United States v. Long: When May a Criminal Defense Attorney Disclose His Client's Future Perjurious Testimony?

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INTRODUCTION

The Journal of Legal Commentary is pleased to present the second edition of the Survey of Professional Responsibility. The Survey examines current issues pertaining to ethical conduct in the legal community.

The 1989 Survey contains three articles. The first examines a controversial topic: When may a criminal defense attorney disclose his client’s future perjurious testimony? The second article discusses attorney liability to nonclients. It gives a general overview of current trends in various states while it specifically addresses New York’s privity requirement. The Survey concludes with an article that examines a recent decision of the Court of Appeals for the Sixth Circuit. In Sparks v. Character and Fitness Committee of Kentucky, the Sixth Circuit granted judicial immunity to a judge and bar committee members for their acts in evaluating a bar applicant’s moral and character fitness to practice law.

It is the hope of the Editors that these articles will assist both students and practitioners in their legal endeavors.

UNITED STATES V. LONG: WHEN MAY A CRIMINAL DEFENSE ATTORNEY DISCLOSE HIS CLIENT’S FUTURE PERJURIOUS TESTIMONY?

I. THE DEFENSE ATTORNEY’S DILEMMA

Among the varied roles of a criminal defense attorney, two of
the most pronounced are that of defendant's "zealous advocate" with its attendant obligation to hold all client communications confidential, and that of "officer of the court" with its corre-

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1 See Nix v. Whiteside, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) (sixth amendment requires client receive zealous and loyal advocacy); United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (defense counsel in criminal case assumes zealous advocate role as well as officer of the court role); John v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959) (cardinal rule that attorney must serve client with "complete loyalty"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1981) (attorney must represent client zealously); see also Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1470 (1966) ("It is essential to the effective functioning of this system" for attorney to have "warm zeal" for client); Gershman, Reflections on Client Perjury, 59 N.Y. St. B.J. Oct. 1987, at 31 (criminal defense lawyer plays the role of "legal champion" of the client); McCann, Nix v. Whiteside: The Lawyer's Response to Perjury, 13 Hastings Const. L.Q. 443, 446 (1986). "If the concept of the advocate role is pushed to an extreme, it can be conceived of as an 'alter ego advocate.'"

2 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B), (C) (1980) (lawyer shall not knowingly reveal confidence or secret of client).

Courts have placed a great deal of emphasis on the attorney-client privilege and the related duty of confidentiality. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (attorney-client privilege is oldest of confidential communication privileges); Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 200 (E.D.N.Y. 1988) (attorney-client privilege is to encourage client to disclose all information necessary to insure an effective representation in the interests of justice); General Realty Assoc. v. Walters, 136 Misc. 2d 1027, 1028-29, 519 N.Y.S.2d 530, 532 (Civ. Ct. 1987). "The confidentiality mandated (under DR 4-101(B)) is a cherished cornerstone of our jurisprudence, grounded in the policy that clients must be encouraged to disclose all to their attorneys, so that the latter may render the most effective representation." Id.; Appel, The Limited Impact of Nix v. Whiteside On Attorney-Client Relations, 136 U. Pa. L. Rev. 1915, 1919-23 (1988) (discussing ethical duties of attorneys); see also Freedman, Perjury: The Lawyer's Trilemma, 1 Litigation 26, 26 (1975). A "lawyer must hold in strictest confidence the disclosures made by the client in the course of the professional relationship." Id.; Riegler, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121 (1985). "The obligation to maintain the confidentiality of client communications derives from two related bodies of law, the confidentiality rules established in professional ethics and the attorney-client privilege in the law of evidence." Id. at 122 n.7. But see Clark v. United States, 289 U.S. 1, 15 (1933) (Cardozo, J.). A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." Id. See generally Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif. L. Rev. 1061, 1069-91 (1978) (discussing variety of confidentiality standards in historic cases).

3 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1981): In re Griffiths, 413 U.S. 717, 723 (1973) (Connecticut codified maxim that an attorney is an officer of the court); United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (defense counsel in criminal case assumes role as officer of the court as well as role as zealous advocate); Herbert v. United States, 340 A.2d 802, 804 (D.C. 1975). "Any counsel is an officer of the court . . . ."; In re King, 7 Utah 2d 258, 261, 322 P.2d 1095, 1097 (1958) (attorney is bound by "officer of the court" status to ensure truthful testimony by client); See also H. Drinker, Legal Ethics 69-88 (1953) (characteristics of legal profession includes "officer of the court"); McCann, supra note 1. "One conception of the proper role for a criminal defense counsel is that of 'officer of the court.'" Id. at 446.: Note, Truth or Confidences: Effective Assistance of Counsel and Client Perjury - Nix v. Whiteside, 20 Creighton L. Rev. 145,
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sponding obligation to "maintain the integrity of the judicial system." Generally performed simultaneously in relative harmony, these roles can conflict when a criminal defense attorney believes that his client will perjure himself if and when he takes the stand.

4 Model Code of Professional Responsibility Canon I (1981): In re Carroll, 244 S.W.2d 474 (Ky. 1951). "[A]s an officer of the court ... [an attorney's] constant duty is to maintain the integrity of our judicial system . . . ." Id. at 475: see People ex rel. Karlin v. Culkin, 248 N.Y. 465, 470-75, 162 N.E. 487, 489-90 (1928) (general characterization of obligations of officer of the court): Note, Client Fraud and the Lawyer-An Ethical Analysis, 62 Minn. L. Rev. 89, 89 (1977). "As an officer of the court, a lawyer is sworn . . . to promote the ends of justice." Id. See also Gershman, supra note 1, at 31 (criminal defense lawyer plays role of "gatekeeper" of the "temple of justice"); McCall, supra note 1, at 446. "[O]ne duty of an officer of the court would seem to be to take all steps necessary to prevent perjury from occurring in the court . . . ." Id.: Note, supra note 3, at 146 (attorney "expected to do everything possible to uphold the integrity of the judicial system").

5 See United States v. Seavey, 180 F.2d 837, 839 (3d Cir.), cert. denied, 339 U.S. 979 (1950). Perjury, an offense at common law, is generally defined as the "false swearing in a material matter requiring affidavit or oath to be taken, with the knowledge . . . that the false swearing is false." Id.: United States v. Neal, 822 F.2d 1502, 1506 (10th Cir. 1987). "[P]erjury has been defined . . . as the act of 'knowingly and willfully giving false testimony relating to a material matter.' " Id. (quoting United States v. Jones, 730 F.2d 593, 597 (10th Cir. 1984)); Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984). "Perjury is the willful assertion under oath of a false, material fact." Id.

"The most difficult situation . . . arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious." Model Rules of Professional Conduct Rule 3.3 comment (1983); see also Hazard, supra note 2, at 1091. With regard to the attorney-client privilege, "[t]he difficult problem is where to draw the boundaries—how to define the kinds of secrets that a lawyer may not keep." Id. But see State v. Fosnight, 295 Kan. 52, 59, 679 P.2d 174, 180 (1984). After attorney was denied leave to withdraw, permitting client to tell his perjurious story from the stand without conventional direct examination or encouragement by attorney was not in violation of Code of Professional Responsibility. Id.; Goodwin v. Covington, 279 S.C. 274, 305 S.E.2d 578 (1982). Attorneys were held in contempt of court for refusing court order to continue representation of client who revealed to the attorneys that he would perjure himself. Id. Recognizing the ethical dilemma, the court did not impose sanctions. Id.

In lieu of making disclosure to the court, there exist reasonable alternative actions, such as continued modified representation, with the attorney refusing to question his client regarding the perjurious testimony, or a motion for immediate withdrawal. See Lowery v. Cardwell, 575 F.2d 727, 751 n.4 (9th Cir. 1978) (carefully modified representation when withdrawal not possible); In re A, 276 Or. 225, 240, 554 P.2d 479, 487 (1976) (Oregon State Bar Opinion mandating withdrawal where client refuses to allow disclosure): Model Rules of Professional Conduct Rule 3.3 comment (1983) (three resolutions have been proposed: permitting client narrative testimony without assistance of counsel, absolute non-disclosure of client perjurious testimony, or full disclosure of perjurious testimony if that is the only remedy to the situation); Burger, Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint, 5 Am. Crim. L.Q. 11, 13 (1966) (if placed in a position of questioning a perjurious client, after dissuasion and withdrawal have failed, the attorney "should confine himself to asking the witness to identify himself and to make a statement, but he cannot participate in the fraud by conventional direct examination."). But see Bow-
Initially, it would appear that if the attorney discloses his concerns of possible forthcoming perjurious testimony to the court, the defendant's constitutional right to effective counsel, his right to testify on his own behalf and the attorney's duty to preserve the...
confidentiality of a client’s communications\(^9\) may be violated. On the other hand, if the attorney chooses to remain silent, he may breach his duty as an officer of the court by knowingly offering perjured testimony.\(^9\)

The tension between a criminal defendant’s right to effective counsel\(^10\) and the attorney’s duty to offer truthful testimony\(^11\) is reflected in the ABA Model Rules of Professional Conduct.\(^12\) The comment to Rule 3.3 provides that if an attorney is aware that his client is offering false evidence, he should first try to convince the client not to testify falsely.\(^13\) If that fails, the attorney should seek to withdraw if that will remedy the situation.\(^14\) As a last resort, the Model Rules allow the advocate to disclose the fraud to the court and have it decide how to proceed.\(^15\)

Historically, there have been proponents on both sides of this issue.\(^16\) In 1986, however, the Supreme Court held, in *Nix v. Whiteside*,\(^17\) that the right to effective counsel does not encompass the right to assistance of counsel in testifying falsely.\(^18\) In *Nix*, the defendant had been charged with murder and was claiming self-defense.\(^19\) He informed his attorney that he believed his victim

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Footnotes:

- \(^8\) See supra note 2.
- \(^9\) *Model Code of Professional Responsibility* DR 7-102(A)(4) (1980) (lawyer must not “knowingly use perjured testimony or false evidence”). See *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) (“Rule...to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct...”); *In re Carroll*, 244 S.W.2d 474, 474 (Ky. 1951) (“Attorney should not sit by silently” while client commits perjury); Freedman, *supra* note 2, at 27 (lawyer should not use perjured testimony where he has foreknowledge of it); McCall, *supra* note 1, at 446 (“One duty of an officer of the court would seem to be to take all steps necessary to prevent perjury from occurring in the court...”).
- \(^10\) See supra note 6 and accompanying text.
- \(^13\) Id. at Rule 3.3 comment.
- \(^14\) Id.
- \(^15\) Id.
- \(^16\) Compare Freedman, *supra* note 1, at 1477-78 (1966) (attorney must allow client to testify falsely if attempts to dissuade him have failed) with Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Minn. L. Rev. 1485, 1489 (1966) (“The partisanship involved in keeping a communication confidential must be restricted when it leads to conduct which...presents perjury to the factfinder.”).
- \(^18\) Id. at 171-74.
- \(^19\) Id. at 160.
had been reaching for a gun even though he did not actually see one. Shortly before trial, the defendant, Whiteside, told his attorney that he would testify that he saw "something metallic" in the victim's hand, effectively offering a false account. The lawyer threatened to withdraw and inform the court of the intended perjury. Whiteside, thereafter, testified truthfully and was convicted of second degree murder. He moved for a new trial, claiming that he had been denied effective assistance of counsel. In upholding the conviction, the Court established that although counsel must be a zealous advocate for his client, his "duty of loyalty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."

While the Nix Court allowed for an attorney to disclose impending perjury by his client, it did not clearly define the standard of belief a criminal defense attorney must possess before making such a disclosure. This Survey will examine the different approaches with regard to this important threshold question while focusing on a recent Eighth Circuit decision.

In United States v. Long, the Eighth Circuit, quoting from its opinion in Whiteside v. Scurr, held that before an attorney can notify the court of his client's intent to commit perjury, he must have a "firm factual basis" for his belief. In Long, Thaddeus

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20 Id. No weapon was recovered in the police search of the victim's apartment, and shortly thereafter, relatives removed all of the possessions from the apartment. Id.
21 475 U.S. at 161.
22 Id.
23 Id. at 161-62.
24 Id. at 162.
25 475 U.S. at 166.
26 Id. at 171.
27 See Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984) (threshold question is basis for counsel's belief that his client intends to testify falsely; ABA presupposes counsel "knows" based on either independent investigation or discussions with defendant or both), rev'd on other grounds sub nom. Nix v. Whiteside, 475 U.S. 175 (1986); see, e.g., Appel, supra note 2, at 1946. "[T]he key question remains unanswered: what standard of knowing is required before a lawyer may threaten to reveal a client confidence . . . ?" Id.: Note, supra note 3, at 163 ("[T]he strength of the evidence giving rise to the attorney's belief that the client will commit perjury" is one factor court will use when determining if defendant's rights were violated).
28 857 F.2d 436 (8th Cir. 1988).
30 Long, 857 F.2d at 444 (quoting Whiteside, 744 F.2d at 1328).
Adonis Long and Edward Larry Jackson were charged with various crimes stemming from their participation in a check forging and bank fraud scheme designed to defraud the United States Treasury. During trial, Jackson’s counsel, having doubts about the truthfulness of his client’s forthcoming testimony, advised Jackson not to testify on his own behalf and subsequently disclosed his concerns to the court. The trial judge then counseled Jackson on his rights to take the stand and give narrative testimony without questioning from his attorney. The judge warned Jackson that his attorney may have “other obligations” if he offered perjurious testimony. Jackson decided to waive his right to testify. Both Jackson and Long were convicted on all counts.

On appeal, Jackson contended that his attorney’s actions led to the deprivation of his constitutional rights to effective counsel and to testify on his own behalf. The Eighth Circuit acknowledged that, under Nix, if a criminal defense attorney is unable to dissuade his client from committing perjury, he must disclose the client’s confidence. However, the court distinguished Nix and adopted a higher standard, holding that prior to making such a disclosure, there must be a “clear expression of intent to commit perjury” based upon a “firm factual basis.” Although the court affirmed the convictions, it held that a collateral proceeding in accordance with 28 U.S.C. section 2255 would be the proper forum to address Jackson’s ineffective assistance of counsel claim.

31 Long, 857 F.2d at 439.
32 Id. at 443-44.
33 Id. at 444.
34 Id.
35 Long, 857 F.2d at 444.
36 Id. at 439-40.
37 Id. at 443 (defendant claimed that attorney’s suggestion to judge that client might perjure himself resulted in warning by trial judge; this, in turn, allegedly coerced client into not testifying): see generally notes 6 & 7 (discussion of criminal defendant’s rights to effective counsel and to take stand on his own behalf).
38 857 F.2d at 444-45.
39 Id. at 445.
40 Id. "Counsel must act if, but only if, he or she has ‘a firm factual basis’ for believing that the defendant intends to testify falsely . . . .” (quoting Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984)).
41 857 F.2d at 447.

In a § 2255 collateral proceeding:
A prisoner in custody under sentence of a court established by Act of Congress
II. DIFFERING STANDARDS

It is suggested that the Eighth Circuit's standard of "firm factual basis" strikes an appropriate balance between an attorney's duty as an advocate for his client and his role as officer of the court. This is the majority view of the standard of belief which should be applied in judging an attorney's disclosure of a criminal defendant's impending perjury. One jurisdiction, however, has held that a "reasonable belief" standard provides adequate protection of the attorney-client relationship and the client's right to effective counsel while allowing disclosure in more instances than would be available under the "firm factual basis" standard. Conversely, those who envision greater protection for the lawyer's role as "advocate" have proposed an "actual knowledge" standard, thus reducing the duty of an attorney to disclose anticipated perjury by limiting the situations in which such a duty would arise.

A. Actual Knowledge

The proponents of the actual knowledge standard typically claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.


See supra notes 1-11 and accompanying text.


See, e.g., State v. Poole, 289 S.E.2d 335, 340 (N.C. 1982) (counsel may refuse to be party to presentation of testimony that he "reasonably believes" to be perjurious); State v. Robinson, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976) (client has no right to assistance of counsel in presenting what counsel "reasonably believes" is perjurious).

See infra notes 43 & 44 and accompanying text.
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predicate their position upon ethics codes such as the American Bar Association Code of Professional Responsibility which expressly prohibits an attorney from \textit{k}nowingly\ using perjured testimony.\textsuperscript{48} Thus, if an attorney does not know with absolute certainty that the forthcoming testimony will be false, he should “put the evidence on.”\textsuperscript{47} Because an attorney will not often have such actual knowledge of imminent perjury, he would be permitted to disclose his doubts as to the veracity of testimony on few occasions.\textsuperscript{48} Therefore, the utilization of this standard may be contrary to an attorney’s officer of the court role which the Supreme Court emphasized in \textit{Nix}. In fact, at least one ardent proponent of the “zealous advocate” role, Professor Freedman, proposes using this standard as a sword to negate the holding in \textit{Nix}.\textsuperscript{49}

\section*{B. Firm Factual Basis}

Though not as severe as “actual knowledge,” the Eighth Circuit’s “firm factual basis” standard is a stringent one. Indeed, the \textit{Long} court did note that “[i]t will be a rare case in which this factual requirement is met.”\textsuperscript{50} Not only must there be “a clear expression of intent” to commit perjury,\textsuperscript{51} but an attorney must be aware that a statement of intention does not necessarily mean a

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\textsuperscript{48} \textsc{Model Code of Professional Responsibility} DR 7-102(A)(4) (1980). “[A] lawyer shall not . . . \textit{k}nowingly use perjured testimony or false evidence.” (emphasis added). See, e.g., \textsc{Appel, supra} note 2, at 1937 (duty “to take affirmative action to prevent client perjury Generally arise[s] only when an attorney ‘knows’ that the client intends to testify falsely.”): \textsc{Lefstein, The Criminal Defendant Who Proposes Perjury: Rethinking The Defense Lawyer’s Dilemma}, 6 Hofstra L. Rev. 665, 668 n.12 (1978) (no authority has indicated that Code is violated where counsel permits client to testify to matter believed to be false).

\textsuperscript{47} \textsc{Stewart, Drawing the Line at Lying}, 72 A.B.A., May 1, 1986, at 88 (where there is only some doubt in attorney’s mind as to truthfulness of witness, attorney is not certain that testimony will be false: therefore he must present evidence); \textit{But see In re Carroll}, 244 S.W.2d 474, 474-75 (Ky. 1951) (“[u]nder any standard of proper ethical conduct, a lawyer should refrain from preventing or correcting his client’s perjury or other misleading testimony).

\textsuperscript{50} \textsc{Id.} \textsc{Id.} \textsc{Id.}

\textsuperscript{51} \textsc{Id.}
client will in fact lie to the court. The *Long* court signals its apprehensions by noting that a lawyer who discloses to the court merely on the belief of possible client perjury takes on the role of the factfinder, thereby threatening to subvert the delicate balance of the adversarial court system by overstepping his role as an advocate. Although remaining somewhat elevated, this standard does allow disclosure when there is a substantial basis for belief of forthcoming perjurious testimony. It is submitted that this is a much more realistic threshold than that of "actual knowledge" and one under which the *Nix* view of lawyer as officer of the court may survive and have practical significance.

**CONCLUSION**

Adoption of the Eighth Circuit's standard of "firm factual basis" would require an attorney to maintain his role as zealous advocate by preserving client confidentiality unless he has a substantial basis for belief of forthcoming client perjury. This would serve to safeguard the criminal defendant's constitutional rights while allowing for a more realistic and practical opportunity for survival of the *Nix* Court's subordination of the zealous advocate role to that of officer of the court.

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62 *Id.* (client may change his mind once he "hears the testimony of other witnesses, takes an oath, faces a judge and jury, and contemplates the prospect of cross examination by opposing counsel . . . ").
63 *Id.* at 445 (court heeds Justice Blackmun's warning from *Nix* that lawyer who acts on belief of possible perjury takes on role of jury).
64 857 F.2d at 445. The court's apprehensions are shared by other courts and commentators. See, e.g., *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) (court distinguishes role of judge and jury from that of defense counsel and cautions that attorney disclosing his client's confidences "without possessing a firm factual basis for that belief . . . would be violating the duty imposed upon him as a defense counsel"); *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981) (court cautions that lawyer's belief "must be based upon an independent investigation" or upon "distinct statements by his client or the witness which support that belief").