NOTES

Legal Ethics, Client Perjury and the Privilege Against Self-Incrimination

Introduction

An attorney has three often conflicting roles in the American system of justice. She is an officer of the court, an instrument in the court's truth finding process with a legal, moral and ethical duty to prevent frauds upon the court. She is a zealous adversary with ultimate loyalty to her client, and has a duty to protect her client's rights. She is a public citizen, with the same duties all citizens have to testify when the need arises and to help prevent crime.[1] To resolve the inevitable conflicts resulting from these three competing interests,[2] the American Bar Association (ABA) has promulgated ethical guidelines, most recently in the Model Rules of Professional Coduct (Model Rules).[3]

Under the Model Rules, an attorney who learns that her client intends to commit perjury[4] must seek to dissuade the client. If the client

---

1. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) [hereinafter cited as MODEL RULES].

2. *Id.*

3. *Id.* The Model Rules and other ethical codes have been the subject of extensive examination by law review writers. *See, e.g.,* Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11 (1984); Alper, *Proposed Client Perjury: A Criminal Defense Attorney's Alternatives*, 12 U. BALT. L. REV. 248 (1983); Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?*, 13 PAC. L.J. 273 (1982); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 322 (1976); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75 (1981); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Kelbley, *Legal Ethics: Discretion and Utility in Model Rule 1.6*, 13 FORDHAM URB. L.J. 67 (1985); Rotunda, *The Notice of Withdrawal and the Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487 (1983).

4. Perjury is defined as:

> In criminal law, the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being

subsequently perjures herself, the attorney must reveal the perjury to the court.[5]

The conflict between the constitutional rights of an accused and an attorney's duty to disclose client perjury was raised in the United States Supreme Court's 1986 decision, *Nix v. Whiteside*.[6] In *Whiteside*, the defense counsel threatened his client that he would inform the trial judge that Whiteside's testimony was perjurious and testify against Whiteside if he testified untruthfully. In a unanimous decision, the Supreme Court found no conflict between the client's right to effective assistance of counsel and the attorney's duty to reveal client perjury.[7]

The attorney's duty to disclose client perjury raises questions regarding the client's privilege against self-incrimination. The Fifth Amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[8]

Does a lawyer, by complying with her ethical obligations, inadvertantly cause her client to be a witness against herself? Is the lawyer's disclosure state action under the Fourteenth Amendment? Are the statements made by a client to her attorney compelled or involuntary? What courses of action are available to counsel to prevent a fraud upon the court, while avoiding "compelling" her client to be a witness against herself, or using confidential information to her client's detriment?

This Note will examine the self-incrimination issue raised by attorney disclosure of client perjury. It will examine the crime of perjury, the lawyer's ethical obligation to reveal client perjury, and the purposes and scope of the privilege against self-incrimination. It will then question whether the attorney's conduct is state action under the Fourteenth Amendment, and focus on the attorney-client relationship to discern any evidence of compulsion. This Note concludes that there is a conflict between the privilege against self-incrimination and the attorney's duty to disclose client perjury, and proposes that the attorney should disclose to

---

material to the issue or point of inquiry and known to such witness to be false. Perjury is a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question.

BLACK'S LAW DICTIONARY 1025 (5th ed. 1979).

5. MODEL RULES, *supra* note 1, Rule 3.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-5, EC 7-6, EC 7-26, EC 7-28, DR 7-102(A)(4), (6), (7), DR 7-102(B) (1979) [hereinafter cited as MODEL CODE]; CANONS OF PROFESSIONAL ETHICS Canon 29 (1969) [hereinafter cited as CANONS]. *See generally infra* note 65 and accompanying text.

6. 106 S. Ct. 988 (1986). The Court did not address the Fifth Amendment in its decision. *See generally* McCall, *Nix v. Whiteside: The Lawyer's Role in Response to Perjury*, 13 HASTINGS CONST. L.Q. 443 (1986).

7. *Whiteside*, 106 S. Ct. at 995 n.4 ("Iowa . . . adopted a form of the Model Code . . . , but has not yet adopted the Model Rules.").

8. U.S. CONST. amend. V.

her client her obligation to reveal client perjury prior to their discussion of the case.

I. Client Perjury and an Attorney's Ethical Obligations

A. The Crime of Perjury and the American Adversarial System of Justice

The confession has a long history in both Christian theology and legal proceedings. As noted by Saint Augustine of Hippo in the year 397, confessions have traditionally helped a penitent to appeal to God's "pity."[9]

In the common law courts, confessions were used to secure information in order to punish crime. Under the inquisitorial system of justice, witnesses and criminal suspects could be compelled to give evidence because church and state were not separated, and because confessions were less burdensome on the limited investigatory reserves of the state.[10] Often witnesses were physicially tortured in the hope of determining whether they were telling the truth.[11] The accused faced what Justice Goldberg called "the cruel trilemma of self-accusation, perjury or contempt."[12]

The privilege against self-incrimination arose in response to the ex officio oath of the ecclesiastical courts, which was used to oppress Puritan and other minority religious groups in England.[13] The privilege became a cornerstone of the evolving adversarial system of justice, which prohibits the state from extracting incriminating information from an ac-

9. SAINT AUGUSTINE, CONFESSIONS 24 (Pine-Coffin trans. 1961). Saint Augustine's omniscient God "will keep record of our iniquities." *Id.* (quoting *Psalms* 129:3 (130:3)). The confession was intended not for the state's informational purposes but to humble the soul for the confessor's spiritual forgiveness. "I must now carry my thoughts back to the abominable things I did in those days, the sins of the flesh which defiled my soul. I do this, my God," wrote the Saint, "not because I love those sins, but so that I may love you." SAINT AUGUSTINE, CONFESSIONS 43 (Pine-Coffin trans. 1961).

10. *See, e.g.*, C. MCCORMICK, EVIDENCE § 118 n.9 (3d ed. 1984) (quoting STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 442 n.1 (1883) who was quoting an Indian civil officer explaining why prisoners were tortured: "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the hot sun hunting up evidence.").

11. *See* 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. ed. 1961); D. JARDINE, USE OF CRIMINAL TORTURE IN CRIMINAL LAW OF ENGLAND 13 (1837); *see also* Brown v. Walker, 161 U.S. 591, 596 (1896) (regarding the privilege as a reaction to "the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and . . . was not uncommon even in England").

12. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

13. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 769-70 (1935). By 1641, Massachusetts prohibited the use of torture against an accused, but only in capital cases involving suspected co-conspirators, and even then only until after she was convicted. *Id.* at 776-77.

cused person against her will.[14] Because it rejects the inquisitorial system's use of physical torture against witnesses, the adversarial system must turn to other means of insuring that witnesses tell the truth. Courts today use criminal sanctions for perjury to fill this need.[15]

Perjury has not always been a crime: in ancient times, "our ancestors perjured themselves with impunity."[16] Perjury was originally punished in the ecclesiastical courts of England, where it was a ground for excommunication from the church,[17] but later it became grounds for much more temporal punishments through the Court of Star Chamber.[18] By 1563, there was a statute against perjury in England,[19] and perjury came to be known as a crime against the state. By 1609 in the American colonies, to swear falsely was punishable by death.[20] Today, it is the duty of all citizens to testify when called upon by the courts, and when they do testify, they must do so truthfully.[21]

B. The Attorney's Accountability for Client Perjury

1. Criminal Sanctions

In an effort to aid the truth-finding goal of the courts,[22] an attorney may be held criminally liable for a client's perjury on various theories. First, an attorney may be liable for aiding and abetting perjury, for in-

14. Under the adversarial system, however, a witness other than the accused still can be compelled to testify. *See, e.g.,* CAL. EVID. CODE § 911(a) (Deering 1985) ("No person has a privilege to refuse to be a witness" except where provided by statute.); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

15. The Supreme Court has stated:

> In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.

United States v. Mandujano, 425 U.S. 564, 576 (1976).

16. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 543 (2d ed. 1968).

17. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts,* 24 AM. J. LEGAL HIST. 145, 159 (1980).

18. *See id.* at 157.

19. *Id.* at 169.

20. *See* Pittman, *supra* note 13, at 766 (referring to the Virginia Charter of 1609).

21. *See, e.g.,* Harris v. New York, 401 U.S. 222, 225-26 (1971).

22. *See Whiteside,* 106 S. Ct. at 1004 (Blackmun, J., concurring) ("This Court long ago noted: 'All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on *truth.* Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.' " (quoting *In re* Michael, 326 U.S. 224, 227 (1945) (emphasis added)).

stance, by advising her client on how to perjure herself.[23] Second, an attorney may be liable for conspiring with her client to commit perjury.[24] Third, an attorney may be liable for misprison of a felony by failing to report her knowledge of the perjury after having a reasonable opportunity to do so, and by committing an act to conceal the perjury.[25] Fourth, an attorney may be liable for compounding crime when she agrees not to prosecute the perjury in exchange for some consideration.[26] Fifth, an attorney may be liable for subornation of perjury if she persuades her client to perjure herself.[27]

2. *Social Sanctions*

In addition to possible criminal liability, an attorney may suffer social condemnation as a result of her client's perjury. Mohandas K. Gandhi, who practiced law in South Africa before turning to more socially beneficial endeavors, wrote that "as a student I had heard that the lawyer's profession was a liar's profession."[28] As a result of the advocacy process, Gandhi felt that "even truthfulness in the practice of the profession cannot cure it of the fundamental defect that vitiates it."[29]

Gandhi often faced the problem of untruthful clients. In one case in which his client was apparently lying on the witness stand, Gandhi immediately asked the court to dismiss his client's case. Gandhi felt that his client would be a better person as a result, and Gandhi himself found that the dismissal enhanced his personal reputation within the South African legal community.[30] Another client reported to Gandhi that he had been involved in a smuggling operation and that criminal charges were to be brought against him. Despite his client's reluctance, Gandhi insisted that he make a full confession to the authorities.[31]

The modern attorney faces a similar choice when it appears that her client wishes to perpetrate a fraud upon the court by committing perjury.

---

23. 18 U.S.C. § 2 (1982); W. LA FAVE & A. SCOTT, CRIMINAL LAW § 64 (1972).

24. 18 U.S.C. § 371 (1982); W. LA FAVE & A. SCOTT, *supra* note 23, §§ 61, 62.

25. 18 U.S.C. § 4 (1982) states:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

A crime of merely failing to report a crime may violate the fifth amendment privilege against self-incrimination. *See* United States v. Daddano, 432 F.2d 1119, 1125 (7th Cir. 1970).

26. BLACK'S LAW DICTIONARY 259 (5th ed. 1979).

27. 18 U.S.C. § 1622 (1982).

28. M. GANDHI, AN AUTOBIOGRAPHY: MY EXPERIMENT WITH TRUTH 361 (1959).

29. *Id.* at 365.

30. *Id.* at 365-66.

31. *Id.* at 367-69. Gandhi's client felt that his confession to Gandhi alone was sufficient, and was "[d]eeply mortified" by the prospect of a confession to the prosecuting authorities. He demanded that Gandhi seek the advice of another attorney.

She may say nothing and allow her client to deceive the court, or she may disclose the information and betray her client. It is not surprising, then, that lawyers have not always been held in high esteem.

C. Ethical Obligations of Counsel Regarding Known Client Perjury

Various solutions to the attorney's dilemma have been proposed, each of which has implications for the client's privilege against self-incrimination. Some commentators and ethical guidelines call for mandatory disclosure of client confidences if necessary to prevent client perjury;[32] others suggest that disclosure is within the attorney's discretion or is permissible only to prevent certain violent crimes.[33] Others have suggested: (1) mandatory or permissive withdrawal from the case by the attorney;[34] (2) firmly advising the client not to perjure herself;[35] (3) keeping the client from taking the witness stand;[36] (4) eliciting a narrative testimony from the client on the perjurious topics and not using the perjured testimony in closing argument;[37] or (5) insisting that the client tell the truth on the witness stand.[38]

Between 1908 and 1970, the ABA Canons of Professional Ethics guided attorneys in cases of client perjury.[39] If an attorney knew that her client had committed perjury or intended to commit perjury, she had a

32. *See, e.g.,* CANONS, *supra* note 5, Canon 29; MODEL CODE, *supra* note 5, EC 7-28 n.49 (quoting *In re* Robinson, 151 A.D. 589, 600, 136 N.Y.S. 548, 556-57 (1912), *aff'd*, 209 N.Y. 354, 103 N.E. 160 (1913) (a lawyer has an "active affirmative duty to protect the administration of justice from perjury and fraud . . . ."); MODEL RULES, *supra* note 1, Rule 3.3(a)(2) (imposes an affirmative duty on a lawyer to disclose client confidences when "necessary to avoid assisting a criminal or fraudulent act by the client").

33. *See, e.g.,* ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT Rule 1.6 (Rev. Draft 1982) [hereinafter cited as LAWYER'S CODE] (not approved by the Commission, but included as a "Supplemental Rule"; gives the lawyer discretion to reveal client confidences if "necessary to prevent imminent danger to human life").

34. *See, e.g.,* MODEL CODE, *supra* note 5, DR 2-110(C)(1)(b) (permissive withdrawal if a client "[P]ersonally seeks to pursue an illegal course of conduct"); MODEL RULES, *supra* note 1, Rule 1.16(b). *But see* LAWYER'S CODE, *supra* note 33, Rule 6.6 (makes the lawyer's duty not to disclose client confidences superior to the lawyer's duty not to commit a disciplinary violation); MODEL CODE, *supra* note 5, DR 2-110(B)(2) (makes the lawyer's duty not to commit a disciplinary violation superior to any implied statement regarding the client's case that such a withdrawal would create).

35. *See, e.g.,* MODEL RULES, *supra* note 1, Rule 3.3 comment on perjury by a criminal defendant ("[T]he lawyer should seek to persuade the client to refrain from perjurious testimony.").

36. Whiteside v. Scurr, 744 F.2d 1323, 1326 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 988 (1986).

37. *Cf.* LAWYER'S CODE, *supra* note 33, Chapter I, Illustrative Cases 1(i) (refers to such an approach); MODEL RULES, *supra* note 1, Rule 3.3 comment on perjury by a criminal defendant.

38. Whiteside v. Scurr, 744 F.2d at 1326.

39. CANONS, *supra* note 5.

duty to "bring the matter to the knowledge of the prosecuting authorities."[40] Moreover, the attorney could not seek to avoid learning of her client's perjury, for she had an affirmative duty to "obtain full knowledge of [her] client's cause."[41] Under the ABA Model Code of Professional Responsibility, approved in 1971,[42] an attorney cannot "[k]nowingly use perjured testimony."[43] If the client commits a fraud such as perjury and fails to take corrective action, the attorney must "reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."[44] Of course, discussions between an attorney and her client, which enable the client to plan or commit a crime are not privileged communications,[45] so an attorney would have to reveal her client's fraud to the court.[46]

The ABA Model Rules of Professional Conduct, adopted in 1983,[47] identify the lawyer's roles as representative of her clients, officer of the court, and public citizen.[48] The Model Rules also state that a client's confidences normally should not be disclosed without a client's consent.[49] As an officer of the court, it is professional misconduct for an attorney to counsel a client in criminal conduct, or engage in criminal or

40. *Id.* Canon 29.

41. *Id.* Canon 8.

42. MODEL CODE, *supra* note 5.

43. *Id.* DR 7-102(A)(4).

44. *Id.* DR 7-102(B)(1).

45. *Cf.* CAL. EVID. CODE § 956 (Deering 1985) ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.").

46. Under the AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE (1980) [hereinafter cited as CRIMINAL JUSTICE STANDARDS], the ABA House of Delegates failed to enact "The Defense Function" Standard 4-7.7, concerning testimony by a witness. Under this proposal, counsel is to "strongly discourage the defendant against taking the witness stand to testify perjuriously." Standard 4-7.7(a). If such intent is revealed prior to trial, counsel is to withdraw from the case if "feasible" without advising the court of counsel's reasons. Standard 4-7.7(b). If unable to withdraw and the client insists on testifying perjuriously, the lawyer must (1) make a record that the defendant is testifying against counsel's advice, (2) examine the defendant witness only where perjurious responses will not be given, (3) allow the defendant to offer any perjurious testimony in a narrative after examination by counsel, and (4) not argue the "false version of facts" to the trier of fact during closing argument. Standard 4-7.7(c).

47. *See supra* note 1 and accompanying text.

48. MODEL RULES, *supra* note 1, Preamble.

49. *Id.* Rule 1.6(a). Client confidences may be revealed by the lawyer "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . ." Rule 1.6(b)(1); *cf.* LAWYER'S CODE, *supra* note 33, "Supplemental Rule 1.6." The lawyer is also free under the Model Rules to disclose client confidences in order "to respond to allegations in any proceeding concerning the lawyer's representation of the client." MODEL RULES, *supra* note 1, Rule 1.6(b)(2). This language would allow the attorney to reveal client confidences if opposing counsel or the judge suspected a lawyer's complicity in perjurious conduct by the client.

fraudulent conduct herself.[50] To avoid furthering criminal or fraudulent conduct, the lawyer must seek to withdraw from representation.[51]

Model Rule 3.3, entitled "Candor Toward the Tribunal," requires a lawyer to abstain from using false evidence.[52] Under this rule, an attorney has an affirmative duty to disclose information "to avoid assisting a criminal or fraudulent act by the client."[53] To avoid using evidence that she "knows to be false," the attorney must take "reasonable remedial measures."[54] If the lawyer "reasonably believes" evidence to be false, it is within her discretion to refuse to offer it.[55] The Comment to Rule 3.3 suggests that a lawyer first try to persuade her client not to present perjurious testimony. If unable to persuade the client, the attorney should withdraw from the representation.[56] These obligations "continue to the conclusion of the proceeding," and supercede any confidentiality requirements of the Model Rules.[57] Thus, if an attorney learns of a client's perjury after the trial, she has no ethical duty to correct the matter.[58]

For criminal cases, the Comments to Rule 3.3 offer three proposals. First, an attorney may elicit narrative testimony from her client and then ignore the narrative in summation to the finder of fact. The Comment suggests that while the lawyer can refrain from using false evidence under this alternative, it is an "implicit disclosure" of the client's confidences.[59] Second, "the advocate [may] be entirely excused from the duty to reveal [her client's] perjury."[60] This of course implicates the attorney in her client's crime, for the attorney would know that she has permitted the use of perjured testimony. Finally, the attorney may be required to "reveal the client's perjury if necessary to rectify the situation."[61] This alternative acknowledges three rights of the accused: the right to (1) assistance of counsel, (2) testify, and (3) confidentiality of communications with counsel. The Model Rules point out that in a criminal case, the lawyer must abide by her client's decision whether to testify,[62] how-

50. MODEL RULES, *supra* note 1, Rule 8.4.
51. *Id.* Rule 1.2(d).
52. *Id.* Rule 3.3.
53. *Id.* Rule 3.3(a)(2).
54. *Id.* Rule 3.3(a)(4).
55. *Id.* Rule 3.3(c).
56. *Id.* Rule 3.3 comment.
57. *Id.* Rule 3.3(b).
58. *Cf.* CAL. CIV. CODE § 338 (Deering Supp. 1985) (statute of limitations for fraud actions is tolled "until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake"). A client's fraud such as perjury may not be made known to counsel until long after the proceeding is over.
59. MODEL RULES, *supra* note 1, Rule 3.3 comment on perjury by a criminal defendant; *see also* CRIMINAL JUSTICE STANDARDS, *supra* note 46, Standard 4-7.7(c); LAWYER'S CODE, *supra* note 33, Chapter I, Illustrative Case 1(i).
60. MODEL RULES, *supra* note 1, Rule 3.3 comment on perjury by a criminal defendant.
61. *Id.*
62. *Id.*; *see also* Rule 1.2(d).

ever a client has no right to the aid of counsel to commit perjury, and the lawyer has a legal and ethical obligation to avoid the use of perjury.[63]

If the perjured testimony has been given, but the proceedings have not terminated, the lawyer, upon learning of the client's transgression, must "remonstrate with the client confidentially."[64] The Comment does not, however, explain what type of client conduct should satisfy the attorney. If the client fails to act and if withdrawal "will remedy the situation," then the attorney should withdraw. If withdrawal is impossible, "the advocate should make disclosure to the court."[65]

The Model Rules point to three alternatives for the court when the attorney discloses her client's perjury. It can (1) make a statement to the trier of fact, (2) call a mistrial, or (3) do nothing. In addition, the client may argue with her counsel before the court when the attorney discloses perjury.[66] This alone would be cause for a mistrial, and as the Comment points out, the artful defendant could postpone judgment indefinitely by repeating this tactic.[67]

The Comments discuss some constitutional implications of the attorney's duty to disclose the existence of perjury.[68] They indicate that some jurisdictions have held that the client has both a due process and a sixth amendment right to present false evidence if she wishes to testify,[69] but this position has been rejected by the Supreme Court in *Whiteside*.[70] The Comments note that "[t]he obligation of the advocate under these Rules is subordinate to such a constitutional requirement."[71]

Although Model Rule 3.3 makes no mention of the privilege against self-incrimination, it follows *a fortiori* that if there is a conflict between the constitutional privilege against self-incrimination and the Model Rules, the latter must bow to the former.

II. Client Perjury and the Privilege Against Self-Incrimination

A. Purposes of the Privilege

The Fifth Amendment to the Constitution provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness

63. *Id.* Rule 3.3 comment on perjury by a criminal defendant.

64. *Id.* Rule 3.3 comment on remedial measures.

65. *Id*; *see also Whiteside*, 106 S. Ct. at 995 ("Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure.").

66. MODEL RULES, *supra* note 1, Rule 3.3 comment on remedial measures.

67. *Id.*

68. *Id.* Rule 3.3 comment on constitutional considerations.

69. *Id.*

70. *See supra* notes 6-7 and accompanying text.

71. *Id*; *see also* U.S. CONST. art. VI, cl. 2, which provides: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

against himself."[72] This privilege against self-incrimination "is also protected by the [Due Process Clause of the] Fourteenth Amendment against abridgment by the States"[73] because "the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay."[74] State and federal governments must "establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."[75]

The Framers considered the privilege to protect only against torture.[76] In the early twentieth century the privilege applied only to judicial compulsion, and not to compulsion by the police or other government agents; the latter forms of compulsion were limited by the Due Process Clauses of the Fifth and Fourteenth Amendments. Thus, in *Brown v. Mississippi*, the Supreme Court held that the Due Process Clause prevented use at trial of an accused's confession that the police had physically coerced.[77] Due process barred compulsion of confessions because of a "complex of values": coerced confessions were considered inherently untrustworthy, for their suspect nature blocked the truth seeking goal of the judicial system; and barring their use preserved the individual's freedom of choice, deterred unlawful conduct and helped preserve the integrity of the judicial system.[78]

In 1964, the Supreme Court in *Malloy v. Hogan*[79] held that the privilege against self-incrimination itself precluded the use of coerced police interrogations. Thus, the privilege, applied through the Due Process Clause, prevents state action to coerce confessions.[80]

Today, the privilege against self-incrimination serves several purposes, as the Supreme Court noted in *Murphy v. Waterfront Commission*:[81]

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treat-

72. U.S. CONST. amend. V.

73. Malloy v. Hogan, 378 U.S. 1, 6 (1964); *see also* U.S. CONST. amend. XIV, § 1.

74. *Malloy*, 378 U.S. at 7 (citing Rogers v. Richmond, 365 U.S. 534, 541 (1961)).

75. *Malloy*, 378 U.S. at 8.

76. Pittman, *supra* note 13, at 788; *see also* Counselman v. Hitchcock, 142 U.S. 547, 554 (1892) (stating that the Amendment was proposed to limit the common law privilege to criminal cases only).

77. 297 U.S. 278 (1936).

78. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

79. 378 U.S. 1 (1964).

80. *Id.* at 7.

81. 378 U.S. 52 (1964).

> ment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[82]

Despite the proscriptions of the privilege or the Due Process Clause, courts by no means discourage the use of confessions. The Supreme Court has said that it is "inherently desirable" to secure admissions by wrongdoers,[83] and has noted that "admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence . . . ."[84]

B. Scope of the Privilege Against Self-Incrimination

Because the privilege against self-incrimination is a personal right that attaches only to natural persons, corporate entities are not within the ambit of its protections.[85] Only an individual holding the privilege can assert it. As her agent, the client's attorney can invoke the privilege on behalf of the client, but only for the client's protection.[86] The client may have a sixth amendment claim of ineffective assistance of counsel if her attorney fails to raise the privilege on her behalf.[87] The privilege cannot be raised by a witness to protect third parties,[88] nor can an individual use the privilege to prevent the admission in her own criminal trial of the compelled inculpatory statements of another.[89]

The privilege has three effects. First, it prevents the government from compelling the criminally accused to testify at her own trial.[90] Sec-

82. *Id.* at 55 (citations omitted).

83. United States v. Washington, 431 U.S. 181, 187 (1977).

84. Brown v. Walker, 161 U.S. 591, 596 (1896).

85. Couch v. United States, 409 U.S. 322, 327 (1972); *see also* Bellis v. United States, 417 U.S. 85, 89-90 (1974).

86. C. MCCORMICK, EVIDENCE § 120 n.6 (3d ed. 1984); *cf.* Fisher v. United States, 425 U.S. 391 (1976) (allows an attorney to claim the fifth amendment privilege to protect her client only if the client herself could claim the privilege).

87. *See Whiteside,* 106 S. Ct. at 993 (for a successful claim of ineffective assistance of counsel, "the movant must establish both serious attorney error and prejudice."); *see also* Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

88. *See* United States v. Mandujano, 425 U.S. 564, 572 (1976) ("The privilege cannot . . . be asserted by a witness to protect others from possible criminal prosecution."); Brown v. Walker, 161 U.S. 591, 600 (1896) ("Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.").

89. *But see* United States v. Bernett, 495 F.2d 943 (D.C. Cir. 1974) (statements made to two private citizens can be excluded, if found to be coerced, despite lack of governmental action under the Due Process Clause of the Fifth Amendment).

90. *See* Minnesota v. Murphy, 465 U.S. 420, 426 (1984).

ond, it prevents the government from using evidence derived from statements it has coerced from the defendant.[91] Third, it requires that arrested individuals be apprised of their privilege against self-incrimination and of their sixth amendment right to counsel.[92] The privilege must be liberally construed to apply to all situations in which an individual could be compelled to give evidence which could be used against her in a criminal case.[93] An individual can assert the privilege in any judicial proceeding, whether civil, criminal, administrative, investigatory, or adjudicatory.[94]

Weighing against the interests of the privilege is the government's need for information. Self-reporting by individuals eases the government's burden in the administration of its laws: two examples are income taxes[95] and hit and run statutes.[96] Other interests are the government's need for criminal law enforcement[97] and the judicial system's need for every person's testimony.[98] According to Chief Justice Burger, there must be a balancing of these competing interests:

> Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.[99]

The privilege does not always apply;[100] rather, its application has

91. "The thrust of the Constitutional privilege against self-incrimination has two interrelated objectives, 'The Government may not use compulsion to elicit self-incriminating statements, and the Government may not permit use in a criminal trial of self-incriminating statements elicited by compulsion.' " Napolitano v. Ward, 457 F.2d 279, 283 (7th Cir.), *cert. denied*, 409 U.S. 1037, *reh'g denied*, 410 U.S. 947 (1972) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 57 n.6 (1964)).

92. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966). The Burger Court, however, asserts that these are not the minimum requirements of the Fifth Amendment, but merely a "prophylactic" standard. Michigan v. Tucker, 417 U.S. 433, 446 (1974) (a violation of *Miranda* is not necessarily the same as a violation of the Fifth Amendment).

93. Baxter v. Palmigiano, 425 U.S. 308, 326-27 (1976); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (privilege "must have a broad construction in favor of the right which it was intended to secure").

94. Kastigar v. United States, 406 U.S. 441, 444 (1972). Thus, if the privilege plays a role in the ethical obligations of an attorney regarding client perjury, that role extends beyond the scope of the Sixth Amendment, which only applies to criminal proceedings. U.S. CONST. amend. VI ("*In all criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") (emphasis added).

95. *See* California v. Byers, 402 U.S. 424, 427 (1971) (plurality opinion).

96. *Id.* at 433-34.

97. *Id.* at 440 (Harlan, J., concurring).

98. *Kastigar*, 406 U.S. at 443 (common law principle that "the public has a right to every man's evidence") (citations omitted).

99. *Byers*, 402 U.S. at 427.

100. *See* Brown v. Walker, 161 U.S. 591, 597-600 (1896).

two requirements. First, it must be state action that compels testimony.[101] Thus, there is a question of whether an attorney is a state actor when she discloses client perjury. Second, the privilege only applies when the holder is compelled to disclose information. In the attorney-client context, there is an issue as to whether the client is compelled to make disclosures to the attorney. Furthermore, the privilege does not apply when the holder has waived it. Another question then is whether the client waives her privilege when she discusses perjury with her attorney.[102]

C. Is There Sufficient State Action in Enforcement of the Ethical Codes to Invoke the Protection of the Fifth Amendment?

The fifth amendment privilege applies only when the government has been a party to the compulsion of a criminally accused individual.[103]

---

101. United States v. Price, 383 U.S. 787, 799 (1966).

102. *See* Harris v. New York, 401 U.S. 222 (1971); Brown v. Walker, 161 U.S. at 598. The privilege does not apply if the prosecution for the alleged crime is barred by the statute of limitations. This is not a concern when the attorney's ethical obligation under the Model Rules terminates at the end of the proceeding in which the perjury would have occured. Nor does the privilege apply if either a sufficient immunity from prosecution or a pardon has been granted to a particular witness. Immunity, however, removes the primary motive for perjury: fear of punishment. The privilege has no application if the disputed testimony would only tend to disgrace the witness or subject the accused or the witness to a civil penalty. For the privilege to apply, the threat facing the witness or defendant must be a realistic threat of criminal sanction. United States v. Powe, 591 F.2d 833, 845 n.36 (D.C. Cir. 1978) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)); Brown v. Walker, 161 U.S. at 599-600. Such a realistic threat exists when an attorney is required to reveal her client's confidences to the court. Disclosure by the attorney provides the state with a "link in the chain of evidence" for a perjury prosecution against the client. *See generally Hoffman*, 341 U.S. at 486. The attorney's testimony would be highly incriminating in a perjury action against the client.

The privilege applies only to evidence of a testimonial or communicative nature, not the compulsion of physical evidence. Schmerber v. California, 384 U.S. 757, 761 (1966). Nontestimonial evidence such as handwriting, fingerprints, voice exemplars, blood tests or other bodily extracts are not protected from governmental compulsion, unless such compulsion "shocks the conscience"—a due process test. Rochin v. California, 342 U.S. 165, 172 (1952) (opinion of Frankfurter, J.).

103. Compulsion by nongovernmental parties is not barred from use at trial unless the compulsion rises to the status of a due process violation. *See supra* note 89 and accompanying text. While ordinarily the government should not suffer for the wrongdoing of private individuals not under its control, compelled evidence from any source still has the problem of being inherently untrustworthy. Blackburn v. Alabama, 361 U.S. 199 (1960). The privilege against self-incrimination cannot be abridged by the states as a result of the Due Process Clause of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). The Supreme Court has held that "[t]he Fourteenth Amendment protects the individual against *state action*, not against wrongs done by [private] *individuals*." United States v. Price, 383 U.S. 787, 799 (1966) (quoting United States v. Williams, 341 U.S. 70, 92 (1951) (opinion of Douglas, J.) (emphasis in original)); *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976); *id.* at 332 (Brennan, J., concurring in part, dissenting in part); Burdeau v. McDowell, 256 U.S. 465 (1921).

A threshold question is whether there is state action when a member of the bar complies with the Model Rules.

In our adversarial system of justice, the lawyer is a diligent and zealous advocate for her client.[104] This role is essential (1) to provide the client with every opportunity to present her case, (2) for counsel to be her client's agent through the complex judicial system,[105] and (3) to encourage the parties to a suit to present their case in the best possible light.[106] The lawyer is also an officer of the court.[107] As an officer of the court, the lawyer is essential to its fact-finding processes.[108] Moreover, a lawyer's duty as an officer of the court is superior to her duty to a client.[109] Attorneys must encourage their clients to comply with the law.[110] The Supreme Court recognizes the "counsel as a 'medium' between . . . [the client] and the State."[111]

1. Attorney as State Actor

The ABA claims that lawyers are members of a self-regulating profession,[112] which indicates that there is no state action when an attorney

104. *See* MODEL RULES, *supra* note 1, Preamble.

105. *See, e.g.,* Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law.").

106. *See generally* Strickland v. Washington, 466 U.S. 668 (1984); Argersinger v. Hamlin, 407 U.S. 25 (1972); Thornton v. United States, 357 A.2d 429 (D.C.), *cert. denied,* 429 U.S. 1024 (1976).

107. *See, e.g.,* MODEL RULES, *supra* note 1, Preamble.

108. *See, e.g.,* CRIMINAL JUSTICE STANDARDS, *supra* note 46, Standard 4-1.1(a); *see also supra* note 22 and accompanying text.

109. *See, e.g.,* Morrell v. State, 575 P.2d 1200 (Alaska 1978); People v. Lee, 3 Cal. App. 3d 514, 83 Cal. Rptr. 815 (1970). *Contra* State v. Olwell, 64 Wash. 828, 394 P.2d 681 (1964). *See generally* Abramovsky, *A Case for Increased Disclosure,* 13 FORDHAM URB. L.J. 43, 55-56 (1985).

110. Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976) (en banc).

111. Maine v. Moulton, 106 S. Ct. 477, 487 (1985). The prosecutor's duty toward the court is well settled. The prosecutor must vigorously represent the government, Taylor v. Curry, 708 F.2d 886, 890 (2d Cir.), *cert. denied,* 464 U.S. 1000 (1983), as well as insure that justice is done. Giglio v. United States, 405 U.S. 150, 153-54 (1972). The prosecutor also has a special duty not to allow false testimony to stand uncorrected. If one of the government's witnesses commits perjury of which the prosecutor is aware, it is reversible error for her not to take measures to remedy the matter. *See* United States v. White, 724 F.2d 714, 717 (8th Cir. 1984).

112. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination.

MODEL RULES, *supra* note 1, Preamble.

follows the Model Rules.[113] But because state supreme courts enforce disciplinary actions against attorneys who are members of state bars, violations of the bar's ethical guidelines receive state censure.[114] In addition, under state law it is illegal to practice law without being a member of the bar.[115] Violation of the ethical rules also can be grounds for disbarment by the state courts.[116] Is this sufficient state action to invoke the protection of the Fifth Amendment?

The manner in which the Supreme Court distinguishes between public and private action has been in flux.[117] In *Burton v. Wilmington Parking Authority*[118] the Supreme Court held that private conduct is normally not sufficient "unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[119] State action will only be found where "the conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State."[120] In *Lugar v. Edmondson Oil Co.*,[121] the Supreme Court applied a two-prong analysis to find "fair attribution": "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by *a rule of conduct imposed by the State* or by a person for whom the State is responsible."[122] State enforcement of ethical codes requiring attorney disclosure of client perjury meets this first prong of the test. The federal right involved is the privilege against self-incrimination, and the rules of conduct imposed by the state are the ethical guidelines.

113. For example, Justice Powell wrote: "The area into which the Court now ventures [lawyer advertising] has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts." Bates v. State Bar of Ariz., 433 U.S. 350, 402 (1977) (Powell, J., dissenting).

114. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6100, 6103 (Deering Supp. 1986); *see also Whiteside*, 106 S. Ct. at 998 ("A lawyer who would . . . cooperate [with a client's perjury] would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension and disbarment.").

115. *See e.g.*, CAL. BUS. & PROF. CODE § 6125 (Deering Supp. 1986).

116. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6077, 6078, 6103 (Deering Supp. 1986); CAL. RULES OF PROF. CONDUCT Rule 9-101 (West 1983). *See generally* Outcault and Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675 (1973).

117. *See generally* Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

118. 365 U.S. 715 (1961) (referring to state action and violation of the Fourteenth Amendment's Equal Protection Clause). The state action concept under the Fourteenth Amendment can also apply to violations of the Fifth Amendment. *See, e.g.*, United States v. Solomon, 509 F.2d 863, 871 (1975) (investigation by New York Stock Exchange of its member firms found not to be sufficient governmental action to invoke the sanction of the Fifth Amendment despite regulation of the NYSE by the SEC).

119. *Burton*, 365 U.S. at 722.

120. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

121. *Id.*

122. *Id.* (emphasis added).

The second prong of the state action test is whether "the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor."[123] The Court has held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[124] In *Rendell-Baker v. Kohn*,[125] the Court examined four factors often used to distinguish a private actor from a state actor. First is whether there is a contractual relationship between the actor and the state. Yet, "significant or even total engagement in performing public contracts" will not convert a private person into a state actor.[126]

In *Polk County v. Dodson*,[127] the Supreme Court held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."[128] If a public defender, who has a contractual relationship with the state, is not considered a state actor, then on first impression it would seem that a private attorney would be even less likely to be a state actor. Moreover, as *Rendell-Baker* shows, a contractual relationship between the individual and the state does not in itself create a state actor.

The second factor is the extent of government regulation of the challenged conduct.[129] In *Jackson v. Metropolitan Edison Co.*,[130] Justice Rehnquist wrote for the majority that lawyers, like doctors, optometrists, and utility companies, "are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, *absent more*, into that of the State."[131] Is state enforcement of legal ethical rules sufficient to convert the attorney's conduct to state action? Unlike the petitioners in *Rendell-Baker*, who "were not compelled or even influenced by any state regulation,"[132] the attorney is required under the Model Rules to disclose client perjury,[133] a rule which is enforced by the state courts.[134]

The third factor used in finding a state action is whether the attorney performs a "public function[: . . .] whether the function performed

123. *Id.*
124. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
125. 457 U.S. 830 (1982).
126. *Id.* at 840-41.
127. 454 U.S. 312 (1981).
128. *Id.* at 325.
129. *Rendell-Baker*, 457 U.S. at 841.
130. 419 U.S. 345 (1974).
131. *Id.* at 354 (emphasis added).
132. *Rendell-Baker*, 457 U.S. at 841.
133. *See supra* note 65 and accompanying text.
134. *See supra* notes 114-116 and accompanying text.

has been 'traditionally the exclusive perogative of the State.' "[135]

Justice Powell wrote for the majority in *Dodson*: "[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[136] The *Dodson* court emphasized that the public defender's function is no different than that of a private attorney when representing her client:

> [I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.[137]

The attorney who discloses her client's perjury to the court is not performing an adversarial function such as a traditional step in litigation. Instead, the attorney violates a fundamental premise of the adversarial process—maintaining client confidences—and produces information that benefits the court and the state and harms her client. The court in *Dodson* recognized the public defender's ethical duty to "mandate his exercise of independent judgment on behalf of the client,"[138] and based its decision on "the assumption that counsel will be free of state control."[139] The attorney who discloses her client's perjury to the court is also acting based on her ethical duties, but which *in this instance* require her not to use her independent judgment. She is required to disclose her client's perjury. She is constrained by the threat of disbarment for violating her professional ethical duties. She does not perform a traditional adversarial function, but a prosecutorial function, which is traditionally an exclusive state perogative.

The fourth factor of state action is whether a "symbiotic relationship" exists between the lawyer and the state.[140] There is a close and mutually beneficial relationship between the lawyer and the state when the lawyer discloses her client's perjury: the state gains highly relevant evidence, and the lawyer is allowed to continue her legal practice. Thus, according to both the *Rendell-Baker* and *Lugar* tests, the attorney is a state actor under the Fourteenth Amendment. The attorney's disclosure

---

135. *Rendell-Baker*, at 842 (citations omitted).

136. 454 U.S. at 317-18 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). This test was used by both the majority and dissenting opinions. *See* 454 U.S. at 329 (Blackmun, J., dissenting). The "under color of law" language of the enabling acts has "consistently been treated as the same thing as 'state action' required by the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966). The *Price* court stated that "[t]o act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Id.* at 794.

137. *Dodson*, 454 U.S. at 320.

138. *Id.* at 321.

139. *Id.* at 322.

140. *Rendell-Baker*, 457 U.S. at 842-43.

of client perjury can "be ascribed to a governmental decision"[141] to enforce the ethical codes.

2. Attorney as State Agent

In addition, a private attorney can be a government agent if she functions "as a conduit for information elicited from defendant and used by the authorities in the prosecution of defendant."[142] Thus, if the government uses the attorney rather than its police force to interrogate the defendant, the attorney becomes an extension of the government's investigatory powers. This is precisely the role the attorney plays when she discloses her client's perjury to the court[143] or to prosecuting authorities.[144] Under the Model Rules, the attorney has an affirmative duty to relay client confidences regarding perjury to these authorities.[145] Therefore, when state courts enforce the Model Rules, in certain instances a private attorney may be considered a government agent.

D. Is There Compulsion in the Attorney Client Interview?

Ordinarily, conversations between an attorney and her client are confidential, and the client can freely make incriminating disclosures to her counsel without fear of criminal sanction.[146] Yet, if the attorney discloses these confidences, they may be the basis for a future perjury action against the client by the state. While an attorney might conceivably discover evidence of her client's perjury, in most instances the attorney's knowledge will be the product of conversations with the client. Does the attorney who discloses client perjury in any way "compel" her client to be a witness against herself?

The Due Process Clause requires a reliable determination[147] that any confession used by the state is "voluntary."[148] The voluntariness

141. *Lugar*, 457 U.S. at 938.

142. People v. Baugh, 19 Ill. App. 3d 448, 311 N.E.2d 607, 609 (1974).

143. *See supra* note 66 and accompanying text.

144. CANONS, *supra* note 5, Canon 29.

145. *See supra,* notes 50-67 and accompanying text.

146. *Supra,* note 49; *see also* CAL. EVID. CODE §§ 950-962 (Deering Supp. 1986) (lawyer-client privilege).

147. *See* Jackson v. Denno, 378 U.S. 368, 391-96 (1964). The defendant can testify at her suppression hearing to determine the voluntariness of her statement without this testimony later being available for use against her during the trial before the trier of fact. Simmons v. United States, 390 U.S. 377 (1968).

148. *See* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) ("The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?"); United States v. Powe, 591 F.2d 833, 838-39 n.5 (D.C. Cir. 1978). There is no constitutional distinction between confessions, admissions, and statements by the defendant, whether inculpatory or exculpatory. *Powe*, 591 F.2d at 840 n.11; *see also* Iverson v. North Dakota, 480 F.2d 414 (8th Cir.), *cert. denied*, 414 U.S. 1044 (1973);

requirement has four purposes: (1) to insure the trustworthiness of the evidence,[149] (2) to preserve the individual's "freedom of will" as to whether she will make such a harmful admission,[150] (3) to deter unlawful police conduct,[151] and (4) to preserve the "integrity of the criminal justice system."[152]

A statement is voluntary if it is "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[153] There can be no "bending of the will."[154] Impermissible compulsion can be very slight coercion[155] or the product of physical brutality.[156] It may also be the product of psychological pressure, such as mental attacks on the individual's volitional capacity.[157] Any duress renders a confession involuntary;[158] as Justice Brennan wrote, "[T]he Fifth Amendment does not distinguish among types or degrees of compulsion."[159]

Information divulged as the result of any express or implied promise by the police or government agents may be deemed to have been compelled.[160] Promises of leniency or promises not to prosecute are particularly likely to render a confession involuntary. Statements made as part

---

Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 3501 (1982) (confession is "any self-incriminating statement").

149. *Powe*, 591 F.2d at 839-40.

150. *Culombe*, 367 U.S. at 581-82; Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960).

151. Spano v. New York, 360 U.S. 315, 320-21 (1959); *see also Culombe*, 367 U.S. at 586-87.

152. *Powe*, 591 F.2d at 841.

153. Bram v. United States, 168 U.S. 532, 542-43 (1897); *see also Malloy*, 378 U.S. at 7.

154. United States v. Washington, 431 U.S. 181, 188 (1977) ("The test is whether, considering the totality of the circumstances, the free will of the witness was overborne.") (citing Rogers v. Richmond, 365 U.S. 534, 544 (1961)); *Culombe*, 367 U.S. at 602 (the defendant's statements are involuntary if her "will has been overborne").

155. *See, e.g.*, Brady v. United States, 397 U.S. 742, 754 (1970).

156. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

157. Blackburn v. Alabama, 361 U.S. 199, 206 (1960); Ziang Sung Wan v. United States, 266 U.S. 1 (1924); *see also* United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981).

158. *See, e.g.*, United States v. Brown, 557 F.2d 541, 551 (6th Cir. 1977) (to determine whether a confession was voluntary, courts must "carefully sift the surrounding circumstances to discern any signs that the statement supposedly 'volunteered' by a prisoner was actually obtained under duress.").

Duress sufficient to render a confession involuntary need not be the same sort of duress that constitutes the criminal defense that negates criminal culpability. Duress as a criminal defense to the accused's otherwise unlawful conduct exists when an unlawful threat from another makes the defendant believe that the only way to prevent death or great bodily harm to herself is through such conduct. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 49 (1972).

159. Baxter v. Palmigiano, 425 U.S. 308, 333 (1976) (Brennan, J., concurring in part and dissenting in part). *See generally* Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977).

160. Hutto v. Ross, 429 U.S. 28 (1976); United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983).

of a plea bargain, for example, may become inadmissible as evidence at a later trial if they were based on such a promise[161] and the government fails to keep its end of the bargain.[162] Similarly, a person who has given testimony under a promise of immunity cannot later have that evidence used against her in abrogation of the agreement.[163]

1. The Attorney's Promise of Confidentiality

The promise of leniency by government agents during plea bargaining is similar to a lawyer's promise of confidentiality to her client. In civil matters, the attorney may impress upon her client that success in litigation depends on the client's full disclosure of the facts. In criminal matters, the client may feel a heightened pressure to disclose because her very life or liberty may hinge upon the success of the litigation. In order to obtain all relevant information, the successful attorney will try to insure that these are her client's impressions. An attorney has an ethical duty to press her client for full disclosure of all information she may have regarding her case and to impress upon her the attorney's duty to protect client confidences.[164] The attorney-client privilege, which excludes highly relevant evidence from trial,[165] is based on the premise that the judicial system is more effective if the attorney and client can engage in frank discussions. Does this pressure affect the client's volitional capacity?[166]

Unlike the attorney-client privilege, the privilege against self-incrimination is more than a mere rule of evidence: it is a constitutional right.[167] The attorney's promise of confidentiality includes an implied

161. United States v. Weiss, 599 F.2d 730, 736-37 (5th Cir. 1979).

162. Santobello v. New York, 404 U.S. 257, 262 (1971).

163. Kastigar v. United States, 406 U.S. 441 (1972).

164. *See, e.g.,* CRIMINAL JUSTICE STANDARDS, *supra* note 46, Defense Standard 4-3.1(a) ("Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client . . . ."); Defense Standard 4-3.2 (a) ("the lawyer should seek to determine all relevant facts known to the accused."); Defense Standard 4-3.2(b) ("It is unprofessional conduct for the lawyer to instruct . . . or to intimate to the client . . . that the client should not be candid in revealing facts.").

165. The purpose of the [attorney-client] privilege is to encourage clients to make full disclosure to their attorneys. . . . However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.

Fisher v. United States, 425 U.S. 391, 403 (1976).

166. The general "rule [is] that a confession is inadmissible if induced by a positive promise of some benefit by 'a person in authority.' The appellant's own counsel is not 'a person in authority' as contemplated by that rule." Weatherly v. Texas, 477 S.W.2d 572, 576 (Tex. Crim. App. 1972). The appellant's counsel had suggested that appellant make a confession to the authorities. The trial court there found the appellant's statement voluntary beyond a reasonable doubt, and the issue of voluntariness was not raised on appeal. *Id.*

167. Justice Brown wrote for the majority in Brown v. Walker:

promise that the client's statements to the attorney will not be used against her. Just as in the plea bargain setting, any later revocation of that implied promise renders the client's statement compelled.

2. *The Extortion Analogy*

Extortion of information is also impermissible compulsion under the privilege against self-incrimination.[168] The attorney's threatened disclosure of client perjury can be analogized to the crime of extortion. The common law required that extortion be done for pecuniary gain.[169] When the attorney threatens to disclose client confidences, often she does so because of her ethical obligation. But like Gandhi,[170] does not the lawyer also act in the hope that her reputation will rise in the eyes of her fellow attorneys, which should have a very beneficial pecuniary effect on her practice?

Modern statutes often do not require that extortion be done only for pecuniary gain: in some jurisdictions extortion may be a demand for any benefit, not just property.[171] Extortion includes threats to do lawful acts as well as illegal acts.[172] For example, the threatened exposure of lawful debts is a form of extortion.[173] Thus, an attorney forcing her client—against the client's wishes—to tell the truth on the witness stand by threatening to reveal any perjury may be a form of extortion. It is no defense for the attorney to claim that she was acting under a legal or ethical duty when she made the threats. When an attorney makes these demands she requires: (1) that the defendant tell the truth, no matter how incriminating if she takes the stand, or (2) that the defendant refuse to testify at all. This is precisely the demand made by the defendant's

---

> So deeply did the iniquities of the ancient [inquisitorial] system [of justice] impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, [*nemo tenetur seipsum accusare*—"no one is bound to accuse himself," BLACK'S LAW DICTIONARY, *supra* note 4, at 937] which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

161 U.S. 591, 597 (1896).

168. Couch v. United States, 409 U.S. 322, 328 (1973) ("It is extortion of information from the accused himself that offends our sense of justice."). Extortion (or blackmail) is threatening another with harm with the intent to cause that person to relinquish property. W. LAFAVE & A. SCOTT, *supra* note 158, § 95; BLACK'S LAW DICTIONARY, *supra* note 4, at 525.

169. *See* W. LAFAVE & A. SCOTT, *supra* note 158, § 95.

170. *See* M. GANDHI, *supra* note 28 and accompanying text.

171. *See* Furlotte v. State, 209 Tenn. 122, 350 S.W.2d 72 (1961).

172. *See In re* Sherin, 27 S.D. 232, 130 N.W. 761 (1911), *modified*, 28 S.D. 420, 133 N.W. 701; People v. Eichler, 26 N.Y.S. 998 (1894), *appeal dismissed mem.*, 142 N.Y. 642, 37 N.E. 567 (1894).

173. *See, e.g.*, 135 A.L.R. 728 (1941) (which states that the threatened exposure of debts is a form of extortion).

counsel in *Nix v. Whiteside*.[174]

The issue is not whether the attorney should be sanctioned for her threats; the attorney, as in *Whiteside*, may merely be trying to act ethically. Instead, the issue is whether the attorney's threats are a form of extortion sufficient to invoke the exclusionary sanction of the privilege against self-incrimination.

3. *The Confinement Analogy*

Poor conditions of confinement may be sufficient to render a statement by the defendant compelled or involuntary.[175] Counsel for a criminal defendant may find her client in oppressive conditions. Burgeoning prison populations and antiquated facilities may create an unhealthy and oppressive environment for the client. These conditions may pressure the client to make involuntary statements to her attorney which reveal her perjurious intent. If involuntary statements of the accused are used against her, a resulting guilty verdict must be reversed, even if the evidence was never presented to the trier of fact.[176]

E. Does the Client Lose Her Privilege When Discussing Perjury with Her Attorney?

The fifth amendment privilege is not self-executing: if a witness fails to assert the privilege when she makes self-incriminating disclosures, she will not be able to claim the exclusionary protection of the privilege.[177] Thus, the privilege against self-incrimination generally need be knowingly and intelligently waived by the accused or witness.[178]

An exception to the requirement of affirmative assertion occurs during custodial interrogation, when a detained individual is questioned by state actors.[179] The justification for this exception is threefold: (1) the state actors at a custodial interrogation are "acutely aware of the potentially incriminatory nature of disclosures sought,"[180] (2) the custodial setting may be "inherently compelling",[181] and (3) the accused's isolation

174. "Counsel told appellant that if he insisted upon testifying that he saw a gun, then he (counsel) would move to withdraw, advise the state trial judge that the testimony was perjurious and testify against him." Whiteside v. Scurr, 744 F.2d 1323, 1326 (8th Cir. 1984). The criminal defendant has a right to testify on her own behalf, although there is no protection for perjury. *Harris*, 401 U.S. at 225.

175. Brooks v. Florida, 389 U.S. 413 (1967).

176. United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981).

177. Minnesota v. Murphy, 465 U.S. 420, 429 (1984).

178. Garner v. United States, 424 U.S. 648, 654 n.9 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 222-27, 235-40, 246-47 (1973).

179. *Id.* at 429-30. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966). For the other exceptions, *see infra* note 207.

180. *Garner*, 424 U.S. at 657.

181. *Miranda*, 384 U.S. at 467.

during the interrogation may be compulsive.[182]

In the attorney-client interview, the attorney clearly understands the incriminatory nature of her client's admissions regarding perjury. Here the first rationale for the custodial interrogation exception applies.

The second rationale, that the custodial setting is "inherently compelling,"[183] is equally applicable. The attorney may find her client in the same setting as the police: an interview may take place at the police station or jail while the suspect is in detention. In these locations the accused may sense all the resources of the government being brought to bear against her, forcing her to make a statement.[184]

An interview at the attorney's office may be just as inherently compelling.[185] At the attorney's office, the client is compelled to make a statement through encouragement to make complete disclosure. Although there are differences from being in police custody—the client is free to come and go as she pleases and there are no law enforcement officers present—these distinctions relate to the comfort of the surroundings and do not necessarily prevent subtle compulsion of information. In the privacy of the attorney's office, the attorney makes the client feel at ease, impresses her with the importance of complete revelation of her innermost thoughts, and reminds her of the confidentiality of the discussions. The attorney intends to set aside any qualms her client may have about revealing even her most embarrassing thoughts or conduct. The client may hear something about the judicial protection of attorney-client disclosures. The attorney may expressly or impliedly promise to do her best to aid the client, as long as the client makes full disclosure of relevant facts.[186]

One could argue that at the stationhouse the accused certainly should know who her adversaries are,[187] but her own attorney would be the last person she would suspect as a foe. Yet her attorney's revelations of perjury could be much more damaging than the accusations of any prosecutor or adverse witness.

The third reason for the custodial interrogation exception is that an accused's isolation during custodial interrogation can be overbearingly compulsive. In *Miranda v. Arizona*, Chief Justice Warren wrote: "The

182. United States v. Washington, 431 U.S. 181, 187 n.5 (1977).

183. *Miranda*, 384 U.S. at 467.

184. *Id.* at 456-57.

185. *See generally* CRIMINAL JUSTICE STANDARDS, *supra* note 46, Defense Standard 4-3.1(c) (steps to be taken by the attorney to insure privacy between counsel and client).

186. "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." MODEL RULES, *supra* note 1, Rule 1.6 comment.

187. *See* Minnesota v. Murphy, 465 U.S. at 432; United States v. Henry, 447 U.S. 264, 273 (1980). *But see Miranda*, 384 U.S. at 467.

[police] officers are told . . . that the 'principle psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation.' "[188] Unlike the civil client, the criminal client may feel very isolated and unable to move about at her own free will; and if the attorney-client interview takes place at the jailhouse, the client is in the very same isolated setting as the police interrogation.

In *Miranda*, the Supreme Court held that the privilege against self-incrimination requires that police officers inform detained criminal suspects of their privilege against self-incrimination and their right to counsel.[189] Under *Miranda*, statements which ordinarily would satisfy the voluntariness requirement will be excluded from evidence if these warnings have not been given. While the present Court has restricted some of the broad mandates of *Miranda*, particularly its remedy,[190] this basic requirement has not been overturned.

The Court has been unwilling to apply the *Miranda* warnings to situations beyond the "inherently coercive custodial interrogations for which it was designed."[191] For example, the warning need not be given to a witness at a Grand Jury inquiry, partly because these proceedings are secret and because the right to counsel usually has not attached.[192] In other cases a court will look at the "totality of the circumstances"

188. *Miranda*, 384 U.S. at 449.

189. *Id.* at 467; *see also* Massiah v. United States, 377 U.S. 201, 206 (1964).

190. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) ("public safety" exception to the *Miranda* requirements).

191. Minnesota v. Murphy, 465 U.S. at 430 (citing Roberts v. United States, 445 U.S. 552, 560 (1980)); *see also* Beckwith v. United States, 425 U.S. 341 (1976).

192. In response to a criminal defendant's argument that his grand jury testimony should have been excluded at the trial court because he was not given *Miranda* warnings, the Supreme Court replied:

> No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play. Kirby v. Illinois, 406 U.S. 682 (1972). A witness 'before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . . .' Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room.

United States v. Mandujano, 425 U.S. 564, 581 (1976) (citations omitted).

Note that unlike the attorney-client interview, the defendants in grand jury cases are warned, and understand their Fifth Amendment privilege prior to making incriminating statements: "Q [prosecutor]: You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear? A [Mandujano]: Yes, sir." *Mandujano*, 425 U.S. at 567. In United States v. Washington, 431 U.S. 181, 188 (1977) it was stated:

> After being sworn, respondent was explicitly advised that he had a right to remain silent and that any statements he did make could be used to convict him of a crime. It is inconceivable that such a warning would fail to alert him to his right to refuse to answer any question which might incriminate him.

Also, unlike the grand jury witnesses, the typical client in the attorney-client interview has not been sworn to tell the truth. *See Mandujano*, 425 U.S. at 582 (the "oath itself is the warning" of possible prosecution for perjury).

when deciding whether the *Miranda* warnings are necessary.[193]

In *Minnesota v. Murphy*,[194] the Supreme Court held that the warnings need not be given to a probationer during interviews with his probation officer.[195] Justice White, writing for the majority, examined several additional factors to determine whether the probation setting is so inherently coercive that the *Miranda* warnings must be given.

First he examined whether the state actor could compel the defendant's "attendance and truthful answers."[196] The private attorney's power to compel her client's attendance may be less than that of a Grand Jury or probation officer. This power, however, may be unnecessary if the client has the impression that her success at trial depends on cooperating and making a full disclosure to her attorney.

Another factor is whether the questioner intends to elicit incriminating information.[197] Both the police and the client's attorney have this intention, and the attorney has the additional ethical obligation to learn as much as she can about her client's case.[198] The *Murphy* Court also considered whether there were observers present "to guard against abuse or trickery."[199] The very nature of the confidential attorney-client interview precludes the presence of outsiders. Another factor in *Murphy* was whether the interrogator is allied with the prosecution.[200] When the attorney reports client perjury to the court, she assumes a position that is adverse to her client and aligns with the prosecution by producing helpful evidence.

In analyzing this factor, however, a court will ask whether "*absent some express or implied promise to the contrary*," the accused should be "charged with knowledge that . . . [the state actor] 'is duty bound to report wrongdoing . . . when it comes to his attention, even if by communication from the . . . [accused] himself.' "[201] In the attorney-client relationship, there is at least an implied promise of confidentiality.[202] Moreover, because only seven percent of attorneys surveyed recently by the ABA feel that a criminal defense lawyer should inform the court if their client commits perjury,[203] a client can reasonably rely on the expec-

193. *See supra* note 154 and accompanying text.

194. 465 U.S. 420 (1984).

195. *Id.* at 431.

196. *Id.*

197. *Id.* (citing Beckwith v. United States, 425 U.S. 341 (1976)).

198. *See supra* note 164 and accompanying text.

199. Minnesota v. Murphy, 465 U.S. at 432.

200. *Id.* (quoting Fare v. Michael C., 442 U.S. 707, 720 (1979)); *see also* Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

201. Minnesota v. Murphy, 465 U.S. at 432 (quoting Fare v. Michael C., 442 U.S. 707, 720 (1982)) (emphasis added).

202. Fare v. Michael C., 442 U.S. at 721-22.

203. Reskin, *How Lawyers Vote on Tough Ethical Dilemmas*, 72 A.B.A. J. 42 (Feb. 1986) (71% would withdraw, 17% would "tell the client he/she will reveal any perjury to the court,

tation of confidentiality. In addition, in light of the uncertainty of the ethical codes themselves on this issue,[204] even the informed client might not be aware of the particular course of action which her attorney will feel obliged to take.

The *Murphy* Court also considered whether the circumstances conveyed "to the suspect a message that he has no choice but to submit to the . . . [state actor's] will and to confess."[205] The client may indeed have the impression that she has no choice but to fully disclose her perjurious intent to her attorney. The court will also examine whether the individual is in " 'an unfamiliar atmosphere' or 'an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner.' "[206] An attorney's interview of a criminal defendant may take place in the same unfamiliar environment as the police interrogation or it may occur at the attorney's office, which is an atmosphere expressly designed to create the impression of confidentiality and to encourage full disclosure to the attorney. Under the totality of these circumstances, the client may be able to claim the "benefit of the first exception to the general rule that the Fifth Amendment privilege is not self-executing."[207]

A client's disclosures to an attorney are similar to those made between patient and psychiatrist, and between spouses. All three relationships are afforded evidentiary privileges to enhance confidential communications.[208] A patient can bar her psychiatrist's disclosures of confidential communications.[209] The examination of an accused by a psychiatrist provided by the state may be a custodial interrogation, which requires that the psychiatrist give *Miranda*-style warnings prior to the interview.[210] A defendant can prevent her spouse from disclosing incriminating confidential communications.[211] A confidential confession goaded by a spouse and exploited by the government is an abrogation of the traditionally confidential spousal relationship and a violation of the

4% would do nothing, 1% other, 4% not sure (totals add up to greater than 100% because of multiple responses)).

204. *See* MODEL RULES, *supra* note 1, Rule 3.3 comment; *cf.* note 65 and accompanying text.

205. Minnesota v. Murphy, 465 U.S. at 433.

206. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 457 (1966)).

207. Minnesota v. Murphy, 465 U.S. at 434. The other two exceptions to the self-executing requirement of the privilege involve penalties for the assertion of the privilege, *id.*, and self-reporting of incriminating information. *Id.* at 439.

208. *See, e.g.*, CAL. EVID. CODE §§ 950-962 (Deering Supp. 1986) (lawyer-client privilege); §§ 970-987 (privilege not to testify against spouse and privilege for confidential communications); §§ 1010-1027 (psychotherapist-patient privilege).

209. *See, e.g.*, CAL. EVID. CODE § 1014 (Deering Supp. 1986).

210. Estelle v. Smith, 451 U.S. 454 (1981).

211. *See, e.g.*, CAL. EVID. CODE §§ 980, 987 (Deering Supp. 1986).

Fifth Amendment.[212]

The attorney who discloses client confidences to the court is an unwitting actor in an interrogation technique described in *Miranda*:

> In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room.[213]

The lawyer plays the role of Jeff. The client may be under detention at a jail or a police station, where everyone appears to be a Mutt. After the Mutts have intimidated the client, the lawyer befriends her, tells her that she will do everything she can to aid her, but that she needs full disclosure from her. If the lawyer reveals then her client's perjury, the Mutt and Jeff technique comes to fruition. Indeed, because the attorney is the client's ally from the start, this interaction may be more easily established than in the case of the Jeff who is a police officer and begins as the suspect's adversary.

Attorney disclosure in these circumstances would be unfair and would violate the client's constitutional right to the privilege: "[I]t is true that both the Fifth and Sixth Amendments . . . reflect the Framers' intent to establish essentially an accusatory rather than an inquisitorial system of justice . . . ."[214] The attorney-client interview is an appropriate setting in which to require *Miranda* warnings before the admission at trial of the accused's incriminating admissions that the state has garnered from the attorney-client interview, regardless of whether the attorney actually compelled the defendant to incriminate herself and regardless of whether the client asserted her privilege in the interview.

---

212. United States v. Neal, 532 F. Supp. 942 (D. Colo. 1982), *aff'd*, 743 F.2d 1441 (10th Cir. 1984). In *Neal*, the government was barred from using the taped conversations of confidential spousal communications despite the willingness of the spouse to incriminate the accused. *Id.* at 947.

213. *Miranda*, 384 U.S. at 452 (quoting C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 104 (1956)).

214. United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting).

F. Balancing the Client's Constitutional Right Against the Public's Interest

In considering whether the privilege should apply in any given situation, courts will balance the individual's interest in avoiding compelled incriminating statements against legitimate societal interests.[215] Thus, certain disclosures that might otherwise fall within the ambit of the privilege may not be protected if competing state interests outweigh the individual interests. These interests may include the need to have citizens report their own income for taxes[216] or the importance of requiring drivers to leave their name when involved in a motor vehicle accident.[217]

With respect to attorney revelation of client perjury, the client has a strong interest in avoiding criminal sanction for her confidential disclosures. Several state interests also weigh in favor of applying the privilege. The state has a strong interest in preserving client confidences in order to protect the integrity of the attorney-client relationship.[218] There is also an interest in preserving the adversarial system of justice and requiring the state rather than the accused or her counsel to provide the fuel for conviction.[219] There is a need to preserve the integrity of the judicial system and insure that convictions are based on fair conduct by the state.[220]

There are also competing state interests in disallowing the perjuring client's assertion of the privilege. The state's ease in acquiring incriminating evidence regarding perjury is enhanced by requiring lawyers to reveal their clients' confidences. But the state's interest in criminal law enforcement alone is always outweighed by the competing values of the privilege.[221]

The state has an interest in preventing attorneys from participating in frauds upon the court. Undiscovered perjury increases the potential for an unjust verdict, and an unjust verdict means that innocent people may be harmed and wrongdoers may go unpunished. Thus, the integrity of both the bar and the judicial system may be compromised if attorneys do not reveal their client's perjury.

There is also the state interest in punishing perjury. In *Harris v. New York*, the Court held that the privilege does not protect perjury, and thus in a criminal case the prosecution may use a statement to impeach a

215. California v. Byers, 402 U.S. 424, 427 (1970).

216. Couch v. United States, 409 U.S. 322, 336 (1973).

217. *See Byers*, 402 U.S. at 433-434.

218. *See supra* notes 165, 186 and accompanying text.

219. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

220. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610, 618 (1976) (telling the defendant that she has the right to remain silent and later using her assertion of that right against her is "fundamentally unfair and a deprivation of [D]ue [P]rocess").

221. *Byers*, 402 U.S. at 440 (Harlan, J., concurring) ("[T]he sole governmental interest that the privilege defeats is the enforcement of law through criminal sanctions.").

defendant even though he never received any *Miranda* warnings.[222] The Fifth Amendment does not give the accused a right to lie.[223]

Yet the mere fact that a person is an accused perjuror does not mean that she loses her constitutional rights, for the privilege is as much a " 'shelter to the guilty' "as it is " 'a protection to the innocent.' "[224] In *Harris*, the Supreme Court did not face the issue of compulsion: the defendant had freely perjured himself on the witness stand.[225] By contrast, attorney disclosure of client perjury directly raises the issue of compulsion. The attorney expressly or impliedly promises that: (1) that client's disclosures will be confidential, (2) the client will not be prosecuted for her statements to her attorney, and (3) the attorney will use her best efforts on behalf of the client if the client makes full disclosure. Although the general rule is that a defendant who elects to make testimonial disclosures waives her privilege,[226] this is not the case when an attorney threatens to disclose the client's intent to commit perjury unless the client acts in a certain manner. In *Whiteside*, for instance, the client had not yet testified.[227] Thus the issue is not whether the privilege protects perjury, but whether the privilege protects a client who has made incriminating statements to her attorney under the promise of confidentialty. Such a client, whether innocent or guilty, should retain her privilege against self-incrimination.

III. A Proposal for Disclosure of the Attorney's Conflicting Duties

Voluntary disclosures of incriminating information to third persons usually are not protected by the Constitution: the individual generally bears the risk of misplacing confidence in others.[228] Nor does the Constitution require that an individual know whether the person to whom she

222. Harris v. New York, 401 U.S. at 225-26.

223. *See* Bryson v. United States, 396 U.S. 64, 72 (1969).

224. Murphy v. Waterfront Comm'n, 378 U.S. at 55. Like the probationer, who "does not lose this protection by reason of his conviction of a crime," the defendant should not lose her privilege because of her attorney's accusation of perjury. Minnesota v. Murphy, 465 U.S. at 426.

225. "Petitioner makes no claim that the statements . . . were coerced or involuntary." Harris v. New York, 401 U.S. at 224.

226. *See* Harrison v. United States, 392 U.S. 219, 222 (1968) ("A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives."); Raffel v. United States, 271 U.S. 494 (1926); *cf.* Minnesota v. Murphy, 465 U.S. at 427-28 ("Witnesses who failed to claim the privilege were once said to have 'waived' it, but we have recently abandoned this 'vague term,' . . . and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.' " (citations omitted)).

227. *Whiteside*, 106 S. Ct. 988 (1986).

228. United States v. White, 401 U.S. 745, 749 (1971).

speaks is a government agent.[229] An exception to these rules exists when a client speaks to her attorney.[230] The right to effective assistance of counsel is guaranteed under the Sixth Amendment,[231] and this right implies counsel independent from the prosecution.[232] Further, with *known* government agents, according to Chief Justice Burger, "[a]n accused . . . is typically aware that his statements may be used against him. The adversary positions at that stage are well established, the parties are then 'arm's-length' adversaries."[233] In contrast, the client typically is not aware that her statements to her attorney may be used against her, nor are the attorney and client in a well established adversary position.

While there is no right to commit perjury, there is a constitutional right to testify implicit in the Fifth and Sixth Amendments.[234] No threats from counsel should be allowed to penalize the exercise of the client's constitutional right to testify.[235] When an attorney threatens to disclose client confidences if the client testifies untruthfully, as in *Whiteside*,[236] or when counsel insists that the client take the stand and tell the truth, the client has been compelled to incriminate herself. It is not enough to say that the client can merely refrain from taking the stand: not only does she have the right to testify, but once the attorney has made the threat, the client probably fears her attorney as much as the police, and may act to please her attorney. Both courses of conduct by the attorney violate the client's privilege against self-incrimination.

The attorney-client interview compels the client to reveal her confidences because the attorney makes express or implied promises of confidentiality and indicates that the client can prevail in court only by making a full disclosure. Yet even assuming that the interview is not coercive, the client's incriminating statements— which were made in reli-

229. *White*, 401 U.S. at 749; Hoffa v. United States, 385 U.S. 293 (1966).

230. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980). The issue in *Henry* was "whether the Government . . . [had] interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements." *Id.* at 272.

231. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI; *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

232. In Polk County v. Dodson, 454 U.S. 312 (1981), Justice Powell wrote for the Court:

> This Court's decision in *Gideon v. Wainwright* . . . established the right of state criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]." . . . . Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and *independent* advocate.

Id. at 322 (citations omitted) (emphasis added).

233. United States v. Henry, 447 U.S. at 273.

234. *Cf.* Harris v. New York, 401 U.S. at 225.

235. *See* Griffin v. California, 380 U.S. 609, 614 (1965) ("a penalty imposed by courts for exercising a[n accused's] constitutional privilege" was held unconstitutional).

236. In *Whiteside*, the Court did not determine "whether [Whiteside] was persuaded or compelled" by his attorney. 106 S. Ct. at 999.

ance on the attorney's promise and duty of confidentiality—should not be disclosed unless the client was fully apprised of the attorney's duty of candor to the court and the attorney's ethical obligations concerning known client perjury.[237] This disclosure should occur at the beginning of the attorney-client interview.

Under the Model Rules, an attorney must reveal her client's perjury, even if the disclosures derive from confidential discussions with the client. This is inherently unfair. The very nature of the attorney-client relationship presupposes that the lawyer will inform her client of her rights to enable the client to make informed choices. But the client has no chance to make an informed choice with respect to revealing evidence of perjury under the existing ethical obligations of attorneys.

The government has the burden to show that any incriminating admissions or confessions introduced into evidence are voluntary.[238] If disclosure of the attorney's duty of candor is left to the lawyer's discretion, the state cannot charge the client with knowledge of the attorney's duty to disclose the client's perjurious confidences. Thus, the state would have a heavier burden of showing that the disclosure was voluntary. Moreover, depending on the facts, the client's disclosure may not have been voluntary. Requiring mandatory disclosure of the attorney's duty of candor may also aid enforcement of the ethical duty to refrain from using false evidence.

If the attorney's evidence of client perjury is to be introduced against the client, it should be shown that the incriminating statements were made with knowledge of the privilege and that the client has "affirmatively renounce[d] the protection of the privilege."[239] If the state is unable to show that the client was aware of her constitutional rights prior to making the incriminating statements the exclusionary rule should bar use of the attorney's evidence against the client.[240] If the state prosecutes the client for perjury, it must show that the attorney's evidence did not provide the state with a "link in the chain of evidence."[241]

---

237. Professor Norman Lefstein has suggested that the criminal defense lawyer "inform the client, at the outset, of the specific scope of the attorney-client privilege." Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 692 (1978). This Note's proposal would require both criminal and civil attorneys to disclose their duty to reveal their client's perjury.

238. *See* Jackson v. Denno, 378 U.S. 368, 394 (1964).

239. Garner v. United States, 424 U.S. 648, 654 n.9 (1976); *see also* United States v. Neal, 532 F. Supp. 942 (D. Colo. 1982).

240. *See, e.g.*, United States v. Blue, 384 U.S. 251, 255 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); *see also* United States v. Janis, 428 U.S. 433 (1976); Mapp v. Ohio, 367 U.S. 643, 657 (1961) ("The philosophy of . . . [the Fifth Amendment] is that no man is to be convicted on unconstitutional evidence.").

241. Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* Kastigar v. United States, 406 U.S. 441, 453 (1972).

The Model Rules should be amended to require that an attorney inform her client that: (1) the attorney has a duty of candor to the court that prevents her from offering untrue evidence, and (2) the attorney must disclose the client's intention to commit perjury. This warning would remove some of the unfairness of allowing an attorney to reveal statements given under the promise of confidentiality.[242] Second, whether a state actor has provided a *Miranda*-style warning is one factor in determining whether an incriminating statement was voluntarily made.[243] This warning would thus allow the attorney's evidence to be more readily admitted, furthering the public interest in punishing perjury. Third, it would address some of the concerns expressed by the Supreme Court in *Miranda* and *Minnesota v. Murphy*, such as allowing a person to make an informed choice concerning incriminating statements when facing the investigatory powers of the state. Fourth, the warning would encourage the legitimate state interest in truthful testimony: it would encourage the client to avoid perjurious testimony by reminding her of her solemn oath when testifying. Fifth, disclosure of the attorney's conflicting duties is the recommended solution in any situation in which an attorney faces a potential conflict of interest.[244]

There is something strange in the image of an attorney giving her client *Miranda* warnings before commencing an interview.[245] But is not the very role of the attorney to advise the client of her rights?[246] Those bent on perjury will not be constrained by the warning. But under this proposal a client can at least make a knowing and intelligent decision before incriminating herself by making statements regarding perjury to her attorney. This proposal is not perfect: it may hinder the establishment of a trusting attorney-client relationship, which is crucial for effective representation. However, attorney disclosure of the unwitting client's confidences, as in *Whiteside*,[247] may be even more damaging to the attorney-client relationship. Moreover, when the price of maintaining trusting attorney-client relationships is the client's loss of protection under the privilege against self-incrimination, perhaps the relationship is too costly.

---

242. This recommendation might presumably apply in any situation where the client's confidential disclosures to her attorney are sought to be used against her in a criminal action.

243. Beckwith v. United States, 425 U.S. 341, 347-48 (1976).

244. *See* MODEL RULES, supra note 1, Rule 1.7.

245. The Supreme Court does not require any set form in which the warning need be given. California v. Prysock, 453 U.S. 355 (1981).

246. *See, e.g.*, Maness v. Meyers, 419 U.S. 449 (1975) (the lawyer has a duty to inform her client of her fifth amendment rights).

247. In *Whiteside*, the court of appeals presumed that appellant would have testified falsely, for it noted that "Counsel must act if, but only if, he or she has 'a firm factual basis' for believing that the defendant intends to testify falsely or has testified falsely . . . . It will be a rare case in which this factual requirement is met." 744 F.2d at 1328.

Conclusion

When an attorney obeys the mandate of the state's ethical requirements and reveals her client's perjury to the court, she has acted on behalf of the government to compel her client to incriminate herself. This disclosure may violate the client's fifth amendment privilege against self-incrimination. The attorney's conduct in this specific instance is state action, for the attorney is not performing a traditional adversarial function, but is acting for the state to prosecute her client, traditionally an exclusive public function. The attorney compels her client to incriminate herself by promising confidentiality. Within that promise of confidentiality is an implied promise that the client will not be harmed by statements she has made to her attorney. After promising confidentiality, any later threat by the attorney to reveal the client's confidences renders the client's choice to testify involuntary, for the attorney's threats are a form of extortion. Any use of the client's confidences against her is inherently unfair.

The Supreme Court takes a balancing approach to the Fifth Amendment. On the one hand are the accused's privilege against self-incrimination and the societal interests in preserving both the accusatorial system of justice and the sanctity of client confidences. Weighing against these interests are the state's interest in criminal law enforcement, the court's need for truthful testimony, and the public's interest in the integrity of the bar. A careful balancing of these interests indicates that if the ethical provisions regarding client perjury are to be enforced, the ABA should amend its Model Rules to comport with the privilege against self-incrimination. Lawyers should give a fair warning to their clients of the attorney's required course of action. This minimum standard of conduct allows the client the protection of the Fifth Amendment. It discourages perjury by allowing the government to use any disclosures made. At the same time, it allows the attorney to fulfill her ethical obligation to avoid the use of false evidence.

*By Thomas S. Donovan**

* A.B., University of California, Berkeley (1981); M.B.A. candidate, Golden Gate University, San Francisco; Member, second year class.

The author would like to thank Professors Peter Keane and William R. Forrester of the Hastings faculty for their inspiration and advice.