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# Professional Responsibility -- North Carolina's View of the Lawyer and the Perjurious Witness

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## Professional Responsibility—North Carolina's View of the Lawyer and the Perjurious Witness

A fundamental right of an accused in our adversary system of criminal justice is the right to be represented by counsel<sup>1</sup> who will zealously advocate his cause against the State.<sup>2</sup> In fulfilling this duty of zealous advocacy the lawyer, as an officer of the court, is required by the ethical code of his profession always to function within the bounds of the law.<sup>3</sup> Against this background, and in the difficult context of the trial of an indigent defendant represented by a court-appointed attorney, the North Carolina Supreme Court in *State v. Robinson*<sup>4</sup> was forced to grapple with one of the most difficult ethical problems faced by the defense attorney: what must the lawyer do to fulfill his duties to client and court when, before trial, his client informs him of his intention to proffer perjured testimony and of his desire to call a witness who will commit perjury? The supreme court's decision was that the trial court's "compromise" solution—denying counsel's request to withdraw, but giving him no responsibility for eliciting what he believed to be perjured testimony—denied defendant a fair trial.<sup>5</sup> If this decision is neither limited nor overruled, the proper answer to an already perplexing question for the attorney is even more doubtful than before.

Defendant Jerome Robinson was found guilty in the Superior Court of Mecklenburg County of felonious breaking and entering and of larceny.<sup>6</sup> Prior to the entry of a plea to the indictment, defendant's court-appointed attorney, William Burns, moved jointly with Robinson that Burns be allowed to withdraw from the case and that substitute counsel be appointed.<sup>7</sup> In support of the motion, Burns informed the

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1. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1969); ABA STANDARDS, THE DEFENSE FUNCTION § 1.1(b) (Approved Draft, 1971) [hereinafter cited as ABA STANDARDS].

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1969); ABA STANDARDS, *supra* note 2, at § 1.1(b).

4. 290 N.C. 56, 224 S.E.2d 174 (1976).

5. *Id.* at 67, 224 S.E.2d at 180.

6. *Id.* at 57, 224 S.E.2d at 175. A previous trial for the same offenses ended in a mistrial. Defendant Robinson was represented by William Burns, but there is no mention in the record of conflict between the two over the use of possibly perjured testimony. Brief for Defendant-Appellant at 5, *State v. Robinson*, 28 N.C. App. 65, 220 S.E.2d 387 (1975).

7. The motion and ensuing remarks by the judge, defense counsel and defendant on each occasion were made in the absence of either prospective or impaneled jurors. 290 N.C. at 58, 224 S.E.2d at 175.

court that a "substantial conflict"<sup>8</sup> had arisen because of defendant's desire, and counsel's unwillingness, to offer at trial what counsel believed would be perjured testimony by defendant and a defense witness.<sup>9</sup> On three subsequent occasions during the course of the trial, defendant, either joined by counsel or on his own behalf, renewed the same motion. On each occasion the motion was denied, the trial judge refusing to shift the ethical burden to another attorney who, the judge assumed, would also refuse to present false testimony.<sup>10</sup> Instead, Burns was left to the alternative of remaining in charge of certain portions of the trial without obligation to participate in eliciting the allegedly perjured testimony.<sup>11</sup>

In accordance with the court's plan, Burns remained seated at the counsel table throughout the trial and, as counsel for defendant, cross-examined the State's witnesses.<sup>12</sup> He called only one defense witness, Carolyn Bertha,<sup>13</sup> and after eliciting her responses to some preliminary questions, requested that she tell her story to the jury.<sup>14</sup> At the close of Bertha's statement Burns remained silent and defendant took charge of

8. *Id.*

9. *Id.* Burns made the following statement to the court:

The defendant has indicated to me he wishes to take the witness stand in his own behalf; which, in my opinion, is perjured testimony. He has indicated he intends to call a witness to the witness stand and elicit testimony which would be perjured testimony to that individual; and I feel that on the basis of that, substantial conflict has arisen between the defendant and myself which would prevent me from devoting my full effort to his representation in this matter; and in addition to that, I don't feel that I should participate in the matter any further because of the foregoing; and I do respectfully request that I be allowed to withdraw as counsel for the defendant.

*Id.* Burns also based his belief that the testimony would be perjurious on previous statements alleged to have been made to him by the witness and on his own independent investigation of the case. *Id.* at 62, 224 S.E.2d at 177. Defendant denied having told his lawyer that the witness' testimony would be false. *Id.* at 63, 224 S.E.2d at 178.

10. *Id.* at 59, 224 S.E.2d at 175.

11. *Id.* at 59-60, 224 S.E.2d at 176. In colloquy with defendant, the trial judge described the extent of counsel's responsibility:

[Y]ou can defend yourself of [sic] perjured testimony if you want to; but I'm not going to ask a lawyer to; I'll let Mr. Burns sit by you and pick a jury, examine the State's witnesses in your behalf; but when it comes to your defense, if you're going to offer perjured testimony, I'm going to let Mr. Burns sit there silently and ask you nothing. When you come on the witness stand, you're on your own.

*Id.*

12. *Id.* at 60, 224 S.E.2d at 176.

13. Defendant chose not to testify in his own behalf. *Id.* at 62, 224 S.E.2d at 177.

14. *Id.* at 63, 64, 224 S.E.2d at 178. The court gave the following instructions about the examination of the witness: "I'm going to allow you to call the witness, identify her by name and address, and you can tell her to say whatever she wants to say about it and you won't have to ask her any questions about it." *Id.* at 63, 224 S.E.2d at 178.

the direct examination of the witness.<sup>15</sup> Counsel did not later argue the witness' testimony in a closing statement to the jury.<sup>16</sup>

Defendant appealed his conviction on the ground that the trial judge denied his constitutional right to effective assistance of counsel when he denied the motion to allow Burns to withdraw and refused to appoint substitute counsel.<sup>17</sup> The North Carolina Supreme Court held that there was no such denial.<sup>18</sup> The court reasoned that although an indigent defendant in a state criminal prosecution has the constitutional right to effective assistance of competent counsel appointed by the court to represent him,<sup>19</sup> he does not have the right to demand that counsel, appointed and representing him within the bounds of the law, be removed and replaced because of defendant's unfounded dissatisfaction with his services.<sup>20</sup> The representation afforded defendant did not, in the court's view, render his trial a "farce and a mockery of justice";<sup>21</sup> therefore, the supreme court ruled that the trial judge did not abuse his discretion in finding that Burns' refusal to participate in a fraud on the court was not a good cause for his replacement by another attorney.<sup>22</sup>

The court went on to hold, however, that defendant did have the right to elect to represent himself and to refuse the services of counsel with whom he was clearly in irreconcilable conflict over the course to be adopted in his defense.<sup>23</sup> According to the supreme court the trial court's adoption of a "middle course,"<sup>24</sup> although intended to provide needed assistance, served rather to convey to the jury that there was discord between defendant and his lawyer, and that counsel attached little credibility to the testimony of the only defense witness.<sup>25</sup> The resulting prejudice to defendant's case was therefore held to have denied

15. *Id.* at 64.

16. Brief for Appellee at 4, *State v. Robinson*, 28 N.C. App. 65, 220 S.E.2d 387 (1975).

17. 290 N.C. at 58, 224 S.E.2d at 175. The court of appeals found no error. *State v. Robinson*, 28 N.C. App. 65, 220 S.E.2d 387 (1975).

18. 290 N.C. at 66, 224 S.E.2d at 180.

19. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

20. See cases cited note 32 *infra*.

21. *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974). See also cases cited note 34 *infra*.

22. 290 N.C. at 66, 224 S.E.2d at 180. See also note 34 *infra*.

23. 290 N.C. at 67, 224 S.E.2d at 180. See, e.g., *State v. Alston*, 272 N.C. 278, 158 S.E.2d 52 (1967); *State v. Morgan*, 272 N.C. 97, 157 S.E.2d 606 (1967); *State v. Elliott*, 269 N.C. 683, 153 S.E.2d 330 (1967); *State v. McNeil*, 263 N.C. 260, 139 S.E.2d 667 (1965).

24. 290 N.C. at 67, 224 S.E.2d at 180.

25. *Id.*

him the fair trial required by the due process clause of the fourteenth amendment.<sup>26</sup> Accordingly, a new trial was ordered.<sup>27</sup>

Cases dealing with the issue of the indigent defendant's right to counsel have uniformly held that such a defendant must accept the lawyer appointed by the court to represent him unless he wishes to proceed in his own behalf<sup>28</sup> or can establish a substantial reason for substitution of new counsel. The courts have also been consistent in holding that "whether to appoint a different lawyer for an indigent criminal defendant who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the [trial] court."<sup>29</sup> A bare allegation of "unfounded dissatisfaction"<sup>30</sup> with a competent assigned lawyer, who is "proceeding according to his best judgment and the usually accepted canons of criminal trial practice,"<sup>31</sup> will not constitute good cause for his replacement.<sup>32</sup> Rather, a defendant must make a sufficient showing that under the particular circumstances of his case, his constitutional right to effective assistance will be substantially impaired or denied by the court's refusal to grant his request for the appointment of another lawyer.<sup>33</sup>

In North Carolina there is a heavy burden on defendant, for the standard of proof is a stringent one: "[T]he general rule [is] that the

26. *Id.*

27. *Id.* At the new trial, defendant is to be represented by his current court-appointed lawyer or other competent counsel selected by the court. If such counsel is unsatisfactory to defendant, he may elect to conduct his own defense without a lawyer. *Id.*

28. *E.g.*, *United States v. Young*, 482 F.2d 993 (5th Cir. 1973); *Brown v. United States*, 264 F.2d 363 (D.C. Cir. 1959); *Campbell v. State*, 231 Md. 21, 188 A.2d 282 (1963) (per curiam); *State v. McNeil*, 263 N.C. 260, 139 S.E.2d 667 (1965); *State v. Wilkinson*, 12 Wash. App. 522, 530 P.2d 340 (1975). If defendant wishes to proceed in his own behalf, unsatisfactory counsel cannot be forced on him. See cases cited note 23 *supra*. See also Note, *Criminal Procedure—The Right to Proceed Pro Se: Judicial Gymnastics with the Sixth Amendment*, 54 N.C.L. REV. 705 (1976).

29. *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973). *But see* *Tague, An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

30. *State v. Moore*, 6 N.C. App. 596, 598, 170 S.E.2d 568, 570 (1969).

31. *State v. McNeil*, 263 N.C. 260, 270, 139 S.E.2d 667, 673-74 (1965) (quoting *Annot.*, 157 A.L.R. 1225, 1226 (1945)).

32. *E.g.*, *United States v. Young*, 482 F.2d 993 (5th Cir. 1973) (defendant unreasonably believed that counsel was communicating confidences to the prosecutor); *Brown v. United States*, 264 F.2d 363 (D.C. Cir. 1959) (counsel pessimistic about defendant's chances for a favorable verdict); *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945) (counsel advised defendant to plead guilty in the face of overwhelming evidence and refused to call a witness defendant wanted to testify); *State v. Gibson*, 14 N.C. App. 409, 188 S.E.2d 683 (1972) (defendant desired an attorney who would do more for him); *State v. Scott*, 8 N.C. App. 281, 174 S.E.2d 80 (1970) (defendant dissatisfied with counsel because unreasonable bond had been set); *State v. Moore*, 6 N.C. App. 596, 170 S.E.2d 568 (1969) (counsel had a negative attitude).

33. For a compilation of cases see *Annot.*, 157 A.L.R. 1225 (1945).

incompetency (or one of its many synonyms) of counsel . . . is not a Constitutional denial of [the] right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice."<sup>34</sup> Only in extreme circumstances is it likely that such a deprivation will be found.<sup>35</sup>

To understand properly the significance of the court's holding that Robinson was ultimately denied a fair trial, some knowledge of the professional debate about the duties and obligations of the lawyer confronted with the perjurious witness, and of the sources to which he may turn for guidance, is essential. The official standards governing the conduct of the legal profession are contained in the Code of Professional Responsibility;<sup>36</sup> it is in interpreting the admonitions and pro-

34. *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974). See, e.g., *Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1959); *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966); *Edgerton v. North Carolina*, 230 F. Supp. 264 (E.D.N.C. 1964).

Although North Carolina still follows the farce-mockery standard first established in *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945), other jurisdictions (including the Sixth Circuit, which first decided *Diggs*) have rejected it as a standard for deciding whether an accused has been denied effective assistance of counsel. Rather, effective counsel is "counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960). Accord, *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *West v. Louisiana*, 478 F.2d 1026 (5th Cir. 1973), aff'd on rehearing, 510 F.2d 363 (5th Cir. 1975) (per curiam); *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967). See generally *Beaney, The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150 (1963); Note, *Criminal Defendants Entitled to Reasonably Competent Assistance of Counsel*, 12 AM. CRIM. L. REV. 193 (1974); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

35. *Duboise v. North Carolina*, 225 F. Supp. 51, 53 (E.D.N.C. 1964). In *Duboise* the court cited *Jones v. Cunningham*, 297 F.2d 851 (4th Cir. 1962), as an example of such extreme circumstances. (Counsel was appointed on the day of defendant's trial, made no investigation of the case, yet advised a guilty plea because defendant had previously made a coerced confession.)

36. The Code was promulgated by the American Bar Association in 1969 to replace the Canons of Professional Ethics that had been in effect since 1908. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preface (1969).

The Code is divided into Canons, Ethical Considerations and Disciplinary Rules:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

*Id.* Preliminary Statement (footnote omitted). North Carolina adopted the Code (with modifications) in 1974, pursuant to a resolution of the North Carolina State Bar, 283 N.C. 783 (1973).

hibitions of the Code that members of the profession have divided.<sup>37</sup>

The "traditional" point of view (among whose exponents is Chief Justice Warren Burger)<sup>38</sup> is that although the lawyer in our adversary system of justice owes a high duty of zealous advocacy<sup>39</sup> and strict confidentiality<sup>40</sup> to his client, he is simultaneously an officer of the court who must always conduct himself within the bounds of the law.<sup>41</sup> Given this duty, never, under any circumstances, may a lawyer knowingly proffer perjured testimony and thereby participate in a fraud upon the court.<sup>42</sup> If the client reveals his intention to take the stand and to lie,<sup>43</sup>

37. In an attempt to give further practical guidance to those confronting ethical problems in criminal trial practice, the American Bar Association has also adopted STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft, 1971). When used in the Standards "the term 'unprofessional conduct' denotes conduct which is or should be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance." ABA STANDARDS, *supra* note 2, at § 1.1(f).

38. Burger, *Standards of Conduct For Prosecution And Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11 (1966).

39. "The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate, with courage, devotion and to the utmost of his learning and ability, and according to law." ABA STANDARDS, *supra* note 2, at § 1.1(b). See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1969).

40. A lawyer is prohibited from revealing a confidence or secret of his client and from using a confidence or secret of his client to the disadvantage of the client. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B)(1)-(2) (1969).

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

*Id.* DR 4-101(A). See ABA STANDARDS, *supra* note 2, at § 3.1(a), and Commentary.

41. Burger, *supra* note 38, at 12. See note 39 *supra*; ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1969).

The North Carolina Supreme Court, although it cites none of the authorities, appears to agree with this proposition: the lawyer "is an officer of the court and owes duties to it as well as to his client. In this there is no conflict of interest." State v. Robinson, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976).

42. Burger, *supra* note 38, at 12. The Code provides that "[i]n his representation of a client, a lawyer shall not:

(4) Knowingly use perjured testimony or false evidence.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(4), (7), (8) (1969).

The lawyer is subject to discipline for misconduct as provided in *id.* DR 1-102.

43. On the related issue of the lawyer's duty to reveal a fraud already perpetrated upon the court by his client, see ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B) (1969); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinions, No. 341 (1975); ABA STANDARDS, *supra* note 2, at § 7.7, Commentary.

and if counsel is unable to dissuade him or to withdraw<sup>44</sup> from the case, counsel "may not engage in direct examination . . . to facilitate known perjury. He should confine himself to asking the witness to identify himself and to make a statement."<sup>45</sup> Neither may the lawyer argue the truth of a lying witness' testimony in his closing statement to the jury.<sup>46</sup> Rather, he must argue the case "on the sufficiency of the government's testimony and the other evidence offered by the defense, exclusive of the . . . perjured testimony."<sup>47</sup>

Critics of the traditional position are led by Dean Monroe Freedman, and it is his answer to the "perjury question" that has been the subject of heated reaction since first offered in 1966.<sup>48</sup> Freedman postulates that the attorney attempting to follow the ethical standards of his profession and, at the same time, to live up to his special responsibilities as partisan advocate in our adversary system finds himself in an impossible "trilemma"<sup>49</sup> when faced with the problem of perjured testimony.<sup>50</sup> "That is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court."<sup>51</sup> Although the Code prohibitions that a lawyer shall not "[k]nowingly use perjured

44. The Code provides that a lawyer may seek to withdraw from a case if his client insists that he "pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules," ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(C)(1)(c) (1969), but offers no guidance as to what the lawyer should do if withdrawal is not allowed.

Although Burger does not address the issue, others in substantial agreement with his position believe that in seeking to withdraw, the attorney may not reveal any confidences of his client (i.e., the reasons for withdrawal are privileged). ABA STANDARDS, *supra* note 2, at § 7.7(c); Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 24 (1966); Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. REV. 65 (1965).

45. Burger, *supra* note 38, at 13. Although the Code gives no guidance beyond the prohibitions of DR 7-102(A)(4), (7) and (8), "the recommendations of the standard as to the steps to be taken by the lawyer when he must remain in the case after learning of his client's intent to commit perjury are regarded as appropriately avoiding violation of the Disciplinary Rules." ABA STANDARDS, *supra* note 2, at § 7.7(c), Commentary.

Burger also believes that "[s]ince this informal procedure is not uncommon with witnesses, there is no basis for saying that this tells the jury the witness is lying. A judge may infer that such is the case but lay jurors will not." Burger, *supra* note 38, at 13.

46. Bress, *supra* note 44, at 24; ABA STANDARDS, *supra* note 2, at § 7.7(c).

47. Bress, *supra* note 44, at 24.

48. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

49. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 28 (1975).

50. *Id.* at 27.

51. *Id.* at 28. "[T]he difficulties presented by those conflicting obligations are particularly acute in the criminal defense area because of the presumption of innocence, the burden upon the state to prove its case beyond a reasonable doubt, and the right to put the prosecution to its proof." *Id.*

testimony,"<sup>52</sup> "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent,"<sup>53</sup> or "[k]nowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule"<sup>54</sup> seem fairly clear, the Code does not indicate how a lawyer is to go about fulfilling his obligations when faced with a criminal defendant who proposes to testify falsely.<sup>55</sup>

It is Freedman's view that once the attorney has pried and cajoled all the relevant facts from a client, having assured the client that full disclosure is necessary to a successful defense<sup>56</sup> and "will never result in prejudice to the client by any word or action of the attorney,"<sup>57</sup> the attorney must honor his obligation of confidentiality.<sup>58</sup> If the client proposes to perjure himself

the attorney's obligation . . . would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward. Any other course would be a betrayal of the assurances of confidentiality given by the attorney in order to induce the client to reveal everything . . . .<sup>59</sup>

Freedman rejects the course of withdrawal<sup>60</sup> as not viable, particularly in the case of the indigent defendant, since in most jurisdictions a court-appointed lawyer or public defender will not be allowed to withdraw from a case unless he establishes an extraordinary reason for moving for leave to withdraw.<sup>61</sup> Freedman also rejects the Burger solution of putting the witness on the stand merely to tell his story, unaided by his lawyer, and of ignoring his testimony in closing argument, as too highly

52. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(4) (1969).

53. *Id.* DR 7-102(A)(7).

54. *Id.* DR 7-102(A)(8).

55. M. FREEDMAN, *supra* note 49, at 29.

56. *Id.* at 30.

57. *Id.*

58. *Id.*

59. *Id.* at 31.

60. Freedman views withdrawal as an avoidance of the ethical problem, since defendant, if he is not indigent, will retain another lawyer from whom he will withhold any incriminating information or the fact of guilt. The new lawyer will be ignorant of the proposed perjury and, therefore, will be unable to discourage the client from presenting it. *Id.* at 33.

61. *Id.* Thus, the attorney must either lie to the judge about his reason for moving to withdraw or else reveal that he has received knowledge of his client's guilt. The latter alternative would violate the obligation of confidentiality, especially since in many jurisdictions the same judge who allows the lawyer to withdraw will later hear the case and sentence the defendant. *Id.* at 34.

prejudicial to defendant's case<sup>62</sup> because of adverse inferences a jury will draw from such a procedure.

In *Robinson* the North Carolina Supreme Court followed a clear line of precedent in rejecting defendant's sixth amendment-based claim that he was denied effective assistance of counsel.<sup>63</sup> The court itself, apparently motivated by a feeling that the trial afforded Robinson was less than fair, raised the due process issue that provided the basis for reversal of defendant's conviction. Unlike the lengthy analysis of the already clear limitations on the indigent's right to counsel, the court's disposition of the fair trial issue was not accompanied by an informed discussion of the intense controversy over the proper role for the lawyer who, in the course of representation, must deal with a potentially perjurious witness.<sup>64</sup> In finding for defendant on due process grounds, without proper regard for the complex ethical issue that the situation in *Robinson* presents, the court created a dilemma for the defense attorney who would attempt to reconcile his duties to his client with those to the code of his profession.

Not once in its opinion did the supreme court allude to or cite any of the provisions of the Code of Professional Responsibility or the American Bar Association Standards. Yet the court's assertion that Burns clearly had no duty to proffer perjured testimony<sup>65</sup> is consistent with the prohibitions of the Code<sup>66</sup> and the Standards.<sup>67</sup> Despite this apparent agreement with Code and Standards, the court rejected the procedure adopted by the trial court for the examination of a perjurious witness<sup>68</sup> (substantially the same procedure adopted by the Standards)<sup>69</sup> on the ground that such trial tactics inevitably prejudiced defendant's case

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62. *Id.* at 37. One practical criticism Freedman offers is that a prosecutor might object to a witness' narrative since it would deprive him of the opportunity to object to inadmissible evidence before it is heard by the jury. A more serious criticism is that jurors will draw prejudicial inferences from such conduct by an attorney who, they assume, knows the truth about about the defendant's case. *Id.* Freedman adds:

There is, of course, only one inference that can be drawn if the defendant's own attorney turns his or her back on the defendant at the most critical point in the trial, and then, in closing argument, sums up the case with no reference to the fact that the defendant has given exculpatory testimony.

*Id.* Further, if a defendant is discouraged by this procedure from taking the stand in his own behalf, as is his right, most would agree that his chances of conviction are increased. Freedman, *supra* note 48, at 1475.

63. See text accompanying notes 29-32 for a discussion of the precedent.

64. 290 N.C. at 58, 224 S.E.2d at 175.

65. *Id.* at 59-60, 224 S.E.2d at 179.

66. See Code provisions quoted note 42 *supra*.

67. See ABA STANDARDS, *supra* note 2, at § 7.5(a), and Commentary.

68. See notes 11 & 14 *supra*.

69. See ABA STANDARDS, *supra* note 2, at § 7.7(c).

in the eyes of the jury and thereby denied him a fair trial.<sup>70</sup> The court, surprisingly, is in substantial agreement with Freedman's estimation of the effect of limited participation by the lawyer;<sup>71</sup> the court, however, would surely not advocate Freedman's course of putting the lying witness on the stand, cross-examining in the conventional manner, and arguing the truth of known false statements to the jury.<sup>72</sup> Even Freedman would concede that the case for confidentiality and loyalty to the client is not so strong if an alibi witness, as in *Robinson*, and not defendant himself, takes the stand to lie;<sup>73</sup> nevertheless, the court still found prejudice. Perhaps the court was influenced by the fact that defendant's only witness against strong evidence offered by the State was made to appear incredible, and that defendant himself was deterred from testifying in his own behalf by the procedure the trial court adopted.<sup>74</sup>

The American Bar Association Standards and many of the commentators clearly take the position that it is a breach of the lawyer's duty of confidentiality to the client to reveal the reason—perjury—for wishing to withdraw from a case.<sup>75</sup> The court, with no discussion, cited Burns' actions in so doing as "commendable."<sup>76</sup> Neither did the court address the corollary problem of possible prejudice to defendant when the same judge who has been informed of his alleged desire to perjure himself is also called upon to sentence defendant after conviction.<sup>77</sup>

The *Robinson* decision is now one more factor to be weighed by the attorney at the point in time when he is informed by a client of the client's intention to commit perjury. If the client is indigent, the lawyer knows it is unlikely a court will allow him to withdraw and appoint replacement counsel.<sup>78</sup> Apparently, he cannot stay on the case and offer

70. 290 N.C. at 67, 224 S.E.2d at 180; see note 62 *supra*.

71. See note 62 *supra*.

72. M. FREEDMAN, *supra* note 49, at 31.

73. *Id.* at 32.

74. See note 11 *supra*.

75. See note 44 *supra*.

76. 290 N.C. at 66, 224 S.E.2d at 180.

77. Before sentencing, the trial judge addressed the following remarks to defendant Robinson:

Why didn't you take the advice of your attorney? You're as guilty as sin, and there wasn't any doubt in anybody's mind in this courtroom, or on that jury. They didn't take five minutes to find you guilty. You're the kind that makes mockery of this system. Your attorney attempted to advise you as best he could, that you were guilty and that you should enter a plea of guilty . . . ; but you wouldn't see it that way. Your guilt was as obvious as anybody I've ever tried. Any other man in your situation would say, "I'm caught," and "Be merciful" . . . . Do you want to say anything before I sentence you?

Defendant's Statement of Case on Appeal at 49-50, *State v. Robinson*, 28 N.C. App. 65, 220 S.E.2d 387 (1975).

78. 290 N.C. at 66, 224 S.E.2d at 179.

the assistance the ethical norms allow since the court has by indirection rejected the solution of the American Bar Association Standards.<sup>79</sup> The lawyer familiar with the workings of the criminal justice system, who feels some sympathy with the plight of a defendant faced with possible imprisonment who wants and needs the guidance of a lawyer in presenting his defense, will be forced to take a hard look at his alternatives before leaving defendant to the course of self-representation.

The seeming inability or reluctance of the court to confront the hard ethical issues is apparently a reflection of the larger problem of the inadequacies and inconsistencies of the Code of Professional Responsibility itself. The new Code was long in the making and long awaited by those lawyers who found the truisms of the Canons outdated and sorely lacking in practical guidance in dealing with specific problems of professional responsibility. Experience under the revised Code would seem to indicate that many of the old problems have been rewritten into its provisions, and that the Code, too, suffers from a lack of clarity and practical guidance.

Canon 7 prohibits the lawyer's knowing use of perjured testimony.<sup>80</sup> Canon 2 allows him to withdraw if continued representation of a client would likely result in violation of a Disciplinary Rule.<sup>81</sup> Thereafter the Code is strangely silent on the subject of what the lawyer should do if permission to withdraw is denied, as is more often than not the case if the lawyer has been appointed to represent an indigent defendant. The American Bar Association Standards supply the solution, which purportedly avoids violation of the Disciplinary Rules.<sup>82</sup> The Standards are careful to point out that revelation of the reason for withdrawal would constitute a breach of Disciplinary Rule 4-101,<sup>83</sup> yet the Standards advocate the course of allowing defendant to present his perjured testimony unaided by his attorney. This solution has the practical effect of informing both judge and jury that the lawyer, because of knowledge of his client's guilt, believes the testimony to be false.<sup>84</sup> The North Carolina Supreme Court would seem to agree.<sup>85</sup>

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79. *Id.* at 67, 224 S.E.2d at 180.

80. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(4) (1969). See note 42 *supra*.

81. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(C)(1)(c) (1969). See note 44 *supra*.

82. See note 45 *supra*.

83. See note 44 *supra*.

84. M. FREEDMAN, *supra* note 49, at 37.

85. 290 N.C. at 67, 224 S.E.2d at 180.

Although a lawyer is subject to disciplinary action for violation of the prohibitions of Canon 4, there is clear disagreement on how to read the exceptions to the requirement of confidentiality.<sup>86</sup> It would seem to be an obligation of the authors of the Code that on such an important question the language of the Rules be precise, so that a lawyer may discern what he must do in order to comply. The Standards, too, are inconsistent, at one point denouncing the idea of proffering perjured testimony in the name of confidentiality as "universally repudiated by ethical lawyers,"<sup>87</sup> yet later admitting that there is disagreement among experienced lawyers about how to proceed and preserve confidentiality.<sup>88</sup>

Those persons in a position to promulgate the Standards that are to give ethical guidance to the profession clearly must go further in defining what the limits of our adversary system are. Although we sanction the "lie" of a "not legally guilty" plea by the accused who is "guilty in fact"<sup>89</sup> and do not foreclose to him the opportunity to make his case to the jury even if he wishes to lie,<sup>90</sup> we still must decide what we wish the role of the lawyer in the system to be. Freedman seems to believe that the criminal defendant, until he is tried and convicted, remains in a totally blameless state, entitled to the undivided loyalty and full cooperation of his attorney in making his defense, even if the

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86. Canon 4 provides that a lawyer may reveal:

- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(C)(2), (3) (1969).

Some would read the "may" language as permissive only, thus freeing the lawyer to exercise his discretion to reveal or not reveal a client's intention to commit perjury. The lawyer would be immune from discipline either way. See Callan, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUT. L. REV. 332, 354 (1976). ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinions, No. 287 (1953) supports the proposition that perjury is included within the definition of "crime."

Others read the DR 4-101(C)(3) exception along with ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinions, No. 314 (1965), which is cited in a footnote to the Disciplinary Rule, to *require* the lawyer to exercise his discretion in certain situations and to reveal client confidences, despite the "may" language. See Rotunda, *Book Review*, 89 HARV. L. REV. 622, 626-27 (1976).

87. ABA STANDARDS, *supra* note 2, at 142. For some interesting information on what lawyers confronted with the perjury problem actually do, see Friedman, *Professional Responsibility in D.C.: A Survey*, 25 RES IPSA LOQ. 60 (1972); Reichstein, *The Criminal Law Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?*, 61 J. CRIM. L.C. & P.S. 1 (1970).

88. ABA STANDARDS, *supra* note 2, at § 7.7, Commentary.

89. Freedman, *supra* note 48, at 1471.

90. ABA STANDARDS, *supra* note 2, at 276.

defendant wishes to testify falsely and to enlist the aid of his attorney in so doing. In answer to Freedman, one commentator has aptly said:

[T]he very existence of the special rights accorded a defendant whose liberties are at stake—appointed counsel, the fifth amendment privilege, jury trial, proof beyond a reasonable doubt, and others—militates against adding the right to compel counsel to allow the client to perjure himself and even ethically require the counsel to argue the client's false story to the jury.<sup>91</sup>

Although he owes his client the duty of zealous representation, the lawyer's own values, his honesty and his integrity, are also at stake. These values should not be sacrificed to the client who, by choosing to pursue an illegal course of conduct, brings on his own prejudice.

If Freedman's solution elevates the duty of confidentiality to the client at too great an expense to the lawyer, then a compromise such as the trial court's, however flawed, that attempts to preserve the lawyer's duty both to his client and to the court, is necessary. Unless the holding in *Robinson* is somehow limited to the particular facts of the case or overruled, the court would seem to have foreclosed the possibility of such a compromise solution for the North Carolina attorney.

DEBORAH A. BRIAN

### Securities Regulation—Challenging the Short Form Merger Through Rule 10b-5 and the Corporate Purpose Doctrine

In the wake of the depressed securities markets of the 1970's, a corporate phenomenon known as "going private" has become increasingly prevalent.<sup>1</sup> "Going private" usually entails the buying out of public minority shareholders of a corporation by a few majority shareholders so as to take the corporation outside the scope of the Securities Exchange Act of 1934 and its attendant reporting requirements.<sup>2</sup> The danger inherent in this mechanism, and one of the reasons it has drawn increasingly close judicial scrutiny, is that in many cases it allows a few

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91. Rotunda, *supra* note 86, at 627.

1. See Borden, *Going Private—Old Tort, New Tort or No Tort?*, 49 N.Y.U. L. REV. 987 (1974).

2. See Note, *Going Private*, 84 YALE L.J. 903, 904 (1975).