal justice process, turn around and deliberately corrupt that process merely because his client insists that he do so? If the client is morally and legally entitled to have an attorney who will insure that the state has followed the rules if it insists on maintaining the prosecution, the attorney clearly is morally and professionally obligated to insist that his client play by the same rules. The systemic argument that a defendant’s rights must be scrupulously protected justifies an attorney defending a confessed criminal using a reasonable doubt strategy. But in the same way, the systemic argument that the attorney must preserve the integrity of the judicial process justifies resolving a moral dilemma affecting a particular client in favor of the system.

It is fair to say that an attorney’s obligation to preserve the integrity of the process at times transcends the interests of the community and at
times transcends the interests of the individual he is defending. However, this obligation is distinct from the purported obligation of the attorney to seek "truth" which has been advanced by some of Freedman's critics. Such critics fail to understand that our system sometimes sacrifices truth and accuracy in order to preserve the integrity of the process. An attorney would be mistaken to curtail his representation of guilty defendants in an attempt to achieve a "true" result. Freedman can be criticized for not recognizing the moral framework within which a defense attorney is permitted to act. One cannot detach one plank—the attorney-client privilege—from the framework without threatening the stability of the entire structure. This overriding commitment to the integrity of the process underlies the attorney-client privilege: the defendant is entitled to the services of a skilled professional who will insure that all the defendant's rights are protected, and the defendant is given the privilege of talking freely with this professional without fear that his highly relevant statements will be admitted at trial. The defendant therefore has no right to abuse the protection afforded by the privilege to corrupt the very process from which it springs.

V. A PRINCIPLED ALTERNATIVE

The alternative I propose to the positions set forth by Freedman and the ABA Standards is designed to impose the least possible injustice upon the client so long as one rejects Freedman's lawyer-as-alter-ego theory. Cases such as McCalvin, Lowery, Thornton, and Harris suggest that the best standard is one which greatly reduces the likelihood that a defendant will insist upon taking the stand and committing perjury. For once that juncture is reached, none of the solutions are satisfactory. The federal law and the prevailing trend in state law is that neither the lawyer nor the judge can prevent the defendant from taking the stand. A solution which would require the attorney to inform the judge of his client's stated intention to commit perjury would leave the judge in a difficult position since, notwithstanding this knowledge, the judge would be required to permit the defendant to commit a fraud upon the court. Still, the holding of Ferguson v. Georgia appears to forbid a procedure which compels the defendant to testify without the assistance of his attorney, and therefore the judge would have no alternative but to permit the attorney to withdraw.

103. See notes 55–80 supra and accompanying text.
104. See notes 33–51 supra and accompanying text.
declare a mistrial, and, if court-appointed counsel is involved, assign the defendant another lawyer.

It is difficult to predict whether the spectre of having to go through another trial, with the possibility of prolonged pretrial detention, would in itself be sufficient to deter most individuals from testifying under these circumstances. But assuming that it would not, one of three things would occur: 1) the client will find an attorney who accepts Freedman's theory of the advocate's duty; 2) the client will lie to his next attorney so he will then be free to lie on the stand; or 3) the client will go through an endless series of mistrials. Each outcome entails either a great squandering of judicial resources, the eventual introduction of perjured testimony, or both. In addition, withdrawal at this juncture involves a type of buck-passing which, instead of resolving the dilemma, tosses it into another attorney's lap.

The only acceptable alternative is one which protects the defendant's unqualified right to take the stand while refusing to "punish" the exercise of this right by depriving him of his lawyer, but still subjects that right to a general obligation to tell the truth. The lawyer would instruct a client who insisted upon taking the stand and committing perjury that, should the client actually begin to testify falsely, the lawyer would approach the bench and inform the judge that his client had just committed perjury. The lawyer would also instruct the client that he (the lawyer) would be a chief witness in the client's subsequent perjury trial. This approach would probably also produce a mistrial should the client commit perjury, since there is the Ferguson problem of inadequate representation as well as a clear conflict of interest between the attorney and the defendant. It is reasonable to assume, however, that the added threat of a perjury prosecution based upon unusually probative testimony would be a far greater deterrent than the mere delay of a mistrial. Under DR 4-101(C)(3) of the Code of Professional Responsibility, the intention of a client to commit a crime, i.e., the defendant's stated intention to commit perjury, is explicitly excluded from those confidences and secrets of his client which the attorney is bound to hold inviolate.

A similar solution would apply for the Lowery dilemma which section 7.7 fails to address. Should the defendant, without warning his

106. Assuming the attorney has been denied permission to withdraw, this is the conduct mandated by the ABA Committee on Professional Ethics and Grievances. See note 96 supra.

107. DR 4-101(C)(3) says that "[a] lawyer may reveal: . . . 3) The intention of his client to commit a crime and the information necessary to prevent the crime." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101 (1975).
attorney that he planned to perjure himself, begin to tell a story that varied significantly from both the client's previous discussions with his attorney and the attorney's own investigation of the facts, the attorney should ask for a short recess at the earliest possible time. He should then inform his client that unless the client rectifies his perjurious testimony when he resumes the stand, the attorney will inform the judge of his client's perjury.

This position is partially consistent with the one expressed by the ABA Committee on Professional Ethics and Grievances. Although the committee, without even mentioning the section 7.7 procedure as a possible alternative, requires disclosure or withdrawal if the attorney knows in advance that his client is going to commit perjury, it adopts the Freedman position in the situation where the attorney does not have advance warning:

If the attorney does not know in advance that the client intends to use perjured testimony or false evidence, but finds in the course of the trial of the case that the client has done this, either by his own admissions or by the obviously false nature of his testimony or evidence, then the lawyer, pursuant to the provisions of DR 7-102(B), has the primary duty to protect the confidentiality of any privileged communication from his client. Subject, however, to affording the client proper protection on the basis of any privileged communication, the lawyer does have an obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client. See DR 2-110(C). In other words, the confidential privilege, in our opinion, must be upheld over the obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal.

It seems highly unlikely that a judge would permit a defense attorney to withdraw in the middle or at the close of his client's testimony, thereby insuring a mistrial. Since a futile motion by the attorney for permission to withdraw would likely be seen by the court, and perhaps by the jury, as a signal that the defendant had just committed perjury, the opinion effectively requires the attorney to proceed with his defense as if the perjury had not occurred.

The rationale for the committee's position is the preservation of the attorney-client privilege. However, even though neither the committee nor the Standards advise or require the attorney to warn his client at the

108. ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, INFORMAL OPINION No. 1314 (March 25, 1975). See text of opinion contained in note 96 supra.

109. Id.
outset that he will not permit the defendant to tell one story in the office and another story on the stand, the committee sanctions disclosure by the attorney if he knows in advance that his client will commit perjury. It would therefore seem that as long as the attorney reveals to the client the limitations of his advocacy, the attorney should not remain silent when his client lies on the stand merely because the client also lied to the attorney concerning his planned testimony.

The obvious objection to the argument that the attorney must disclose his client's perjury to the court is that abrogating the attorney-client privilege and forcing the lawyer to be an informer would undermine the attorney-client relationship and discourage frank communications between lawyer and client. This may be true, but this alternative is preferable to Defense Function section 7.7 which, in addition to all the defects described above, undermines the relationship to exactly the same extent. As has been shown, the extraordinary alteration of trial tactics mandated by the Standard puts the judge and prosecutor on notice that the defendant has committed perjury. Any client who knows in advance that his lawyer will abandon him on the stand, while tipping off the judge and prosecutor, will never confess guilt to his lawyer. In fact, any solution other than Freedman's will discourage frank communication unless the attorney conceals his position from the client until the last moment. Any solution which requires the lawyer to dissociate himself or to curtail his courtroom advocacy penalizes the client for disclosing the truth to his lawyer. If the consensus is that this price is too high, if this discouragement of frank communication outweighs the client's perjury, then the answer is Freedman's position, rather than any purported compromise which assesses a much higher, and arguably unconstitutional cost, while failing to achieve the benefit of keeping the trial free from the effects of the defendant's perjury. For Freedman understood what the committee which drafted the ABA Standards did not. When a lawyer is faced with the dilemma of the perjurious defendant he must choose between being an advocate for his client or being an officer of the court. If he tries to do both, he ends up being neither.

The other principal objection to my position is that it impermissibly burdens the defendant's right to testify. That it applies such a burden cannot be denied; that the burden is impermissible was denied by implication in the Supreme Court's decision in *Harris v. New York.*\(^{110}\) In simple terms, *Harris* stands for the proposition that a defendant's perjury is more offensive to the judicial process than certain illegal

police conduct. The adoption of my position does not entail the introduction into evidence of the fruits of any crime by the attorney or the state. Rather, it recognizes that a defendant’s right to testify does not include a right to have an attorney assist him to testify falsely. It adds something to the cost of representation by counsel which the Supreme Court described in *Henry v. Mississippi.*

Any standard which limits the attorney’s freedom to present the perjured testimony of his client should be disclosed to the client at the outset. He has the constitutional right to appear *pro se* or through counsel, and this right is compromised if at the outset the client is not informed that there are some things which the lawyer will not do for him. This would entail some modification of Defense Function section 3.2(b), which states: “It is unprofessional conduct for the lawyer to instruct the client or to intimate to him in any way that he should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer’s knowing of such facts.” The Commentary to this section noted that leading defense lawyers “stressed that at the outset they invariably informed the client that, if the client failed to disclose all relevant facts, they would consider immediate withdrawal from the case.”

The lawyer cannot have it both ways since it is dishonest to demand complete candor without informing the client of the attorney’s obligation to the court. Notwithstanding the ABA Standards, it would seem to be unprofessional conduct to solicit and promote a relationship where the client tells all and the lawyer conceals the fact that such complete disclosure may hurt the client. The attorney should explain to the client at the outset that the attorney will not permit the client to say one thing in the office and another thing on the witness stand. If the client is not satisfied with the attorney’s ethical principles the attorney will gladly withdraw to permit the client to seek other counsel.

The dilemma of the perjurious defendant grows out of the recognition that the attorney cannot satisfactorily and simultaneously fulfill his competing obligations to his client, to himself, and to the court. There is no way that the lawyer can (1) refrain from introducing testimony which he knows to be false; (2) completely safeguard the confidences of his client while in no way fettering the client’s right to testify; and

111. 379 U.S. 443, 451–52 (1965). A client risks the waiver of rights with little or no consultation in the name of trial strategy when he enlists a lawyer. The question left undecided was whether a defendant had, because of his counsel’s trial strategy, waived the right to assert constitutional claims in federal habeas corpus action.


113. Commentary to § 3.2, note 112 supra.
(3) set principled limits on his own advocacy consistent with his moral views. Freedman's solution is to satisfy fully (2), and to take a moral position on (3) which enables him to subordinate, and therefore override, (1). The ABA position in Defense Function section 7.7 attempts to satisfy, in a minimal fashion, each obligation. I have tried to show that the result is a course of conduct which satisfactorily meets none of the attorney's obligations and which is arguably unconstitutional as well.

The alternative I suggest is to honor at least the integrity and autonomy of the defendant. By setting limits on counsel's advocacy which the lawyer discloses to the client at the outset of the relationship, the lawyer is respecting the integrity and autonomy of both his client and himself. The lawyer is able to regulate his professional conduct according to moral principles, and the client makes the choice whether to take the lawyer with his stated principles or to seek other counsel. One of the advantages of my proposal is that it permits the attorney to withdraw very soon after he has taken the case. In the situation involving court-appointed counsel, the waste of judicial resources will be minimal should the judge grant the motion and appoint another attorney. Should the client agree to the terms of the representation and then seek to perjure himself, his autonomy will not be violated when the attorney informs the court of the perjury.

One of the major objections to the regime imposed by Defense Function sections 3.2 and 7.7 is that the lawyer is potentially sandbagging every client he takes. A client is not likely to be familiar with the Code of Professional Responsibility and will not know the limits of his lawyer's advocacy in advance. By making the full disclosure mandate of section 3.2 a condition for undertaking and continuing the representation, while at the same time concealing the existence of his obligation under section 7.7, the attorney is extracting information under pretenses which may prove to be false. The fact that his sandbagging is purportedly done for the benefit of the client, whom it is argued will not get effective legal assistance should the attorney not know all the important facts, does not render it any less an invasion of the client's autonomy. If the lawyer elects to adopt any standard short of Freedman's, he must, if he is to respect his client's autonomy and integrity, disclose that fact at the outset of the representation to dispel any possible misconceptions on the client's part.

It can be argued that a lawyer who makes such a disclosure will encourage his client both to lie in the office and to lie on the stand. Either the lawyer's statement will have a chilling effect on the free flow of information or it will actually provoke a client into thinking
that the smartest thing to do is to think up a good story and to stick with it. On the other hand, the initial candor of the lawyer may encourage a better attorney-client relationship, since the client may either respect the lawyer for his principles or at least appreciate the fact that the lawyer is not trying to con him.

Without some empirical data, we can only speculate as to whether or not the adoption of my proposal would lead to an increase in perjury by defendants. However, it is not the lawyer's role to minimize the risk that a given client will not tell the truth by screening out testimony which the lawyer thinks might be untruthful. It is up to the jury to make the ultimate determination of a defendant's credibility, and the dilemma which is under discussion arises only if the attorney knows as a result of communications with his client and his own investigation, that the client is going to commit perjury. The attorney is not required to be a surety for his client's honesty. In fact, DR 7-106(C)(4) of the Code of Professional Responsibility expressly forbids a lawyer to state his personal opinion as to the credibility of any witness or as to the guilt or innocence of the accused. It is only when the attorney knowingly introduces perjurious testimony that he violates the integrity of the court and the community which it serves. The fact that the attorney remains seated at counsel table while his client lies does not make this violation any less offensive.

VI. CONCLUSION

The answer to the dilemma of the perjurious defendant will not be found by simply resolving whether or not the right to testify is statutory or constitutional, or whether the attorney must adhere to his client's demand to testify. It must come instead through a determination of how heavily our society is willing to burden that right in order to prevent the client from committing perjury. In an effort to impose as light a burden as possible, one much lighter than the courts have been willing to condone, the ABA adopted Defense Function section 7.7 which appears to impose an unconstitutional burden upon that right while still permitting the jury to be influenced by the perjured testimony.

The ABA Standard avoids rather than solves the dilemma, and what I have tried to demonstrate is that this is a dilemma which must be answered one way or the other. Because of the unqualified right of the defendant to testify and the constitutional prohibition against non-advocacy, the lawyer must make a choice between serving as a repre-

114. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4) (1975).
sentative of his client or a representative of a court and the judicial process.

The solution proposed here permits the attorney to fulfill his obligations to preserve and to promote both the integrity of the process and the autonomy of his client. Like the unacceptable ABA position, and any other alternative which requires the attorney to do something less than to proceed with the presentation of his client's testimony as if it were the truth, my solution may encourage defendants to be less than candid to their attorneys. But it is the only satisfactory alternative to Monroe Freedman's position. If the price my position demands is too great, then individual attorneys and the profession as a whole should openly espouse Freedman's views. If, on the other hand, the profession is sincere in both its rejection of the lawyer-as-alter-ego or hired gun, and in its commitment to preserve the integrity of the process, it should publicly recognize a limitation on the attorney-client privilege and fully explain this limitation to clients. The court, the public, and the clients deserve no less.