

## CLIENT PERJURY: AN OLD “TRILEMMA”

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Reprinted from *Bench & Bar of Minnesota* (May/June 1986)

. . . an ethical lawyer, [is] an officer of the court and a key component of a system of justice dedicated to a search for truth . . . . [*Nix v. Whiteside*, slip op. at 16 (U.S. S. Ct., Feb. 26, 1986).]

It is the job of the defense attorney – especially when representing the guilty – to prevent, by all lawful means, the “whole truth” from coming out. [Alan Dershowitz, *The Best Defense*.]

The attorney with a perjurious client is faced “with what we may call a trilemma – that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.” [Monroe Freedman, “Perjury: The Lawyer’s Trilemma,” *Litigation*, Winter, 1975.]

The United States Supreme Court in *Whiteside* has offered its holding, and the benefit of its majority’s general thoughts, on a perennial topic of legal ethics: the tension between an attorney’s duty as an officer of a court seeking to determine the truth and the attorney’s duty to advocate zealously and maintain confidences for a perjurious client.

Whiteside purposed to testify in defense of murder charges that he saw “something metallic” in the decedent’s hand even though he previously told his attorney he had not seen a gun. In Whiteside’s words, “If I don’t say I saw a gun I’m dead.” Whiteside’s appointed counsel, Gary Robinson, tried to dissuade him from perjuring himself and further advised him,

. . . if he did do that it would be my duty to advise the court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.

Whiteside was convicted; the Iowa Supreme Court affirmed and commended Robinson for high ethical standards. The Eighth Circuit, however, reversed a federal district court and granted a petition for writ of habeas corpus, even though, “for the purposes of our analysis, we presume that appellant would have testified falsely.”<sup>[Ftn1](#)</sup> The appellate court found that Robinson’s “threat” to advise the trial judge and testify against Whiteside entailed a conflict of interest, a breach of loyalty, and unnecessary disclosure of confidences from which prejudice to Whiteside could be presumed, in violation of his Sixth Amendment protections. Whiteside’s Fifth Amendment right to testify was also found to have been violated. The Supreme Court reversed unanimously, with a majority opinion and three concurrences.

The majority addressed both aspects of the ineffective assistance of counsel standard, whether there was serious attorney error and prejudice. The majority determined there was no error because Robinson’s conduct comported with relevant professional standards as well as the basic purpose of a trial. The majority also held that Whiteside suffered no prejudice because the only effect of Robinson’s “dissuading” his testimony was to prevent perjury. The lower court was wrong to presume prejudice – there could be no conflict of interests, when Whiteside had no cognizable interest in testifying falsely. The concurrences agreed that Whiteside suffered no prejudice, but declined to address the question of appropriate attorney

behavior in facing the dilemma of client perjury.

The Eighth Circuit said both that Sixth Amendment scrutiny did not require it “to determine whether counsel behaved in an ethical fashion” and “that counsel here fell short” of various standards. Judge Lay branded Robinson’s actions “unethical” (750 F.2d 717), but the Iowa Supreme Court (“high ethical manner”), Justice Stevens’ concurrence (“a proper way”), and the Supreme Court majority found Robinson’s conduct to be exemplary.

The U.S. Supreme Court has settled at least one aspect of the constitutional requirement for effective assistance of counsel when a client indicates intent to testify falsely. Such a client has no right to the attorney’s assistance, and the Constitution does not compel the attorney to disregard state ethics codes and criminal statutes proscribing subornation of perjury.

Although the Supreme Court majority has also declaimed on the ethical requirements in such a situation, it appears that debate will continue. Justice Brennan, concurring in the judgment, stated:

. . . the Court’s essay regarding what constitutes the correct response to a criminal client’s suggestion that he will perjure himself is pure discourse without force of law . . . . Lawyers, judges, bar associations, students and others should understand that the problem has not now been “decided.”

The Supreme Court appears undivided, however, on the conclusion that the states, without infringing Sixth Amendment rights, have wide latitude to regulate the ethics of counsel facing client perjury.

While Minnesota has not addressed the client perjury issue in a disciplinary case, the new Minnesota Rules of Professional Conduct increase emphasis on the attorney’s duty to the court. Although new Rule of Professional Conduct 3.3, “Candor Toward the Tribunal”, is in part similar to the former DR 7-102, “Representing a Client Within the Bounds of the Law,” the new rule increases the lawyer’s duty of candor toward a tribunal. Rule 3.3 and DR 7-102 both forbid a lawyer to offer evidence the lawyer *knows* to be false. However, if a lawyer offers evidence which he or she later comes to know was false, former DR 7-102(B) required revelation to the tribunal “except when the information is protected as a privileged communication.” The exception tended to swallow the rule. Rules 3.3(a)(4) and (b) effectively remove the exception by requiring the lawyer to “take reasonable remedial measures” even when this involves disclosure of confidential client information. The comment to Rule 3.3 specifically states, “If withdrawal will not remedy the situation, the advocate should make disclosure to the court.”

The difference between the new and old rules might be crucial in a case like *Whiteside*. The Eighth Circuit emphasized that it was Robinson’s threat to advise the trial judge and impeach Whiteside which it found unconstitutional. The Supreme Court found no constitutional or other fault with Robinson’s suasions. Therefore, Minnesota attorneys may, constitutionally and ethically, deal with client perjury by suasion, withdrawal, and disclosure.

The interplay between disciplinary rules and Sixth Amendment requirements is difficult to define. The comment to Rule 3.3 makes clear that in criminal cases ethical obligations are “subordinate to constitutional requirements.” From the constitutional perspective, state ethics standards are “guides” determining whether there has been “serious attorney error;” but ethical breach does not necessarily entail a constitutional violation. What the constitution requires of defense counsel is only conduct which “falls within the wide range of reasonable professional assistance”; within that range states are free to define and

apply standards of professional conduct.

The subordination of ethical standards to Sixth Amendment requirements should occur rarely. In principle counsel should not often be subjected to the apparent dilemma of having to obey the Sixth Amendment at the cost of apparently disobeying state disciplinary rules. If Whiteside's attorney could threaten to impeach him at trial, after withdrawing as counsel, by revealing otherwise privileged information, without thereby violating Whiteside's Sixth Amendment protections, there is indeed a broad range of acceptable conduct available to defense counsel without violating either the Constitution or the Rules of Professional Conduct.

The problem of the zealous lawyer's duties to the court and his perjurious client has been called one of the three most difficult a lawyer can confront. Various responses have been proposed, including suasion, withdrawal, passively allowing a client to testify narratively, informing the judge, and Robinson's own novel combination of measures. Each situation must be carefully analyzed in its own terms.

There are, in the most pressing ethics dilemmas, however, limits to analysis.<sup>Ftn2</sup> In such situations, and *after analysis*, it may be necessary to do what a good attorney would do. Although this sounds question-begging, it means relying on the advice and example of those who are undeniably excellent and morally astute lawyers and following the lead of previous cases. The common law has recognized that rules have their limits. The client perjury rule and *Whiteside's* constitutional interpretation recognize a range of "reasonable remedial measures." *Whiteside* did not definitively crack the old chestnut of client perjury, but it told lawyers they are constitutionally free to follow ethical requirements and their own informed decision making.

## NOTES

<sup>1</sup> *The Eighth Circuit said it would be a "rare case" when an attorney "knows" the client's testimony will be perjurious. The Supreme Court said the maxim "that 'a lawyer must believe his client not judge him' in no sense means that a lawyer can honorably be a party to or in any way give aid to presenting known perjury." All of the courts reviewing Whiteside took it without serious question that Robinson "knew" Whiteside would commit perjury. When an attorney knows perjury will occur will often be a crucial question – one which Whiteside illuminates at best indirectly. Rule 3.3(c), Rules of Professional Conduct, provides, "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false." Other rules apply when the lawyer "knows" the testimony's falsity.*

<sup>2</sup> *For recent scholarly analysis, see, Rieger, "Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues," 70 Minn. L. Rev. 121 (1985) and Subin, "The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm," 70 Iowa L. Rev. 1091 (1985).*