Mandatory Disclosure: California Bar Refuses to Adopt Proposed Rule to Confront Client Perjury

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I. INTRODUCTION

The California Rules of Professional Conduct\(^1\) (California Rules) were amended in 1975 to effect numerous changes in the law of professional responsibility in California.\(^2\) The 1975 amendments did not, however, adequately address the ethical dilemma faced by criminal defense attorneys confronted with a client who insists upon taking the witness stand for the sole purpose of committing perjury.\(^3\) Although the California Rules instruct attorneys confronted with this situation to withdraw from the case, this course of action has not always been an appropriate or available alternative.\(^4\)

In 1985, the Board of Governors of the California State Bar Association (the Board) authorized the Committee on Professional Responsibility and Conduct (COPRAC) to survey the changes in California law in the area of professional responsibility. A subcommittee was directed to evaluate the American Bar Association’s recently adopted Model Rules of Professional Conduct,\(^5\) as well as other changes in the area of professional ethics in order to determine whether revisions to the existing California Rules were needed.\(^6\) In September 1985, COPRAC and its subcommittee presented an interim report to

\(^1\) Rules of Professional Conduct of the State Bar of California Rule 1-100 (effective Jan. 1, 1975, 14 Cal. 3d). [hereinafter CALIFORNIA RULES].


\(^3\) Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 823-24 (1977). “Client perjury” has become the term of art to describe the situation in which a defendant, seeking to exonerate himself in a criminal or civil trial, commits perjury on the witness stand.

\(^4\) The California Rules require that the attorney obtain the court’s approval in order to withdraw from the case. At some point in the course of the trial, however, the judge may decide that withdrawal would be too prejudicial to the interests of the client. In such cases, the judge would deny the motion for withdrawal. Dunetz, Surprise Client Perjury: Some Questions and Proposed Solutions to an Old Problem, 29 N.Y.L. SCH. L. REV. 407, 434-36 (1984); see generally CALIFORNIA RULES supra note 1, Rule 2-111.

\(^5\) MODEL RULES OF PROFESSIONAL CONDUCT (1983) (adopted by the House of Delegates of the American Bar Association) [hereinafter MODEL RULES].

\(^6\) Proposed Amendments to the Rules of Professional Conduct of the State Bar
the Committee on Professional Standards. The Committee extended the survey for another year to allow for the completion of the report. In the summer of 1986, the subcommittee submitted the 1986 Discussion Draft to the Board which thereafter authorized its publication. From August through December of 1986, the Board was open to public comment concerning the Proposed Rules. After this 120-day comment period, the subcommittee was reappointed by the Board. The subcommittee, under the new title of Commission on the Revision of the Rules of Professional Conduct (Commission), was expected to review the comments received, make any appropriate recommendations in light of these comments, and submit its proposed amendments to COPRAC and the Board Committee in July of 1987. This draft will be presented to the California Supreme Court for official enactment.

The 1986 proposed amendments to the Rules of Professional Conduct, recommended by the subcommittee and contained in the 1986 Discussion Draft (1986 Proposed Rules), would have substantially changed the Rules of Professional Conduct in California in the area of client perjury. Proposed Rule 4-102(E) would have made the disclosure of client perjury mandatory, notwithstanding the fact that the evidence or facts surrounding its disclosure were protected by the attorney's duty of confidentiality to his client. By forcing attorneys to disclose false evidence to the court, the proposed rule sought to shift the burden of resolving the problem of client perjury from the attorney to the court. Had this proposed rule been adopted, it would have provided California attorneys with a bright-line test to manage the ethical issues surrounding client perjury. But despite the fact that the rules requiring mandatory disclosure of client perjury were rejected, it is significant that these rules were given serious consideration in light of the respect traditionally extended by the California

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7. Id. at i, ii.
8. Id. at ii. See also Proposed Amendments to the Rules of Professional Conduct, at i (Committee on Professional Responsibility and Conduct, Subcommittee to Study the Rules of Professional Conduct) (Discussion Draft, 1986) [hereinafter 1986 Proposed Rules].
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State Bar Association for the attorney's duty of confidentiality. As a result of the introduction of the 1986 Proposed Rules, the discussion of the issue of mandatory disclosure has been regenerated.

Under the 1975 California Rules, the attorney is given very little guidance to resolve issues surrounding client perjury. It was the intention of the drafters of the proposed rules to provide a bright-line test upon which California attorneys could rely in confronting these ethical issues. A mandatory disclosure rule would have provided such guidance by establishing the parameters of the attorney's duty to a client. Although one may disagree with the parameters proposed, it is clear that some guidelines are needed.

The commission's final draft (1987 Proposed Rule) failed to include a rule requiring the disclosure of client perjury. Instead, the 1987 proposed rules resemble the A.B.A. Code of Professional Responsibility. If the 1987 proposed rules are adopted by the supreme court, California attorneys will be relegated to resolving these ethical issues without the benefit of clear, uniform guidelines from the California Bar.

The purpose of this Comment is to examine the various ethical issues surrounding client perjury. Before analyzing these issues, however, the various competing ethical duties confronting attorneys will be presented along with a review of the current ethical standards and guidelines available to practicing attorneys confronted with this ethical dilemma. This Comment will then analyze the merits of the 1986 Proposed Rule 4-102 in order to determine the impact such a rule would have on attorneys in practice. Finally, in light of the apparent trend toward the enactment of these types of rules, some practical suggestions will be offered on how to best comply with rules of ethics requiring disclosure of client perjury.

II. CONFLICTING ETHICAL DUTIES

A. As Officer of the Court

The criminal defense attorney faced with a client who insists upon

17. See infra notes 129-137 and accompanying text.
19. 1986 Proposed Rules, supra note 8, at 19 (Rule 3-100, discussion).
20. There is a distinct trend toward the acceptance of mandatory disclosure rules throughout the United States. See infra notes 103 and 121.
presenting false evidence to the fact-finder is confronted with conflicting ethical duties. First, as an officer of the court, the attorney is sworn to uphold the integrity of the judicial system. Since the presentation of any false evidence to the court necessarily interferes with the court’s truth-finding function, an attorney violates his duty as an officer of the court by allowing false evidence to be offered.

This duty to maintain the integrity of the court is codified in the California Business and Professions Code. Section 6068(b) declares that “[i]t is the duty of an attorney . . . (b) . . . to maintain the respect due to the court of justice and judicial officers.” Furthermore, the attorney shall “employ, for the purpose of maintaining the causes confided to him or her, such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

The California Supreme Court has long recognized the attorney’s duty to the court. The court has noted that “[a] deliberate attempt to cause a miscarriage of justice through perjured testimony is not a light offense . . . .” In fact, the court has held that “[c]ounsel may not offer the testimony of a witness which he knows to be untrue. To do so may constitute subornation of perjury.” Although the court is confident that the attorney’s duty to the court mandates the disclosure of unprivileged false evidence, the court is much more reluctant to require such disclosure of privileged testimony. Thus, the attorney’s duty to the court is limited by his duty of loyalty to the client.

B. As Zealous Advocate

Standing in conflict with the attorney’s duty to the court, is the attorney’s duty to be the strongest advocate possible for his client’s cause. This duty is also considered vital to the effectiveness of our
adversarial system. The attorney's role in the system is based upon the belief that only by the interaction and conflict between diametrically opposed positions will the truth be revealed to the courts. Once this assumption is accepted, logic dictates that the greater the freedom of advocacy, the greater will be the effectiveness of the truth-finding function. Proponents of this position argue that a vital element in the attorney's ability to represent the client's interests is the free flow of information from the client to the attorney. It is argued that if client confidences are no longer protected, clients will become reluctant to disclose potentially incriminating information. If the client is inhibited from disclosing otherwise incriminating information, the attorney will be at a significant disadvantage if the opposing side independently discovers this information. The result will be to cripple the ability of the attorney to protect the interests of the client. Thus, the duty of loyalty to the client, which is the source of protecting the confidentiality of communications between the attorney and client, is vital to the effectiveness of the judicial system.

The positive impact of the free flow of information upon the attorney's ability to defend the interests of his client has been the primary justification for the imposition of the duty of confidentiality upon the attorney. Section 6068(e) of the California Business and Professions Code states that, "[i]t is the duty of an attorney . . . to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his or her client." The law in California fails to clearly establish this duty. While the California Supreme Court has held that "[t]he relationship between an attorney and client is a fiduciary relationship of the very highest

29. Freedman, Symposium on Professional Ethics, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469, 1470-74 (1966). Professor Monroe H. Freedman has suggested that "the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views." Id. at 1470.

30. Id. See Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061 (1978). "It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good." Id.

31. Hazard, supra note 30, at 1069-70. See Mitchell v. Superior Court, 37 Cal. 3d 591, 599, 691 P.2d 642, 646, 208 Cal. Rptr. 886, 890 (1984). The court noted that "the fundamental purpose behind the [attorney-client] privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." Id.

32. Freedman, supra note 29, at 1470.

character," the court has also held that the confidentiality of the communication between the attorney and client must be strictly constructed in light of the fact that it works to preclude testimony from being presented to the fact-finder. The California statutes only add to the confusion; the duty to maintain the confidences of the client is found in the same provision which mandates the attorney to uphold the integrity of the court.

The attorney confronted with a client who insists upon committing perjury in his own defense is immediately faced with conflicting ethical duties. As a zealous advocate, the attorney must present every possible defense in order to provide the client with the utmost protection. If the attorney fails to present every possible defense, the attorney provides his client with a defense that is less than adequate, thereby threatening the client's vital interests. In California it seems clear that an attorney can discharge his duty of loyalty to the client only at the expense of his duty to the court. Unfortunately, the attorney cannot fully serve two masters.

III. ETHICAL STANDARDS OF PROFESSIONAL CONDUCT

There are presently five main sources of guidance available to one confronted by the ethical dilemma of a client who seeks to offer false evidence in court. These sources are as follows: 1) the American Bar Association Code of Professional Responsibility; 2) the American Bar Association Defense Function Standards; 3) the Trial Lawyer's Code of Conduct; 4) the American Bar Association Model Rules of Professional Conduct; and 5) the California Rules of Professional Conduct. Each source presents various standards of conduct, and there is no single course of action common to all that would apply in every circumstance. These five sources will be discussed in this section.

35. Satterlee v. Bliss, 36 Cal. 489, 508 (1869). See Rigolfi v. Superior Court, 215 Cal. App. 2d 497, 501, 30 Cal. Rptr. 317, 320 (1963) (holding that "consistent with the modern attitude of the Legislature and of the courts in the matter of discovery, and that the [attorney-client] privilege, being a means by which the truth may be concealed, must be strictly construed." Id. (citations omitted)).
36. CAL. BUS. & PROF. CODE § 6068(b), (d), (e) (West 1974 & Supp. 1987). This precludes one from being able to compare the statutes in order to determine which one is subordinate to another.
37. California attorneys are subject only to the California Rules of Professional Conduct. But where these rules are silent, the attorney may use other standards as guidelines. See CALIFORNIA RULES supra note 1 (Rule 1-100). While it is generally recognized that the most appropriate course of action available to the attorney in this situation would be to withdraw, this alternative is not always available. Dunetz, supra note 4, at 434-36.
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PEPPERDINE LAW REVIEW

A. American Bar Association Code of Professional Responsibility

The most widely recognized standard of professional conduct is found in the American Bar Association's Code of Professional Responsibility (the Code). The Code was drafted to replace the old American Bar Association's Canons of Professional Ethics adopted in 1936. The Code was adopted by the American Bar Association Model Code of Professional Responsibility (as adopted by the American Bar Association) (1970) [hereinafter CODE].

38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (as adopted by the American Bar Association) (1970) [hereinafter CODE].

1908. The Code was originally designed to form the guidelines used by state bar associations in developing their own rules of professional ethics. In drafting the Code, the American Bar Association (ABA) examined and attempted to identify the common ethical problems confronting attorneys, in an attempt to provide adequate guidance in the resolution of these problems. In recognition of the ABA's efforts in the advancement of professional ethics, many states, including California, have indicated that in areas where their own rules are silent, attorneys should look to the Code for guidance.

The Code consists of three separate parts: Canons, Ethical Considerations, and Disciplinary Rules. The Disciplinary Rules set out the mandatory standards of conduct, and the Canons and Ethical Considerations interpret and explain these standards. The Code states that the Disciplinary Rules establish "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." As a result, the Disciplinary Rules are the primary source of guidance the Code provides.

The duty of confidentiality is set out in Disciplinary Rule (D.R.) 4-101. D.R. 4-101(B)(1) provides that "[e]xcept where permitted under D.R. 4-101(C), a lawyer shall not knowingly: (1) [r]eveal a confidence or secret of his client." The Code defines a "confidence" as any communication between the attorney and his client that would be protected by the attorney-client privilege as interpreted in the applicable jurisdiction. The Code defines "secrets" as all other information gained pursuant to the professional relationship which the client has requested to remain confidential or that, if revealed, would harm or embarrass the client. The duty of confidentiality imposed by D.R. 4-101 is broader than that of the traditional attorney-client privilege. While there is considerable overlap between the two, the attorney's ethical obligations set forth in the Code are broader than the statutory privilege.

41. Id. at 79.
43. See CALIFORNIA RULES supra note 1, Rule 1-100.
44. CODE, supra note 38, preliminary statement.
45. It should be noted that only the D.R. have mandatory effect. The Canons and Ethical Considerations are merely advisory. Id.
46. Id.
47. Id. at D.R. 4-101(B) (emphasis added). This duty is also imposed upon California attorneys. CAL. BUS. & PROF. CODE § 6068(e) (West 1974 & Supp. 1987). See CODE, supra note 38, D.R. 4-101 n.11.
49. Id.
50. While the attorney-client privilege involves information gained by the attorney
The duty to maintain the confidences and secrets of the client set forth in the Code is far from absolute. While the drafters' respect for the attorney's obligation to maintain the confidentiality of client conversations is clear, there are several exceptions to this rule in the Code.  

D.R. 4-101(C) provides that an attorney may reveal the confidential information of his client if the client consents to such disclosure, when disclosure is required by law, or when to do so is necessary in order to collect attorney's fees. The most troublesome exception to the attorney's duty of confidentiality under D.R. 4-101(C), however, is the future-crimes exception. 

It has been argued that the future-crimes exception places a mandatory obligation upon the attorney to reveal client's intentions to commit perjury. A number of scholars, however, have taken an opposite position, arguing that this exception should be narrowly construed against disclosure. In spite of the conflicting views surrounding the meaning of D.R. 4-101(C), it must be recognized that this section is permissive rather than mandatory. Although it may be argued that an attorney ought to reveal to the court any confidential information necessary to prevent the client from committing perjury, there is nothing in D.R. 4-101(C)(3) to suggest that mandatory disclosure is required. 

The only section in the Code that requires the attorney to disclose pursuant to pending litigation, the ethical duties of confidentiality include information which is not necessarily protected under the attorney-client privilege—for example, information conveyed in the presence of other persons. As a result, the attorney cannot simply rely upon the court's interpretation of the attorney-client privilege in defining the scope and circumstances under which the ethical obligation of confidentiality will be imposed upon the attorney. 

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51. CODE, supra note 38, at D.R. 4-101(C)(1-4).  
52. Id. at D.R. 4-101(C)(1) (emphasis added).  
53. Id. at D.R. 4-101(C)(2).  
54. Id. at D.R. 4-101(C)(4).  
55. Id. at D.R. 4-101(C)(3). D.R. 4-101(C)(3) reads: "A lawyer may reveal: . . . (3) the intention of his client to commit a crime and the information necessary to prevent the crime." Id.  
56. Lazarus, Book Review, 51 N.Y.U. L. REV. 348, 355 n.25 (1976). Contra, Wolf-ram, supra note 3, at 863-66. See also, ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (holding that in dealings with the Internal Revenue Service, the lawyer is under an ethical duty, upon discovery of illegal behavior by the client, to withdraw from service or disclose the client's intent as per Canon 15).  
57. Erickson, supra note 40, at 81 (attorney need not disclose client's fraud if discovered via privileged communication).  
59. Callan & David, supra note 58, at 353-55.
information gained on behalf of a client is D.R. 7-102(B)(1).60 Once
the attorney discovers that his client intends to commit a fraud upon
the court, he must disclose all information necessary to prevent this
crime from occurring.61 This rule was amended in 1974 to exclude all
privileged communication from the disclosure requirement.62 As a
result, the attorney who discovers that his client is about to commit
perjury is required to reveal all nonprivileged information to the
court. However, if the client's illegal intentions are discovered by way
of confidential information, disclosure is prohibited.

It should be remembered that the attorney's duty of confidentiality
under the Code is defined more broadly than the statutory privilege.
Thus, even though the information gained might not be considered
confidential under the statutory attorney-client privilege, the Disci-
plinary Rules contained in the Code might nevertheless demand
confidentiality.

The Code does not adequately resolve the conflicts which result if
the only information the attorney has acquired is privileged.63 Under
the Code, it seems clear that disclosure is forbidden.64 The Commit-
tee on Ethics and Professional Responsibility65 has declared that the

60. CODE, supra note 38, D.R. 7-102(B)(1). This Disciplinary Rule holds that once
the attorney becomes aware that his client has committed a fraud upon the court, he is
directed to reveal any relevant, nonprivileged information to the court.

61. Id. Note that until the Code was amended in 1974, D.R. 7-102(B)(1) did not
exempt privileged communication from an attorney's duty to disclose frauds com-
mitted against the court. As a result, a great deal of conflict existed between supporters
of the attorney-client privilege and those championing the ethical obligation of disclo-
sure. Callan & David, supra note 58, at 360. It should be noted that several states
which adopted the Code did not accept the 1974 amendments. See generally supra
note 39. See also Wolfram, supra note 3, at 965 n.218. After 1974, however, attorneys
were only required to disclose nonprivileged communications. Once the attorney con-
cluded that the nature of the communication was privileged, he could not reveal it to
the court even to prevent the client from committing perjury. Callan & David, supra
note 58, at 360-62. Cf. Los Angeles County Bar Ass'n Comm. on Legal Ethics, Opinion
267 (1960) (misappropriation of funds).

62. Callan & David, supra note 58, at 360.

63. For an exhaustive elaboration on the ineffectiveness of the Code to provide ad-
 equate guidelines to attorneys confronted with client perjury, see Dunetz, supra note 4,
at 410-20. See also Wright, The Code of Professional Responsibility: Its History and
Objectives, 24 Ark. L. Rev. 1 (1970); Note, Client Fraud and the Lawyer—An Ethical
Reveal a Client's Intended Future Criminal Conduct, 1984 Duke L.J. 582.

64. CODE, supra note 38, D.R. 4-101(B)(1), 4-101(C)(3), 7-102(B). See ABA Comm.
amendment precluding from the duty to reveal client perjury the confidential informa-
tion of the client). See also ABA Comm. on Ethics and Professional Responsibility, In-
formal Op. 1314 (1975) (holding that an attorney's duty to maintain the confidentiality
of privileged communication supersedes duty to reveal client's perjury); ABA Comm.
on Ethics and Professional Responsibility, Informal Op. 1318, 1320 (1975) ("It is the
opinion of the Committee that you [an attorney] have a primary duty to protect the
confidentiality of any privileged communication from your client.").

65. In 1913, the Standing Committee on Professional Ethics of the American Bar
Association was established in order to make recommendations concerning areas
proper course of action for an attorney confronted with a client insistent upon committing perjury is to withdraw from the case.66 This opinion reflects the Ethics Committee's tendency to preserve the confidentiality of the attorney-client relationship even at the risk of the presentation of false testimony. But while withdrawing from the case may be an appropriate solution in some instances, it may not be appropriate in others.67 Thus, the Code cannot be said to be a sufficient standard under all circumstances where client perjury is present.

B. The American Bar Association Defense Function Standards68

The ABA Defense Function Standards Relating to the Administration of Criminal Justice (Defense Function Standards) were drafted as part of an ABA effort to provide guidance to practicing criminal defense attorneys in specific areas of ethical behavior.69 The Defense Function Standards were adopted by the ABA House of Delegates in 1971 to be applied in conjunction with the Code.70 Though these standards are offered purely as guidelines,71 they provide an alternative course of action for the criminal defense attorney.

Defense Function Standard 4-7.5(a)72 states that it is "unprofessional conduct" for an attorney to offer false evidence to the courts.73 which the Code addressed. ABA Comm. on Ethics and Professional Responsibility, Introduction, 1 (1985). The Committee opined as to what the Code was designed to cover. After several changes in the Committee in 1971, it was renamed the Standing Committee on Ethics and Professional Responsibility. Id. at 2. Its purpose has not changed much. It is to "express its opinion on proper professional or judicial conduct, either on its own initiative or when requested to do so by a member of the bar . . . ." ABA Comm. on Ethics and Professional Responsibility, Formal and Informal Ethics Op. 1, 2-3 (1985). While only advisory in nature, these opinions have strong persuasive influence concerning the interpretation of these rules. Id.


67. See supra note 4 and accompanying text.

68. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (approved by the American Bar Association House of Delegates in 1979) [hereinafter Defense Function Standards].

69. Wolfram, supra note 3, at 824.

70. Id.

71. Defense Function Standards, supra note 68, Standard 4-1.1(f). ABA Defense Function Standard 4-1.1(f) states that, "These standards are not intended as criteria for the judicial evaluation of alleged misconduct of counsel to determine the validity of a conviction . . . ."

72. Id. Standard 4-7.5(a).

73. Id.
This section, however, is rather general, and fails to directly address the issue of the disclosure of confidential information.

Defense Function Standard 4-7.7, however, focuses specifically upon client perjury. The section provides detailed steps for a defense attorney to take when confronted with a client about to commit perjury in his own defense. First, the attorney is to persuade the client not to testify falsely. If this is ineffective, the attorney may move for withdrawal from the case but is precluded from revealing to the court the reasons for withdrawal. If withdrawal is denied, “it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony.” The attorney is to allow the defendant to take the stand and to testify. The attorney should, however, make a record of the fact that the client is testifying against the wishes of the attorney, but must do so without revealing to the court the reasons for the attorney's disagreement. The attorney may not reveal the false testimony to the court and is prohibited from arguing or otherwise supporting this evidence. Instead, the attorney must conduct direct examination of the client while avoiding questions which might result in the presentation of false evidence. Following this examination, he must allow the client to give narrative testimony. In closing argument, the attorney may not make reference to this false evidence but may otherwise advocate his client's case. Although this guideline provides the attorney with a definite, concise course of action, it may not be very practical.

The Defense Function Standards are not a practical solution to the problem of client perjury because they preclude the attorney from taking any steps, beyond persuasion, to prevent this false evidence from being presented to the court. If the attorney is unsuccessful in dissuading the client from taking the stand to commit perjury, the attorney must withdraw from the case. Even if his motion to withdraw is granted, however, there will always be another attorney ap-

74. Wolfram, supra note 3, at 825-26. It should be noted that the ABA Standing Committee disapproved this approach. See infra note 121, at 8. Note also that the ABA House of Delegates refused to adopt Standard 4-7.7 in 1979. Id. § 8 n.10.
75. Defense Function Standards, supra note 68, Standard 4-7.7.
76. Id. Standard 4-7.7(a).
77. Id. Standard 4-7.7(b).
78. Id. Standard 4-7.7(c).
79. Id.
80. Id.
81. Id. The ABA had denounced this course of conduct. See supra note 64. It should be noted that states are free to adopt this plan if they desire.
83. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978). See also Comment, supra note 39, at 499 (1983); for a discussion of this issue see Comment, Responding to the Criminal Defense Client Who Insists on the Presentation of Perjuring Nonparty Witnesses: The Schultheis Solution, 68 Iowa L. Rev. 359 (1983).
pointed as counsel. This attorney may be unaware of the client's intent to commit perjury. Moreover, there is every reason to believe that the client will learn from his attorney's reluctance to allow false testimony and will become more adept in the presentation of perjured testimony.

On the other hand, if the attorney is unsuccessful in withdrawing from the case, this passive narrative approach may be just as undesirable. First, it is likely that judges and sophisticated jurors will become aware of the fact that the client is giving testimony from the apparent lack of support of the attorney. This situation will become even more acute in closing arguments when the attorney fails to address the perjured testimony. Judges familiar with the Defense Function Standards, and bright jurors will likely suspect that the client's testimony is not wholly truthful.84

Another problem with this approach is that the prosecution will probably object to the narrative testimony since it precludes the raising of timely objections.85 The prosecutor may also object on the ground that there is no question pending. This would force the defense attorney to ask a series of questions. Under these circumstances, the attorney would be unable to avoid participating in the fraud. For these reasons, the standards do not provide a viable alternative approach for the attorney who does not want to participate in the presentation of false evidence to the court, but who also seeks to uphold his duty to his client.86 Although these standards provide an avenue by which the attorney can avoid prosecution or discipline,87 they do nothing to preserve the integrity of the court. It would seem more consistent with our concept of ordered justice for a system of rules governing the conduct of defense attorneys to promote truthful fact-finding rather than allow its perversion.

It has been argued that imposing a duty upon the attorney to disclose any false evidence the client presents to the court would not


85. Id. at 469-70 n.109. But note that the trial court does have the discretion to allow this type of testimony if appropriate. FED. R. EVID. 611.

86. Defense Function Standards, supra note 68, Standard 4-1.4(a-c). Note that nowhere in these guidelines is the attorney required to prevent the client from giving perjured testimony.

87. While there are few cases where the court has allowed an attorney to be prosecuted for passive participation in fraud, this scenario remains a possibility. McCall, supra note 84, at 461.
promote truthful fact-finding. Compelling the attorney to evaluate the evidence presented by his client and to screen out any false evidence, puts the attorney in the position of the finder of fact. In the adversarial process, the jury is the fact-finder. It fulfills this function by examining all admissible evidence for trustworthiness. It is presumed that the collective evaluation of the evidence by an impartial panel of jurors will yield an unbiased decision. It is the impartial character of the jury that makes it the most effective body for the evaluation of evidence. When the evidence is presented to the jury by two adversarial parties, it is presumed that the truth will emerge. However, compelling an attorney to withhold certain evidence from the jury that is determined by the attorney to be false serves to disrupt this adversarial process. The attorney is not an unbiased party and will be unable to make an impartial evaluation of the truthfulness of the evidence. Furthermore, since he is subject to sanction by the Bar for allowing false evidence through to the jury, he will have the incentive to strictly construe all the evidence. As a result, some evidence which would otherwise go to the jury may be unjustifiably withheld by the attorney. It may be concluded that under a rule of mandatory disclosure the advocate is placed in a position where the jury’s fact-finding function is usurped.

By establishing clear guidelines for the attorney to follow, the Defense Function Standards aim at ensuring that the roles of the various players within the adversarial process are clearly defined. These standards also help ensure that the players remain within their respective roles. The drafters argue that the result of all this is that the truth is more likely to be revealed.

Concern has been focused upon the implications of mandatory disclosure rules. Is the risk so slight, and the likelihood juries will not be able to determine the trustworthiness of evidence so great, that we should be willing to grant to attorneys the power to deny juries the chance to evaluate all the evidence? Do we have no confidence in

88. See infra Freedman, supra note 196, at 1063-64.
90. Robinson, supra note 89, at 552-53.
91. In re King, 7 Utah 2d 258, 262, 322 P.2d 1095, 1097 (1958). An attorney who passively allows his client to give false evidence to the court may be subject to prosecution. The above case indicates that there is a possibility of such prosecution. See McCall, supra note 84, at 461. But see 575 F.2d at 731 (stating “a passive refusal to lend aid to what is believed to be perjury in accordance with the Defense Function Standards would [not] violate due process” of the defendant).
92. Defense Function Standards, supra note 68, Standard 4-7.7(c).
93. Id.
94. For an overview discussion of this passive narrative approach and the problems it presents, see Dunetz, supra note 4, at 443.
the ability of the prosecutor to find discrepancies in the testimony of witnesses and to expose these on cross-examination? If we are to make attorneys responsible for presenting only truthful testimony, are we not putting them in the role of the prosecutor, investigating his client's story and presenting it at trial as truthful? If so, there is a strong likelihood that if the attorney fails to discover false evidence, and it is presented to the court, this false evidence will be given more credibility than if the attorney was not responsible for its veracity. In light of these compelling concerns, the Association of Trial Lawyers of America (ATLA) takes the position that the defense attorney should never reveal confidential information to the court.

C. The Trial Lawyer's Code of Conduct

An alternative means for guidance to the resolution of this ethical dilemma is found in the American Lawyer's Code of Conduct (Code of Conduct). The Code of Conduct was drafted under the close supervision of Professor Monroe Freedman. Professor Freedman's position is that the attorney should not reveal confidential communications occurring between the client and the lawyer. Professor Freedman reasons that the attorney's duty of confidentiality to the client is so central to the effective functioning of the adversary system, that to require the attorney to disclose confidential information to the court would materially inhibit the system's truth-finding function. Professor Freedman argues that the attorney faced with a client who insists upon committing perjury ought to allow the defendant to take the stand, give his testimony and argue the testimony to the jury in the most persuasive manner possible.

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95. By making the attorney responsible for the truthfulness of such evidence, the judge and jury will likely give such evidence more weight, depending, of course, on the reputation of the attorney. Consequently, this false evidence may be considered trustworthy and be given more weight than otherwise. The jury should be encouraged to judge the evidence presented independent of the reputation of the lawyer. To some degree, this influence of the lawyer is inescapable. But the Bar should avoid compounding this problem by requiring lawyers to be watch-dogs over the conduct of their clients.

96. See infra notes 97-101 and accompanying text.


98. Freedman, supra note 29, at 1470-74.

99. Id.

100. Robinson, supra note 89, at 552-53.
worthy or not. It also places the attorney in a purely advocative role and affords the client the greatest amount of loyalty.\textsuperscript{101}

The Code of Conduct obviously gives the duty of confidentiality great significance. Rule 1.2 of the Code of Conduct prohibits the attorney from revealing confidential information, either directly or indirectly unless under compulsion of law; to avoid appearing before a corrupted fact-finder; to defend a fellow member of the bar for charges of misconduct; or to prevent imminent danger to life.\textsuperscript{102} It should be noted that these exceptions are not likely to appear very often.

As a guideline, the Code of Conduct falls short of offering a balanced approach between the two competing interests. Instead, the Code of Conduct amounts to an affirmation of the notion that the attorney ought to be a zealous advocate despite the possible harmful effects the presentation of perjured testimony will have upon the court.

\section*{D. American Bar Association Model Rules of Professional Conduct}

The ABA Model Rules of Professional Conduct (Model Rules) were adopted in 1983 by the American Bar Association in order to consolidate the “patchwork amendments” to the Code and to eliminate many of the “gaps” therein which left many questions concerning serious ethical issues unanswered.\textsuperscript{103} The Model Rules were

\begin{itemize}
\item \textsuperscript{101} Id. See also supra notes 29-32 and accompanying text.
\item \textsuperscript{102} Code of Conduct, supra note 97, Rule 1.2.
adopted as a result of the Kutak Commission's comprehensive analysis of the Code in light of the changing law of professional responsibility. But the Model Rules were not only meant to be a restatement of the law of professional conduct; they were intended to set out prospective guidelines providing practicing attorneys useful options and information for the resolution of ethical problems.

Robert J. Kutak, Chairman of the American Bar Association's Commission on Evaluation of Professional Conduct, noted that in order to more effectively achieve this goal, the proceedings of the commission ought to be open to the public. Since "[n]o one has a monopoly on the judgment and insight that such a comprehensive evaluation of professional standards demands . . . anyone who wanted to participate needed only to ask."

The Model Rules were drafted with recognition of the many "ethical tensions engendered by the competing rights and duties involved in our legal system." At the same time, the drafters sought to maintain sensitivity to the various interests competing for favor in the area of client perjury. This was a very ambitious goal. As Kutak noted, "[a] client's perjury offers what may be the most cruel dilemma an advocate can face." In light of these competing interests—or because of them—the Model Rules offer the attorney a great deal of discretion to reveal client confidences under circumstances which the Code would have prohibited.

The Model Rules express the need and concern for the maintenance of the client's confidence. The comments to Rule 1.6 state: "A
fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. This desire to preserve confidentiality is believed to facilitate “the full development of facts essential to proper representation of the client” as well as encourage clients to seek legal advice early. The Model Rules view confidentiality as a necessary component of the truth-seeking machine. But the Model Rules also recognize that this need for confidentiality is not absolute. Rule 1.6(b) gives the attorney the discretion to reveal otherwise confidential communications when to do so would “prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm” to another, or in order to defend oneself in court against an action brought by the former client. Furthermore, the comments to Rule 1.6(b) specifically direct the attorney to Rule 3.3(a)(4), which deals with client perjury.

Rule 3.3(a)(4) essentially provides that since the lawyer is forbidden from knowingly offering false evidence to the court, once the lawyer is confronted with or discovers that such evidence has been

111. MODEL RULES, supra note 5, Rule 1.6. The Rule states:
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

112. Id. at comment, para. 2.
113. Id. at Rule 1.6(b)(1) (emphasis added).
114. Id. at comment, para. 10. Rule 3.3 comment 11 reads:
Remedial Measures
[11] If perjured testimony or false evidence has been offered, the advocate’s proper course ordinarily is to demonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer’s version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Id. at comment, 11.
presented to the court, "the lawyer shall take reasonable remedial measures." The comments to the Rule provide three such measures. First, the lawyer is directed to try to persuade the client to reveal to the court the fact that such evidence is false, or in some way to eliminate the taint that the presentation of such evidence may have on the fact-finder. If this attempt at persuasion is ineffective, the lawyer is required to attempt to withdraw from the case. If this option is inappropriate or otherwise unavailable, then the lawyer should disclose to the court the evidence the lawyer believes to be false, and allow the judge to determine what to do.

Under the Model Rules, the disclosure of client perjury is clearly mandatory. The ABA Standing Committee on Ethics and Professional Responsibility has declared that the adoption of Model Rule 3.3 represented a major change in the ABA's position with respect to the attorney's duty when the client seeks to or has committed perjury. "It is now mandatory, under these Model Rule provisions,

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115. Id. at Rule 3.3(a)(4) (emphasis added). Rule 3.3, Candor Toward the Tribunal, states:

(a) A lawyer shall not knowingly:
   (1) make a false statement of material fact or law to a tribunal;
   (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
   (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

MODEL RULES, supra note 5, Rule 3.3.

116. Id. at comment 11. See supra note 114 (full text of comment 11).

117. Id.

118. Id.

119. Id. (emphasis added).

120. There is, however, some question as to whether disclosure of client fraud is mandated by the Model Rules. Dunetz, supra note 4, at 432. See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1318 (1975).

121. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1981) (Lawyer's Responsibility with Relation to Client Perjury). This opinion deals specifically with the situation in which the client has presented false evidence and refuses to disclose such information, compounded by the fact that the court refuses to allow the lawyer to withdraw.
for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal . . . .” 122 The Committee determined that Rule 3.3, read as a whole, required the disclosure of perjury despite the fact that this evidence was otherwise confidential. The Committee determined that Rule 3.3(b) expressly made Rule 3.3(a)(2) and (4) supersede Rule 1.6. 123 Although this mandatory approach may very well put some lawyers at odds with their own moral feelings on this issue, alternate means are available by which they might resolve their personal moral convictions. 124

The Model Rules do not resolve all the ethical issues surrounding client perjury. By rejecting the “participation approach” offered by the ATLA Code of Conduct and the “passive accommodation” of the Defense Function Standards as an inadequate resolution of the problem, the Model Rules go a long way toward providing a meaningful and workable standard. However, it should be noted that the Model Rules contain several limiting features. For instance, Model Rule 3.3(a) is subordinate to the constitutional rights of the defendant/client. 125 Therefore, if presented with an ethical dilemma, the resolution of which could result in the violation of the client’s constitutional rights, disclosure by the attorney may be prohibited under the Model Rules. 126 Furthermore, the Model Rules require

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122. Id. at 4.
123. Id. at 5.
124. The attorney could, for example, inform the client at the beginning of the representation that all false evidence given to the court will be immediately disclosed to the court by the lawyer. In this way, the attorney whose moral convictions preclude him from allowing false evidence to be presented to the court, can forewarn his client of his moral predisposition. Furthermore, the attorney could draft a contract to this effect. The California Court of Appeals has held that a client may waive the attorney-client privilege by contract, thereby allowing the attorney to disclose such information to the court. The court further held that this contract may also alleviate the lawyer’s duty under the Ethical Codes of Conduct. See Roberts v. Superior Court, 9 Cal. 3d 330, 344, 308 P.2d 309, 317, 107 Cal. Rptr. 309, 317 (1973). See also Maas v. Municipal Court (Sully), 175 Cal. App. 3d 601, 606, 221 Cal. Rptr. 245, 248 (1986). See generally MODEL RULES, supra note 5, at Rule 3.3 and 3.3(a)(4). See also Comment, Lying Clients and Legal Ethics: The Attorney’s Unresolved Dilemma, 16 CREIGHTON L. REV. 487, 505 n.177 (1983).
125. MODEL RULES, supra note 5, Rule 3.3, comment 12. The comment, “Constitutional Requirements,” reads:

[12] The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Id.
126. Id. This is not to suggest that rules requiring disclosure would not have similar constraints, but rather that the issue cannot be easily decided by any set of ethical rules. The rules of conduct in this area cannot be expected to resolve all of the ethical
Mandatory Disclosure of Client Perjury

display disclosure only in cases where the lawyer "knows" the evidence is false.\footnote{127} Therefore, it seems logical that in circumstances in which the attorney has some doubt as to the falsity of the evidence, disclosure would be prohibited. This is significant since there will almost always be some degree of doubt as to the truth or falsity of any evidence obtained from the client.\footnote{128} As a result, the Model Rules may not be able to resolve every ethical issue which arises when the client seeks to present perjured testimony to the court.

E. California Rules of Professional Conduct

The 1975 California Rules of Professional Conduct\footnote{129} were last amended in 1983 and have retained much of the language borrowed from the American Bar Association's Canons of Ethics.\footnote{130} California Rule 7-105(1) provides that the lawyer shall "[e]mploy, for the purpose of maintaining the causes confided to him such means only as are consistent with the truth . . . ."\footnote{131} But there is no affirmative issues confronting attorneys in all situations where a client seeks to present false evidence to the court.

It should also be noted that several courts have held that disclosure of client perjury would not be a violation of the client's constitutional rights. In McKissick v. United States, 379 F.2d 754, 761 (5th Cir. 1967), the court held that perjury was a continuing crime "so long as [it was] allowed to remain in the record to influence the jury's verdict."\footnote{132} See Thornton v. United States, 357 A.2d 429, 437-38, cert. denied, 429 United States 1024 (1976) (holding that the criminal defendant's due process rights were not violated when his attorney followed the ABA Defense Function Standard 7.7). See also State v. Henderson, 205 Kan. 231, 237, 468 P.2d 136, 141 (1970) (holding that there was no violation of client's confidentiality when attorney disclosed to court the client's intent to commit perjury).

\footnote{127}{MODEL RULES, supra note 5, at Rule 3.3(a). The Rule begins: "A lawyer shall not knowingly . . . ." Id. (emphasis added). See generally C. WOLFRAM, supra note 110, at 655-56.}

\footnote{128}{Grady, supra note 93, at 8. Grady argues that the issue of whether the lawyer has sufficient knowledge to conclude that a client will commit perjury is "a mixed question of law or fact to which the presumption of correctness does not apply." Id. Under the facts of Nix, Grady argues that there was insufficient evidence for the attorney to conclude that the client was about to commit perjury. Id. See also Nix v. Whiteside, 475 U.S. 157 (1986). But see Appel & McGrave, Nix v. Whiteside: Client Perjury and the Criminal Justice System: The State's Position, 23 AM. CRIM. L. REV. 19, 22 n.43 (1985) ("Whiteside told his lawyers that he intended to testify falsely on the stand at his upcoming trial."). But see, ABA Formal Op. 87-353, supra note 121, at 9. The Committee held that under the Model Rules "the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury." Id.}

\footnote{129}{CALIFORNIA RULES, supra note 1.}

\footnote{130}{Wolfram, supra note 3, at 823.}

\footnote{131}{CALIFORNIA RULES, supra note 1, Rule 7-105. The Rule, "Trial Conduct," reads: In presenting a matter to a tribunal a member of the State Bar shall: (1) Em-}
duty to disclose false evidence to the court.\textsuperscript{132} Instead, the California Rules provide only that the attorney should, and under some circumstances must, withdraw from the case.\textsuperscript{133} California Rule 2-111(B)(2) provides that the attorney is under a mandatory duty to withdraw from the case if it becomes apparent that continued representation would result in a violation of a Rule of Professional Conduct.\textsuperscript{134} Therefore, if the attorney discovers that the client intends to, or has, committed perjury, the lawyer must petition the court for removal from the case, since continued representation would violate California Rule 7-105(1).\textsuperscript{135}

There are several reasons why this “bail-out approach” is inappropriate. First, the attorney cannot make the decision to withdraw unilaterally—permission to withdraw must be obtained from the court.\textsuperscript{136} As a result, withdrawal may simply be unavailable. But more importantly, the attorney's withdrawal from the case does nothing to preclude the false evidence from being introduced to the court.\textsuperscript{137} Furthermore, even if withdrawal is obtained, it is reasonable to assume that a dishonest client will learn that if he wishes to get away with perjury in court, he must not disclose to the succeeding attorneys the fact that he intends to present false evidence. Thus, by withdrawing, the attorney may actually facilitate the client's efforts to commit a fraud upon the court. This is no solution to the problem of client perjury and the result is, in fact, detestable.

The source of the various duties of California attorneys is the California statutes. But these statutes fail to provide adequate guidelines or the necessary clarity that the perjury dilemma demands. As such, there is a clear need for a California Rule that would provide adequate guidance for attorneys faced with this ethical problem.

IV. 1987 PROPOSED RULES OF PROFESSIONAL CONDUCT

The 1987 Proposed Rules, as currently drafted, would significantly alter the California Rules of Professional Conduct. Virtually every

\textit{ploy, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law . . . .}

\textit{Id.}

\textsuperscript{132} Wolfram, \textit{supra} note 3, at 823.

\textsuperscript{133} \textsc{California Rules,} \textit{supra} note 1, Rule 2-111(B). The Rules provide an elaborate procedure allowing the attorney to withdraw from the case when the attorney should know that his continued employment will result in violation of these Rules of Professional Conduct. \textit{Id.}

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} Rule 7-105(1) prevents an attorney from misleading a court with false statements.

\textsuperscript{136} For a discussion of the issues surrounding mandatory withdrawal, see Wolfram, \textit{supra} note 3, at 854-62. \textit{See also} McCall, \textit{supra} note 84, at 466, 469.

\textsuperscript{137} McCall, \textit{supra} note 84, at 469.
California Rule has been modified in some manner and no less than six new rules have been added.138 The Commission’s comprehensive evaluation and revision of the California Rules specifically concentrated on areas of conflict between the attorney and client.139 One such area of concentration was that of the attorney’s duty of candor to the court and the client’s expectation of attorney confidentiality.

The subcommittee originally drafted Proposed Rule 4-102140 in or-

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138. 1987 Proposed Rules, supra note 6, pt. III, at 1-2. At least six new rules were added: Rule 1-110, 2-200, 3-320, 3-500, 3-600, and 4-400.
140. Id. Rule 4-102, at 27. The 1986 Proposed Rule, “Duty to Maintain Client Confidence and Secrets Inviolate,” reads as follows:

(A) Is it the duty of a member to maintain inviolate the confidence, and, at ever peril to himself or herself, to preserve the secrets of a client.

(B) Definitions

(1) As used in this rule, “confidence” means any information, advice or a legal opinion communicated between a member of a law firm or a client or prospective client.

(2) As used in this rule, “secrets” means any information obtained by the member during the professional relationship, or relating to the representation, which the client has requested to be held inviolate or the disclosure of which might be embarrassing or detrimental to the client.

(C) A member may reveal a confidence or secret:

(1) with the consent of the client; or

(2) upon the lawful order of a tribunal and after the member has asserted all relevant privileges of the client or former client and has given the earliest reasonable notice of such order to the client or former client to permit him or her to protect such confidence or secret; or

(3) to the extent the member reasonably believes necessary:

(a) to prevent the client from committing a criminal act that the member believes is likely to result in death or substantial bodily harm; or

(b) to establish a claim or defense on behalf of a member in a controversy between the member and the client, to establish a defense to a criminal charge or civil claim against the member based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the member’s representation of the client.

(D) Except where disclosure is otherwise permitted by this rule, a member shall not:

(1) use a confidence or secret of a client or former client to the disadvantage of the client; or

(2) use a confidence or secret of a client for the advantage of the member or of a third person, provided that a member may make use of work product secrets, if that is done without disclosing the client’s identity or the nature of the professional engagement for the client.

(E) When a member comes to know beyond a reasonable doubt that material evidence offered to a tribunal by the member on behalf of a client is false, the member shall confidentially exhort the client to permit the correction of the false evidence. If the client refuses to permit such cor-
order to establish the parameters of the protection to be afforded to client confidences and secrets, and to clarify the attorney’s duty to his client as well as to the court. Proposed Rule 4-102 was adopted in large part by COPRAC. 1987 Proposed Rule 3-100 incorporated sections A-D of Proposed Rule 4-102 verbatim, but did not include section E requiring mandatory disclosure of client perjury.

A. Client Confidences and Secrets

1987 Proposed Rule 3-100 defines the attorney’s duty to maintain the confidences and secrets of his client. Under the 1975 California Rules, the duty of confidentiality was not clearly defined and the duty is only briefly mentioned in the California statutes. Rule 3-100, however, contains a comprehensive definition of attorney-client communications which constitute “confidences,” and which are therefore protected from disclosure by the attorney. The Commission's comments concerning this proposed rule note that this rule “represents an attempt to balance the interest the client and legal system have in maintaining the confidentiality of the attorney-client relationship against the counterbalancing interest which may exist with respect to disclosure of a particular confidence or secret.”

Proposed Rule 3-100 is similar to Disciplinary Rule 4-101, although subtle differences exist. Subsection B of the Proposed Rule de-
fines “confidences” and “secrets” in much the same way as does the Code, but with one significant difference. Unlike the Code, the Proposed Rules do not refer to the attorney-client privilege in defining what amounts to a “confidence.” The Proposed Rule merely states that a “confidence” is “any information, advice, or a legal opinion communicated between a member or a law firm and a client or prospective client.” The Code, however, specifically links the definition of a confidence to the attorney-client privilege, defining all other information gained during the relationship as a “secret.” While this is only a subtle difference, the effect is to sever the definition of the duty of confidentiality under the Proposed Rule from the definition of the attorney-client privilege. As a result, a clear demarcation is established between the attorney’s ethical duty of confidentiality and the definition of privileged communications under the attorney-client privilege.

In general, the enumerated exceptions to this duty of confidentiality, as presented in Proposed Rule 3-100(C), are similar to those found in the Code (D.R. 4-101(C)), with certain exceptions. The Code permits the attorney to reveal client confidences in order to prevent the client from committing a crime, but the Proposed Rules demand that these criminal acts be of the type reasonably likely to cause death or substantial bodily harm. Thus, while it may be argued that the future-crimes exception under the Code allows attorneys to reveal the client’s intent to commit perjury, this argument does not exist under the Proposed Rules.

Although 1987 Proposed Rule 3-100 is similar to 1986 Proposed Rule 4-102, there is one significant difference. Proposed Rule 4-102 contains language in subsection E which calls for the mandatory dis-
closure of client perjury. Under Proposed Rule 4-102(E), an attorney who has knowledge beyond a reasonable doubt that his client has committed perjury or has otherwise presented false evidence to the court, "shall disclose the falsity of the evidence to the tribunal, notwithstanding that the facts establishing such falsity are confidences or secrets of the client." Subsection E thus mandates that the attorney reveal all false evidence presented to the court.

Also, even though Rule 3-100 is similar to Rule 4-102, Proposed Rule 3-100 does not contain any language making the disclosure of client perjury mandatory. In fact, the Commission refused to adopt proposed Rule 4-102's less restrictive alternative approach to mandatory disclosure, which called for the members to take "all reasonable steps to remedy the deception" offered to the court. Under this approach, the attorney would be required to take affirmative steps to prevent the client from committing perjury. Presumably, this would at least allow the attorney the discretion to disclose the perjured testimony to the court. As a result, the attorney who seeks to maintain his own ethical and moral standards would be allowed to do so without the threat of disciplinary retaliation by the Board.

The Commentary to the 1987 Proposed Rules notes that the Commission received strong criticism of the idea of enacting Rule 4-102. The Commission received 35 comments focusing upon this Proposed Rule. While some 80 comments were received concerning Proposed Rule 7-107, and 43 comments concerning Proposed Rule 2-101, the controversy generated by Proposed Rule 4-102 was nevertheless considerable. The Commission noted the existence of the competing interests facing an attorney whose client intends to commit perjury, but maintained that "the negative systemic side-effects on the legal process of a mandatory disclosure rule would be serious . . . ." As a result, the Commission refused to include the mandatory language of Proposed Rule 4-102(E).

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153. 1986 Proposed Rules, supra note 8, Rule 4-102(E), at 27 (see supra note 140 for full text).
154. Id.
155. 1987 Proposed Rule, supra note 6, Rule 3-100, at 19.
156. Id.
158. The inclusion of this "least restrictive alternative" language would give the attorney the discretion to reveal confidential information to the court if no other avenues were available. This is similar to the provisions of the Model Rules. See supra note 115, Rule 3.3 comment 11.
160. Id.
161. Id.
162. Id.
163. Id.
B. Mandatory Disclosure

The subcommittee sought to impose a duty of full disclosure of client perjury on the attorney, and to allow the court to decide how this evidence should be treated. This amounted to a very bold attempt at a resolution of one of the most troubling ethical dilemmas confronting the criminal defense attorney.\(^{164}\) In commenting about subsection E of Proposed Rule 4-102, the drafters noted that it is "one way of resolving a conflict which occasionally may arise because of the duties imposed upon a member by [California] Business and Professions Code section 6068(d) and (e)."\(^{165}\)

Several limitations to this duty of disclosure are found in the Rule, however. First, the Rule applies only to situations in which the attorney knows beyond a reasonable doubt that his client has committed perjury. But because of ambiguities inherent in such testimony, only in limited situations will the attorney be convinced beyond a reasonable doubt that the client's testimony is false.\(^{166}\) The requirement of mandatory disclosure of client confidences may therefore only arise

\(^{164}\) This was not the first time such a proposal has been advocated and proposed to a Board of Ethics. Judge Marvin E. Frankel, District Judge for the United States District Court for the Southern District of New York, made a similar proposal to the American Bar Association in 1975. Frankel, *The Search For Truth: An Umpired View*, 123 U. PA. L. REV. 1031 (1975). In 1974, Judge Frankel introduced his beliefs on the attorney's duty of candor to the Association's 31st Annual Benjamin N. Cardozo Lecture in New York City. He noted that "[t]he rules of professional responsibility should compel disclosures of material facts and forbid material omissions rather than merely proscribe positive frauds." *Id.* at 1057. He also proposed requiring disclosure of "any untrue statement by client or witness or any omission to state a material fact . . . ." *Id.* at 1057-58.

In 1928, the Board of Governors of the California State Bar, pursuant to the provisions of the State Bar Act, submitted for the California Supreme Court's approval a set of amendments to the California Rules of Professional Conduct. Amendment eighteen required the attorney to disclose to the court the client's perjured statements. *Rules of Professional Conduct of the State Bar of California*, 2 CAL. ST. B.J. 203, 205 (1928). In commenting about this new proposed rule, Joseph J. Webb, the President of the Bar, wrote that it was a reaction to the court's disbarment of attorney Hardenbrook for subornation of perjury. *Id.* at 206. Webb noted that the interests of society in maintaining the integrity of the Bar outweighed the interests of the client under these circumstances. *Id.* This rule, however, was rejected. *See Rules of Professional Conduct, 3 CAL. ST. B.J. 17, 19 (1928)* (note that Rule 18 is not among the rules enacted by the Supreme Court of California).

\(^{165}\) 1986 Proposed Rules, *supra* note 8, Rule 4-102(E) at 27.

in clear-cut cases of attempted abuse where the client fully admits to committing perjury.  

Another self-imposing limitation to the mandatory disclosure rule of subsection E is that the false evidence must have been actually presented to the court or tribunal before a duty is imposed. Thus, if the attorney discovers that his client intends to commit perjury before trial, the attorney must consider Proposed Rules 7-101 and 2-111(B), but is precluded from disclosing this confidential information to the court until the client has actually testified and presented false evidence. 

Because of these two limitations, Proposed Rule 4-102(E) requires mandatory disclosure in only a few selected situations. The narrow scope of the Rule is evidenced by the fact that it does not adequately address the situation where the attorney believes, before trial, that his client intends to commit perjury. In light of these limitations on the duty of mandatory disclosure, the Rule's impact would not have been very significant. But despite the limitations, Proposed Rule 4-102(E) would have at least established a workable guideline for the 

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167. Absent a complete admission on the part of the client, the attorney will rarely be certain that his client's testimony is false. Furthermore, once the client discovers that the attorney must reveal client perjuries and believes that the attorney will do so, the client will not make this admission. If he believes that the attorney has discovered sufficient evidence which tends to disprove the client's alibi defense, the client will likely discharge the attorney before testifying and attempt to conceal this evidence from the new attorney. The effect of this "educated" client is to preclude the attorney from discovering sufficient evidence to be certain that client perjury is imminent. The attorney is thereby not confronted with the ethical dilemma. It rests with the judicial system to determine whether the defendant is presenting false evidence, and if perjury is present, to impose appropriate sanctions. It should be noted, however, that even though mandatory disclosure will not prevent the discovery of perjury, it is a step in the right direction. Also, it removes the attorney from any participation in this endeavor.

168. 1986 Proposed Rules, supra note 8, Rule 4-102(E), at 27.

169. 1986 Proposed Rule 7-101 deals with the prohibition against the attorney from advising his client to violate the law. 1986 Proposed Rules, supra note 8, Rule 7-101, at 36. Presumably, the attorney is to take notice that he must not actively participate in the presentation of such false evidence to the court. Additionally, if the attorney knows that the client intends to use his legal services to defraud the court, then the attorney should refrain from accepting employment from the client.

170. 1986 Proposed Rule 2-111(B) concerns the requirement of mandatory withdrawal. Id. Rule 2-111(B), at 4. "A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal if required by its rules . . . if: . . . (2) [t]he member knows or should know that continued employment will result in violation of these rules . . . ." Id. (emphasis added). The requirement of withdrawal is subject to the approval of the court. The court may therefore unilaterally decide that due to the pending trial, the attorney's motion to withdraw will be too prejudicial to the interests of the client. See Dunetz, supra note 4, at 419-20.

171. 1986 Proposed Rules, supra note 8, Rule 4-102(C) (under Proposed Rule 4-102(C) there are no provisions for the permissive disclosure of false evidence presented to the court; the only provision within Rule 4-102 which requires or even allows disclosure of confidential information is subsection E).
attorney confronted with a client who is known to already have perjured himself.

V. RELATIVE MERITS OF MANDATORY DISCLOSURE

A. Integrity of the Legal Profession

The attorney's duty to disclose to the court all false evidence which has been presented has been supported on the grounds that doing so helps to gain the respect of the general public. Though the merits of mandatory disclosure have been aggressively debated among scholars and practitioners for many years, Professor Samuel D. Thurman has argued that "[p]ublic criticism of the legal profession is most stringent when there is belief that truth telling is not uppermost in the lawyer's code of ethics." Thurman suggests that requiring attorneys to disclose false evidence presented to the court furthers the judicial process of truth-finding. More importantly, this requirement may increase the public's confidence in the legal profession. As Thurman notes, "[i]f the legal profession and its members are looked upon as dissemblers, distorters who subordinate truth to winning, and as technicians who answer to but one command, that of their client, public confidence in lawyers will be found wanting."

Retired Chief Justice of the United States Supreme Court, Warren E. Burger, while a Judge for the United States Court of Appeals, characterized the rule prohibiting an attorney from presenting false evidence...
evidence to the court as "so basic and fundamental to the integrity of our system of justice and the legal profession that it can never admit of any exception, under any circumstances." Burger went on to comment that, "[n]o pressure on the lawyer can ever justify a knowing and conscious departure from this rule." Burger viewed the rule prohibiting the attorney's presentation of false evidence to the court as the starting point for the discussion of whether client perjury ought to be permitted. He felt that to allow the criminal defense attorney to use his client's perjured testimony as a "tool in the administration of justice overlooks an ancient axiom of the law that next to having a strong case the best asset of a litigant is to be represented by a lawyer who has the complete confidence of the courts and of his fellow lawyers." Burger later argued in Nix v. Whiteside that the disclosure of client perjury to the court is "professionally responsible and acceptable . . . conduct."

The integrity of the profession, as well as the interests of justice, would be served best by a blanket rule requiring disclosure of client perjury. Such a rule would be fortified by the principle that the client has no right to present false evidence to the court. Professor Thurman contends that since the client does not have the right to present perjured testimony to the court, the attorney should not be prevented from disclosing his client's wrongdoing once it has been presented in court. Thurman notes that while "[a]n accused has a constitutional right to the assistance of counsel, a right to testify on his own behalf, a right to refuse to testify, and a privilege of confidential communications with counsel . . . [h]e does not have a constitutional right to commit perjury." This argument is further supported by Justice Burger's opinion in Nix v. Whiteside, where in dicta he proclaimed that "there is no right whatever—constitutional or otherwise—for a defendant to use false evidence." The above arguments are both premised on the concept that if the client has no right to commit perjury, then the legal profession should be for-

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179. Id.

180. Id. He noted that "the purposes and objectives of a system of justice are to obtain fair and just results by fair and decent methods . . . ." As a result, "a lawyer may never, under any circumstances, knowingly present false testimony . . . or otherwise participate in a fraud on the court."

181. Id. at 13.


183. Thurman, supra note 174, at 15.

184. Id.

185. 475 U.S. at 173.

186. Id. at 169 ("The offense of perjury was a crime recognized at common law and has been made a felony in most states by statute . . . .").
bidden to further any attempts by the client at introducing this false evidence.

B. The "Chilling Effect" of Disclosure Rules

While some argue that full disclosure protects the integrity of the legal profession, others contend that this amounts to a breach of trust between the attorney and client. Jerome Sapiro, Jr., former Chairman of the San Francisco Bar Association's Legal Ethics Committee, argued that even the rather limited disclosure requirements under the Model Rules would be destructive to the attorney-client relationship.\(^\text{187}\) He suggests that imposing any disclosure requirements will lead to the necessity of giving “Miranda warnings” to clients at the initial conference, and that this would in turn cause an immediate distrust of the attorney by the client.\(^\text{188}\)

It has also been argued that this resultant distrust would serve to reduce the integrity of the legal profession.\(^\text{189}\) The disclosure requirement demonstrates a lack of confidence in the ability of the judicial system to discover the truth despite attempts to corrupt the system.\(^\text{190}\) Sidney Rosdeitcher, Chairman of the New York City Bar Committee, warned that:

> If a lawyer can go out and tell, it would seriously undermine the trust placed by clients in their lawyers. . . . You may find you are creating an adversary relationship between lawyer and client. To the extent that society's interests are served, there are other means of discovery rather than turning the lawyer into a policeman. There would be a terrible social loss in chilling that [attorney-client] relationship.\(^\text{191}\)

The strongest argument against a mandatory disclosure rule focuses upon the impact such a rule would have on the attorney's ability to gain sensitive information from the client. Rosdeitcher warns that such a rule would have a "chilling effect" upon the attorney-client relationship, since clients will feel less secure about telling the attorney the "whole" story,\(^\text{192}\) possibly disrupting the entire adversary process.

In response to this argument, Professor Thurman points out that there are no empirical studies evaluating the degree to which a strict

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188. *Id.*
190. *Lawyer as Cop, supra* note 189, at 438.
191. *Id.*
192. *See supra* notes 29-32 and accompanying text.
rule of confidentiality encourages clients to disclose sensitive information to their attorneys.\textsuperscript{193} Since the penalty for perjury and the risk of being caught are slight, the client may decide that it is in his best interest to withhold incriminating information from the attorney, despite the strict rule of confidentiality. The client may feel that if the attorney believes the client to be innocent, then he will be in a better position to argue passionately for the client before the jury.\textsuperscript{194}

Thurman counters this argument by noting that even if the rule of mandatory disclosure reduces the flow of information from the client to the attorney, it “is a small price to pay for the reputation thereby gained, both within and outside the profession that lawyers do honor their obligation of candor to the court.”\textsuperscript{195} The primary goal of the judicial process is to uncover the truth, and full disclosure allows the system to more effectively attain this result.

Professor Freedman, however, argues that this emphasis on discovering the truth may be misplaced. While the discovery of the ultimate truth may be an important function of the criminal justice system, it is argued, the state’s interest in the discovery of this truth is not absolute nor is it even paramount.\textsuperscript{196} Under our American system of justice, “[t]he dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination.”\textsuperscript{197}

Freedman further asserts that in a free society a balance must be drawn between the interests of the state in protecting its citizens by gaining the ultimate truth, and the interests of these citizens to be free from any harmful residual or collateral effects of the state’s pursuit of its interests.\textsuperscript{198} To achieve or maintain this balance, each party must make concessions. The citizens allow the state the necessary latitude to conduct a reasonable investigation of facts while demanding at the same time that the parameters of these investigations be narrowly drawn. The state is further constrained from pursuing

\textsuperscript{193} Thurman, \textit{supra} note 174, at 16.

\textsuperscript{194} This argument has merit considering that clients may not be aware of the significance of this sensitive information or be able to realistically evaluate the prosecution’s ability to discover it. As a result, clients who are not familiar with the legal process will probably not recognize any benefits in disclosure. At the same time, however, they may be very sensitive to the risks involved if such information were to become public.

\textsuperscript{195} Thurman, \textit{supra} note 174, at 16.


\textsuperscript{197} \textit{Id.} at 1063.

\textsuperscript{198} \textit{Id.} at 1063-64.
the absolute truth by the Constitution's protection of each citizen from self-incrimination. Professor Freedman poses an appropriate question to illustrate this point: "What more effective way is there to expose a defendant's guilt than to require self-incrimination at least to the extent of compelling the defendant to take the stand and respond to interrogation before the jury?"\textsuperscript{199}

Once it is recognized that the pursuit for the truth is not the only goal of the judicial process, the question then becomes, to what extent should the scales of justice be readjusted? They may be tilted either to favor the state's interest in obtaining the truth, or conversely, toward the citizen's interest in securing individual freedom. Freedman argues that the individual's interest is paramount. "[I]n a society that respects the dignity of the individual, truth-seeking cannot be an absolute value, but may be subordinated to other ends, although that subordination may sometimes result in the distortion of the truth."\textsuperscript{200}

Professor H. Richard Uviller takes the position that mandatory disclosure may not be the appropriate solution to the ethical dilemma of client perjury, and criticizes the mandatory disclosure rule on the grounds that the "truth" may not always be clearly recognizable.\textsuperscript{201} Professor Uviller declares that "the supremacy of Truth is easier to assert than to define."\textsuperscript{202} Evidence presented to the court is rarely unflawed and unambiguous. In recognition of this well established fact, certain constitutional safeguards have been created in order to prevent abuses of justice.\textsuperscript{203} This process is a manifestation of the realization that the truth cannot be discovered in an environmental vacuum. Rather, the judicial system must wallow in the bog of uncertainty lying between fact and fiction. The adversary system, however, was designed with this environment in mind. By pitting one side against another, the truth or the closest thing that we can expect thereto, will emerge. Although forceful arguments have been posed

\textsuperscript{199.} Id.
\textsuperscript{200.} Id. at 1065. It should be noted that there is a distinct difference between compelling a defendant to testify against himself and prohibiting an attorney from assisting in the presentation of false evidence. Even recognizing the merit of Professor Freedman's argument, mandatory disclosure rules do not violate individual rights.

While admitting that these disclosure rules do not prevent client perjury, they do prevent the attorney from participating in this illegal act.

\textsuperscript{202.} Id. at 1078.

\textsuperscript{203.} This point was raised earlier in Professor Freedman's argument. See supra notes 197-200 and accompanying text.
that the duty of confidentiality hinders the truth-finding process, it has become a "necessary evil" without which the interests of the accused become increasingly more vulnerable to abuse. As a result, to the extent that the mandatory disclosure rule would render individuals less likely to disclose confidential, sensitive information to the attorney, Freedman and others denounce it as a hindrance to the effectiveness of the adversary process.\textsuperscript{204}

The mandatory disclosure rule has also been criticized as merely shifting the problem of client perjury from the attorney to the court.\textsuperscript{205} As Sampson notes, "If... no judicial action is taken after counsel's disclosure, an egregious distortion will have been introduced into the truth-seeking process."\textsuperscript{206} The effect would likely be that after client perjury is disclosed, the court will be forced to declare a mistrial. The resultant disruption and delay may be so significant as to outweigh any benefits.\textsuperscript{207} Also, there is always the chance that the defense will capitalize on the disclosure and delay, either as a means to gain a mistrial or to delay the trial.\textsuperscript{208} Thus, it is argued that, although it may at first seem that the mandatory disclosure rule would facilitate the truth-finding function of the judicial process, on closer examination this conclusion becomes unfeasible.

C. Uniform Standards of Conduct

Despite these arguments, the rules requiring mandatory disclosure of client perjury serve a vital and worthy function. The rules provide the attorney with a firm set of guidelines. Despite some ambiguities,\textsuperscript{209} once a falsehood is presented to the court, the attorney's duty is quite clear.

Furthermore, the rules provide a uniform standard applicable to all attorneys within the jurisdiction. If a state bar allows attorneys the discretion to determine whether disclosure is warranted,\textsuperscript{210} each attorney would be able to establish a different standard. This would produce ambiguity within the legal community as to "the rule" in

\textsuperscript{204} See generally supra notes 195-99 and accompanying text.
\textsuperscript{205} Sampson, supra note 82, at 399-400.
\textsuperscript{206} Id. at 400 (footnote omitted).
\textsuperscript{207} Id. at 400 n.91. Furthermore, in the rare cases in which such a disclosure rule would apply, its enforcement would be very difficult if not impossible. Comment, The Privilege of Confidential Communication Between Lawyer and Client, 16 CALIF. L. REV. 487, 495 (1928).
\textsuperscript{208} Whether this alternative is realistic is yet to be seen. This strategy may backfire on attorneys if the judge decides to disregard the disclosure, continue the trial, and use the information against the defendant in sentencing.
\textsuperscript{209} The Rule requires the attorney to disclose evidence believed false beyond a reasonable doubt. There is ambiguity as to what standard should be applied—the criminal law standard or that of the Model Rules.
\textsuperscript{210} It has been argued that the Model Rules allow the attorney the discretion to either disclose or remain silent. See Comment, supra note 39, at 505.
this area. Mandatory disclosure rules provide much-needed uniformity applicable to all attorneys.

The debate surrounding this issue is focused upon those calling for absolute confidentiality and those calling for mandatory disclosure. While the arguments in favor of confidentiality are compelling, they often result in undesirable results. Under California's Rules (as well as the 1987 Proposed Rules) the attorney is forbidden to disclose client confidences to the court. As a result, if his client has admitted to committing perjury, the attorney is precluded from disclosing this to the court. A problem arises, however, in the case where the client admits to testifying falsely against a co-defendant because of personal dislike for the co-defendant. The client admits that he wants to see the co-defendant go to jail. Under the California Rules, the attorney would be precluded from disclosing this falsehood in this situation. As a result, the attorney may have to sit and listen to the jury return a guilty verdict against the co-defendant. This scenario is most troubling. It cannot be argued that by remaining silent, the attorney is adequately protecting the interests of his client. The system has truly broken down in this situation, and there are few remedies.

Even though this scenario probably does not occur often, it demonstrates the troubling effects the confidentiality rule can have on lawyers in certain cases. Under 1986 Proposed Rule 4-102(E), the lawyer in this situation would be free to disclose this evidence to the court, thereby initiating remedial measures to prevent any prejudicial effects.

VI. LIMITATIONS OF MANDATORY DISCLOSURE

Several limitations impair attorneys' efforts to cope with disclosure rules. Before addressing some of the approaches an attorney may employ to help alleviate the impact of the conflict between the attorney's duty of candor to the court and the duty of confidentiality to his client, two constitutional issues must first be discussed. As noted earlier, the Rules of Professional Conduct of any jurisdiction must yield to the constitutional rights of the client. Therefore, to be

211. As a result, a single attorney would be put into the position of not having to decide what course of action to take. While it is regrettable that the attorney loses some freedom to make his own ethical decisions, it is far more important that the Bar establish a unified standard applicable to all attorneys.

212. MODEL RULES, supra note 5, Rule 3.3, para. 12 (noting the general rule presented in paragraph 12 that constitutional rights are paramount).
valid, any suggested approach to resolving the problem of client perjury must not violate these constitutional rights.

A. Client’s Right to Testify

The most effective way to prevent the client from presenting false testimony to the court would be to preclude the client from taking the witness stand at all. Once sufficient evidence to form the basis for a reasonable belief that the client will commit perjury becomes known to the attorney, he can resolve the ethical dilemma by refusing to call the client to the stand. The viability of this approach is bolstered by the fact that before 1864, criminal defendants were systematically prevented from testifying on their own behalf.213 The justification for the rule was the belief that such testimony would be too susceptible to taint and abuse due to the intense interest of the defendant in fabricating testimony.214 Today, however, a majority of the states have statutes allowing criminal defendants to take the stand in their own defense.215 But while the states and the federal government216 allow defendants to take the stand, the United States Supreme Court has never ruled that the criminal defendant has a constitutional right to testify on his own behalf.217

Moral Philosophy’s Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529, 1560 n.131.

213. Ferguson v. Georgia, 365 U.S. 570 (1961). Prior to 1864, the English common law rule dictated that defendants were incompetent to testify. Maine became the first state in America to enact a general competency statute allowing defendants to testify in 1864. Id. at 577.
214. Id. at 573-76.
215. Id. at 596-98 (for a list of states adopting competency statutes).
217. Appel & McGrane, supra note 128, at 6 (in Harris v. New York, 401 U.S. 222 (1971), the Supreme Court alluded to the existence of a constitutional right to testify). Cf. “A constitutionally based ‘right to testify’ is not violated when an attorney, pursuant to the rule of a state criminal justice system, prevents a client from committing perjury.” Id. at 35.

The Supreme Court has alluded to the fact that such a right may exist, but has refrained from addressing the point squarely. In Ferguson, the Court had the opportunity to render a decision on the constitutionality of the right to testify but refused to do so. Rather than addressing the issue, the Court based its decision on the fact that a state could not deny a defendant the right to counsel. 365 U.S. at 596. Justice Frankfurter wrote a separate opinion arguing that this case should have been decided on the grounds of the right to testify rather than on a right-to-counsel basis. Id. at 599-600 (Frankfurter, J., separate opinion for reversal). In fact, only in dicta has the Court held that an individual has the right to testify on his own behalf. In Harris, the Court stated that “[i]very criminal defendant is privileged to testify in his own defense or refuse to do so.” 401 U.S. at 225. The issue in this case focused upon whether an otherwise inadmissible statement by the defendant could be used for impeachment purposes. Id. at 222. The Court answered affirmatively, noting that a right to testify does not include the right to commit perjury. Id. at 225. Furthermore, the Court held that the right to testify may be grounded in due process considerations. Faretta v. California, 422 U.S. 806 (1975). In Faretta, the Court held that a criminal defendant has the right to conduct his own defense. Id. Again, the Court merely alluded to the guar-
The California Supreme Court has declared that the defendant has a constitutional right to testify. In *People v. Robles*, the court held that "the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury." The court declared that the right to testify is fundamental, and the attorney's power to control court proceedings must not deprive the defendant of his fundamental rights. Accordingly, attorneys are prohibited from preventing the defendant from taking the stand in California.

Since a California defendant has the right to testify in his own behalf, any California Rule of Professional Conduct that would interfere with the defendant's right to testify would be contrary to the Constitution of California and hence, invalid. While the California Supreme Court has held that the defendant ought to be afforded the right to be heard, the United States Supreme Court has also recognized that this right may be limited or curtailed under certain circumstances.

Several federal circuit courts of appeal have held that criminal defendants have a constitutional right to testify on their own behalf. See *Alicea v. Gagnon*, 675 F.2d 913, 920-23 (7th Cir. 1982); See also *Whiteside v. Scurr*, 744 F.2d 1323, 1329-30 (8th Cir. 1984), *rev'd sub nom. Nix v. Whiteside*, 475 U.S. 157 (1986) (reversing on the grounds that the conduct of an attorney in admonishing his client for intending to commit perjury and threatening to disclose such perjury to the court did not amount to ineffective counsel); *United States v. Bifield*, 702 F.2d 342, 347-49 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983). But while the Second, Seventh, and Eighth Circuits have rendered decisive opinions on the matter, several others, including the Ninth Circuit, have remained silent.

In *Alicea v. Gagnon*, the Seventh Circuit upheld a decision by the Wisconsin Supreme Court holding invalid a state statute which prohibited a criminal defendant from testifying in his own defense unless he had given adequate notice to the prosecution of the defendant's intent to present an alibi defense. 675 F.2d at 919-20, 923. The court held that this "notice-of-alibi" statute violated the defendant's constitutional right to testify under the fifth, sixth, and fourteenth amendments. *Id.* at 913.

In *Bifield*, the Second Circuit Court of Appeals held that the criminal defendant has a constitutional right to testify. 702 F.2d 342. The court reviewed the issue at length and noted that although the "right to testify has never been resolved authoritatively by the Supreme Court... we believe that such a constitutional right exists." *Id.* at 347.


220. *Id.* at 215, 466 P.2d at 716, 85 Cal. Rptr. at 172.

221. *Id.* at 214, 466 P.2d at 716, 85 Cal. Rptr. at 172. See *People v. McKenzie*, 34 Cal. 3d 616, 631 n.9, 688 P.2d 769, 779 n.9, 194 Cal. Rptr. 462, 472 n.9 (1983).

222. 2 Cal. 3d at 214-15, 466 P.2d at 716, 85 Cal. Rptr. at 172-73.
cumstances.\textsuperscript{223} This principle is buttressed by the United States Supreme Court's holding that, "[a]lthough mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, we explicitly hold today that a defendant can lose his right to be present at trial . . . ."\textsuperscript{224}

The Second Circuit Court of Appeals held in \textit{United States v. Bifield}\textsuperscript{225} that although the defendant has the right to testify, this right "is not without limits."\textsuperscript{226} The court noted that "[i]n responding to the charges against him, an accused must comply with the established rules of procedure and evidence . . . ."\textsuperscript{227} In \textit{United States v. Curtis},\textsuperscript{228} the Seventh Circuit held that "a defendant has no constitutional right to testify perjuriously in his own behalf."\textsuperscript{229} Although the court only alluded to the appropriate standard the attorney would be held to maintain in his determination of when the defendant will commit perjury, the court stated that "[b]ecause it seems apparent that [the defendant] would have testified perjuriously, counsel's refusal to put him on the witness stand cannot be said to have violated [his] constitutional rights."\textsuperscript{230}

In \textit{Nix v. Whiteside},\textsuperscript{231} the Supreme Court echoed these same considerations. Chief Justice Burger, writing for the majority, declared in dicta that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying \textit{falsely}."\textsuperscript{232} The Court went on to note that the lawyer who cooperates with his client to present perjured testimony "would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment."\textsuperscript{233} From these pronouncements, it seems that the Court is not only going to allow attorneys to prevent their clients from testifying falsely, but will sanction them for failing to either withdraw from the case or prevent their clients

\textsuperscript{223}. Illinois v. Allen, 397 U.S. 337, 343 (1969), \textit{reh'g denied}, 392 U.S. 915 (1970). This case dealt with the power of a trial court to expel the defendant after warning him that his conduct was too disruptive to maintain the dignity, order, and decorum necessary to conduct the trial. The Court expressly rejected the argument that the defendant's sixth amendment right to be present in the courtroom is absolute. \textit{Id}. at 342.

\textsuperscript{224}. \textit{Id}.


\textsuperscript{226}. \textit{Id}. at 350.

\textsuperscript{227}. \textit{Id}.

\textsuperscript{228}. 742 F.2d 1070 (7th Cir.), \textit{cert. denied}, 106 S. Ct. 1374 (1984).

\textsuperscript{229}. \textit{Id}. at 1076.

\textsuperscript{230}. \textit{Id}. \textit{See also id}. at 1076 n.4 (court seemed to adopt or suggest that the defense attorney ought to refer to the Defense Function Standards to resolve this issue).

\textsuperscript{231}. 475 U.S. 157 (1986).

\textsuperscript{232}. \textit{Id}.

\textsuperscript{233}. \textit{Id}. The Supreme Court of North Carolina held that the failure of the attorney to withdraw from the case once the attorney "knows" that the client intends to perpetrate a fraud upon the court is grounds for discipline. Matter of Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).
from giving false testimony, even to the extent of preventing them from taking the witness stand.

It must be noted, however, that even though Justice Burger declared that the defendant does not have a right to testify falsely, this remark was not part of the holding. Justice Brennan’s concurring opinion noted: “Let there be no mistake: the Court’s essay regarding what constitutes the correct response to a criminal client’s suggestion that he will perjure himself is pure discourse without force of law.”

The courts are in general agreement that the defendant who seeks to take the witness stand and testify truthfully has a right to do so. But the issue of whether a lawyer, after discovering that the client intends to commit perjury, can prevent the defendant from taking the stand, remains. There is, however, only limited authority for the proposition that such a power on the part of the attorney exists. In any event, it seems clear that if the attorney does prevent the client from taking the stand for fear that the client will give false testimony, the attorney will not be held to have rendered ineffective assistance of counsel.

The California attorney who finds himself in this situation may not have the option to prevent the client from taking the witness stand. Under the California Rules of Professional Conduct, the defendant’s right to testify supersedes the attorney’s duty as officer of the court. While there seems to be a trend in other jurisdictions toward allowing attorneys this discretion, California has not followed this line of cases.

B. Right of Effective Assistance of Counsel

In light of the fact that nearly any remedial measure undertaken by the attorney will result in a conflict with the interests of the client, an issue arises as to whether this conflict violates the defendant’s right to effective counsel under the sixth amendment. The sixth amendment to the United States Constitution guarantees the right of

234. 475 U.S. at 175 (Brennan, J., concurring).

235. Id. at 992. The Court held that “there is no constitutional right to present a perjured defense.” Id. A Florida state Court of Appeals held that since the defendant does not have the right to commit a fraud upon the court, an attorney who fails to call a particular witness because he believes the witness will commit perjury has not rendered ineffective assistance. Sanborn v. State, 474 So. 2d 309, 312 (Fla. 1985).
assistance of counsel to criminal defendants.\footnote{236} The Supreme Court has declared that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel . . . .”\footnote{237} In light of this right to counsel, the Court held in \textit{Strickland v. Washington} that the purpose of the sixth amendment right of counsel was to protect the defendant’s right to a fair trial.\footnote{238} The Court thus held that the defendant must be provided with effective assistance of counsel in order that these interests are protected and preserved.\footnote{239}

It has been argued that the imposition of a mandatory duty upon the attorney to disclose all false evidence presented to the court would result in conflict of interest between the attorney and client, stifling the ability of the attorney to render effective assistance.\footnote{240} The Eighth Circuit determined that this conflict of interest resulted in ineffective assistance.\footnote{241}

If the attorney attempts to prevent the client from taking the stand by means other than passive persuasion,\footnote{242} an actual conflict of interest between the attorney and his client is present.\footnote{243} It has been held that under these circumstances a presumption of ineffectiveness is raised.\footnote{244}

The Supreme Court, however, laid this argument to rest in its opinion in \textit{Nix}.\footnote{245} The defendant (Whiteside) claimed that he was denied effective assistance of counsel because his attorney (Robinson) refused to allow him to present perjured testimony to the court.\footnote{246} The court relied upon its decision in \textit{Strickland}\footnote{247} in evaluating the defendant’s claim. In \textit{Strickland}, the Court held that in order for the movant to prove that he has been denied effective assistance of coun-

\footnote{236. U.S. CONST. amend. VI. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that the sixth amendment mandates that indigent defendants be appointed counsel).}
\footnote{237. 407 U.S. at 37; Gideon v. Wainwright, 372 U.S. 335, 342 (1963).}
\footnote{238. 466 U.S. 668, 687, \textit{reh’g denied}, 467 U.S. 1267 (1984).}
\footnote{239. \textit{Id.} at 687.}
\footnote{240. Grady, \textit{supra} note 89, at 13-16.}
\footnote{241. \textit{Id.} at 12 n.93. The court in Whiteside v. Scurr argued that: a lawyer who has a firm factual basis for believing that his or her client is about to commit perjury, because of confidential communications the client has made to the lawyer, may not disclose the content of those communications to the trier of fact. . . . The lawyer who discloses confidential communications or who threatens to do so has departed from the role of an advocate and has become an adversary to the interests of his or her client. \textit{Id.} (quoting Whiteside v. Scurr, 750 F.2d 713, 714 (9th Cir. 1984)), \textit{rev’d sub nom.} Nix v. Whiteside, 475 U.S. 157 (1986).}
\footnote{242. “Passive persuasion” includes remonstrating the client along the guidelines provided in Model Rule 3.3 comment 11. \textit{See supra} note 115.}
\footnote{243. Grady, \textit{supra} note 89, at 14-15.}
\footnote{244. \textit{Id.} at 15.}
\footnote{245. 475 U.S. 157.}
\footnote{246. \textit{Id.} at 159.}
\footnote{247. 466 U.S. 668, \textit{reh’g denied}, 467 U.S. 1267 (1984).}
SEL, he must show serious attorney error and prejudice. The Court, however, found that there was no actual conflict of interest between Whiteside and Robinson. Since an attorney has an ethical obligation to prevent the introduction of false evidence to the court, the Court ruled that Robinson's attempts to prevent Whiteside from committing perjury were within the standard of "reasonable professional conduct." Since the Court could find nothing wrong with Robinson's conduct, it therefore rejected Whiteside's claim.

The position of the Court was supported by the concurring Justices. Justice Blackmun wrote that the defendant "had no legitimate interest that conflicted with [his attorney's] obligations not to suborn perjury . . . ." This is a significant affirmation of the majority's opinion on this issue. The Nix decision affirms the principle that the Court will allow attorneys great latitude in their efforts to prevent clients from committing perjury.

C. Pre-Trial Intent to Commit Perjury

The various standards of ethical conduct discussed earlier in this comment offer criminal defense attorneys a number of avenues for dealing with the ethical dilemma of client perjury. While some of these approaches are clear and concise, each one leaves a great deal of discretion to the individual attorney to resolve the issue. The Proposed Rule 4-102, however, differs in a significant way from these ethical standards. Proposed Rule 4-102 provides that once the attorney is convinced beyond a reasonable doubt that the defendant has committed a fraud upon the court, the attorney must disclose this false evidence to the court. As noted earlier, however, this rule does not provide additional guidance to the attorney who discovers his client's wrongful intention before the client takes the witness stand.

Once an attorney has discovered that his client intends to commit perjury before trial, it is recommended by most commentators that the attorney make a good faith attempt to discourage the client from defrauding the court or to encourage disclosure after its occurrence.

248. Id. at 687.
249. CODE, supra note 38, EC 7-6. The attorney "may not do anything furthering the creation or preservation of false evidence." Id. See supra notes 21-28 and accompanying text.
250. 475 U.S. at 166.
251. Id. at 187 (Blackmun, J., concurring).
252. See supra notes 168-171.
rence. Existing case law is also generally supportive of this requirement. This requirement that the attorney show some disapproval for the client's attempt to defraud the court is necessary in order to ensure that the attorney does not passively assist in the presentation of false evidence to the court. The requirement is intended to demonstrate that the client's conduct is not supported by the Bar Association and the legal profession.

In light of the Supreme Court's decision in Nix v. Whiteside, which held that threatening to disclose confidential information of the client to the court as a means of persuading the client not to commit perjury is permissible conduct, it seems that the mandatory disclosure rule should increase the persuasiveness of the attorney's warnings to the client, since there is nothing to stop the attorney from disclosing this to the court.

If the client nevertheless refuses to refrain from committing perjury, some commentators suggest that the attorney should withdraw from the case. The drawbacks to withdrawal have been previously mentioned and focus upon the fact that withdrawal requires the approval of the court and that, if successful, the ethical problem is resolved only for that attorney. The client will receive another lawyer and possibly another chance at defrauding the court.

Under Proposed Rule 4-102(E), however, the attorney would be required to wait until the client has actually committed a fraud upon

254. Id. See In re Malloy, 248 N.W.2d 43, 45-46 (N.D. 1976) (the court held that the attorney must attempt to persuade the client to refrain from committing perjury); see also In re Robinson, 151 A.D. 589, 592, 136 N.Y.S. 548, 551 (1912) (attorney disbarment).
255. Wolfram, supra note 3, at 846. It is true that this requirement does very little to ensure that the attorney will not assist his client in the presentation of perjured testimony. In a situation of conspiracy to commit false testimony, the attorney could go through the motions of discouraging the client from presenting false testimony while both realize that the advice is as meaningless as the proposed testimony. It should be noted, however, that this process does provide an important symbolic message to attorneys that the court disapproves of any attempt on the part of the attorney to assist in client perjury. Nix v. Whiteside, 475 U.S. at 172.
256. The ABA Standing Committee stated that once the attorney discovers that his client intends to commit perjury he is directed to warn the client of the consequences of this action, and if the client persists, to disclose this falsehood. See supra note 121. The Committee went on to suggest that the attorney could prevent the client from taking the stand if permitted by the legal jurisdiction. Id. But where the client is granted the right to testify, the Committee suggests that the attorney can reveal to the court the client's intent to commit perjury. Id.
258. Callan & David, supra note 58, at 383; see generally CODE, supra note 38, D.R. 2-110; MODEL RULES, supra note 5, Rule 3.3. Model Rule 3.3, para. 7 reads: "If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw." See MODEL RULES, supra note 5, Rule 3.3, para. 11 ("the advocate should seek to withdraw if that will remedy the situation"). Id.
259. See Dunetz, supra note 4, at 434-36; contra Wolfram, supra note 3, at 857-60.
the court before disclosure becomes mandatory. Therefore, for those attorneys subject to this rule, it would be appropriate to remain in the case despite awareness of the perjurious intent of a client, and await the presentation of the testimony. This is especially likely in light of the negative effects of withdrawal, and the difficulty in determining whether the client truly intends to commit perjury.

The most compelling justification for this “wait-and-see” approach is that it is the least disruptive alternative. If the client changes his mind at the last moment, or the attorney is not convinced that the testimony is false, the attorney can continue the trial as if the issue had never been raised. Furthermore, this approach safeguards the client from the attorney who mistakenly believes that the client intends to commit perjury when, in fact, this was never the intention of the client. The Proposed Rule would thus protect the client from the gross injustice that could result if the attorney reacted prematurely.

The best alternative course of action for the attorney confronted with evidence that the client intends to commit fraud upon the court is to attempt to persuade the client to adopt a more appropriate trial strategy. If the client does not relent but the attorney is not totally convinced that the client will present false evidence, the attorney should remain on the case and await the client’s testimony. If the attorney then becomes convinced beyond a reasonable doubt that the client has presented false evidence to the court, his duty to disclose the falsity would become mandatory under the Proposed Rule. This approach allows the attorney to assume that the client will testify truthfully, enabling the attorney to maintain loyalty to the client

261. See supra note 140 and accompanying text.
262. Id. The mandatory disclosure requirement is applicable only in those circumstances when the attorney knows or should know beyond a reasonable doubt that the evidence is false.
263. The gross injustice will occur if, in pursuit of proving that the client intends to commit a fraud upon the court, the attorney may disclose confidential information to the court which could be used against the client. See United States v. Grayson, 438 U.S. 41 (1978) (the Court held that a judge is permitted to consider perjured testimony in sentencing even if the court held that the defendant’s attempt to defraud the court warrants a stronger sentence against the defendant). Id. at 54. See People v. Salquerro, 107 Misc. 2d 155, 433 N.Y.S.2d 711 (1980) (the court held that the attorney’s disclosure of confidential information to withdraw did not require the judge to disqualify himself once the judge denied the attorney’s motion).
264. If the attorney is convinced that the client will commit perjury, the attorney may withdraw (under some circumstances this will be required) or he can prevent the client from testifying.
265. See supra note 140 for full text of Proposed Rule 4-102(E).
as long as possible.266

D. Surprise Client Perjury

The mandatory disclosure requirement imposed by Proposed Rule 4-102(E)267 upon the attorney who discovers that his client has committed a fraud upon the court provides a clear course of action for the attorney. However, while this rule helps the attorney escape the client perjury dilemma, the rule simply shifts the problem onto the shoulders of the court. This may be preferable to the mandatory withdrawal requirement since courts are able to impose sanctions or other preventative means to stop perjury upon the defendant. However, the mandatory disclosure rule's high standards and other inherent limitations reduce its overall effectiveness.268

The Rule does, however, provide the attorney with a course of conduct that is clear and concise and which will not subject the attorney to discipline or malpractice liability. No attorney has been disciplined, sanctioned, or prosecuted in a case where the client committed perjury, except where the attorney actually knew or should have known that the testimony was false. In those situations in which the attorney was in doubt as to the falsity of the testimony, the attorney was permitted to err in favor of the client. Proposed Rule 4-102(E) clarifies these principles.269 Under the Proposed Rule, the attorney must be convinced beyond a reasonable doubt that the testimony is false before any duty to disclose to the court may arise.270 In the absence of an admission on the part of the client, or an abundance of clearly fraudulent conduct and evidence, reasonable doubt sufficient to allow the attorney the discretion to permit questionable testimony to be presented will almost always be present. Thus, the mandatory disclosure rule does not put the attorney in a position of having to reveal client confidences in order to elude prosecution for subornation, unless the evidence clearly demonstrates that the attorney knew or should have known that the evidence was false. Only under these clearly defined circumstances, would the attorney have to disclose or be subject to discipline.

266. If the attorney withdraws or prematurely discloses the attorney’s concern to the court, there is potential, if not actual, conflict of interest between the attorney and client. See supra note 29 and accompanying text.
267. See supra note 4 and accompanying text.
268. But see Vangsness v. Superior Court, 159 Cal. App. 3d 1087, 1090, 206 Cal. Rptr. 45, 48 (1984) (holding that “[a]n attorney has a duty and a right to withdraw from a case if his representation will violate his professional responsibility”).
269. 1986 Proposed Rules, supra note 8, Rule 4-102(E), at 7.
VII. CONCLUSION

The California State Bar Association has refused to impose upon its members a mandatory duty to expose their clients' attempts to commit perjury. In light of the adoption of the Model Rules by the American Bar Association and the majority decision in Nix v. Whiteside,271 the legal environment seems more receptive to the suggestion that making attorneys accountable for their clients' attempts to defraud the court will increase the integrity of the legal profession. Adoption of a mandatory disclosure rule therefore seems an appropriate step for the California Bar.

The issues surrounding the ethics of client perjury focus upon a resolution of the various conflicting interests of the parties involved in the judicial process. The resolution of this dilemma will necessarily turn upon the moral and political ideals of the decision-makers involved. As society becomes more critical of legal ethics,272 the Bar will be prone to decide the issue accordingly. Since the Bar is dependent upon the public for its social and economic well-being, it may be presumed that the Bar will in the future impose stronger sanctions against attorneys who violate its legal standards. Equally assured is the enactment of rules and standards which require members to be more responsible to the Bar for the conduct of their clients. Because of the strong arguments available to both sides of this debate, whether such an action would appear healthy or destructive will necessarily depend upon the moral and political beliefs of the individual.

The California Proposal to make disclosure of client perjury mandatory in cases in which the attorney knows beyond a reasonable doubt that his client has committed perjury is a reasonable and practical resolution to the problem. While attorneys who do not think that attorneys should be watchdogs for the Bar will scoff at such a rule, it must be remembered that the alternative is to allow the client to commit perjury. This is clearly unacceptable. In the overall balancing of the interests, the truth must be given supreme weight and the integrity of the judicial system must be recognized.

The judicial system exists in order to find the truth. While we must be highly sensitive to the rights of the individual, we must not forget that the true purpose is fact-finding. The mandatory disclo-

271. Id.
272. The public perception of the legal profession has been declining over the last five years. L.A. Times, Oct. 19, 1987, § I, at 1, col. 4. The explanation for this lack of faith in the legal profession is the perception that lawyers are unethical. Some claim that lawyers should not even be considered professionals. Id. at 16.
sure rule furthers the interests of the fact-finding function without significant infringement of the rights of individuals. Therefore, its adoption ought to be aggressively sought. Attorneys should not be forced to sit back and acquiesce to the efforts of their clients to defraud the judicial system.

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