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Neither Reasonable nor Remedial: The Hopeless Contradictions of the Legal Ethics Measures to Prevent Perjury

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NEITHER REASONABLE NOR REMEDIAL: THE HOPELESS CONTRADICTIONS OF THE LEGAL ETHICS MEASURES TO PREVENT PERJURY

SUSAN E. THROWER*

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I. INTRODUCTION

Picture a typical law student in her Professional Responsibility course, learning the American Bar Association’s various frameworks for client confidentiality and candor toward a tribunal. If she is like most law students, she would easily agree with the precept that a lawyer must keep her client’s confidences; she would like the sense of trust that confidentiality builds between lawyer and client. As class instruction turns to the rules on candor to a court, the law student’s internal moral compass would surely lead her to agree that a lawyer must tell the truth to a judge. Her relative lack of experience with people in legal trouble could bring her a somewhat unsettled feeling at the realization that a desperate client might perjure himself to achieve exoneration. Her discomfort would probably grow to a sense of unbalance once she learns that model rules require a lawyer to tell on her client once

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the lawyer comprehends that the client has perjured or will perjure himself. And that sense of unbalance would undoubtedly develop into outright cognitive dissonance if she realizes that every model ethics guide promulgated by the ABA places a lawyer in the position of violating either the rule of confidentiality or the rule of candor in the service of fulfilling the other.

At that point, the law student might assume that her conclusion simply must be inaccurate and that the nation's legal experts have provided some concrete steps for lawyers to take in the highly charged situation when a client's interests in confidentiality clash with the interests of justice. After all, the current rule on candor toward a tribunal tells a lawyer that when she confronts a perjury situation, she must take "reasonable remedial measures."¹ Surely, those "measures" provide the steps, the path, for the lawyer to take to resolve the conflict—and resolve it in an ethical manner. Sadly, any law student who immerses herself in the study of professional ethics must draw the conclusion that those "measures" provide neither path nor safe harbor. At this stage of realization, the law student likely closes her ethics casebook and silently hopes that she never finds herself in that situation. But then she passes the bar, becomes a practicing lawyer, represents a lying client, and suffers the full force of her dismay: she has no way out of this ethical dilemma. And now it's a real situation, not an academic exercise. With no way out, she is likely to face professional discipline for any step she takes because that step will conflict with some other ethical or constitutional mandate. This forced false choice deprives the lawyer of due process.

The ABA's Model Rule of Professional Conduct 3.3 mandates "reasonable remedial measures" for lawyers who have to navigate the competing mandates of client confidentiality and honesty to a court.² Unacceptably, the Model Rules do not define what measures would be both reasonable and remedial. The non-binding commentary following Rule 3.3 does spell out several steps for a lawyer to take: remonstrate with the client, withdraw from representation, disclose the perjury to the court.³ Unfortunately for the lawyer in the bind, these steps almost always prove to be ineffective, unavailable, and hopelessly contradictory. This witches' brew deprives the lawyer of due process when her inability to satisfy judge and bar counsel results in court-imposed sanctions or professional discipline.

Analyzing the inherent conflict posed by the use of an undefined mandate—"reasonable remedial measures"—leads to analysis of the even deeper, unresolvable conflicts in the primary steps prescribed by commentary: the client's narration of his own story, the lawyer's withdrawal from representation, and the lawyer's disclosure of the client's false evidence. Not all of the reasonable remedial measures protect both the client's confidentiality and the court's insistence on honesty, and none of them protects the lawyer from charges of impropriety. In the face of the utter failure of the Model Rules to accomplish their conflicting goals, the ABA's rules drafters should start over from the beginning with a clear-eyed view of which one goal is most important to them. They do not have to stay with the current failed regime. They could, instead, provide direct and defined rules that people of reasonable

¹ See MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983) (amended 2002).

² MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983) (amended 2002).

³ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002) (emphasis added).

intelligence can understand and fulfill. Doing so is, at this point, the only way by which the ABA can maintain any credibility in its leadership position in the realm of legal ethics.

II. CONFLICTS IN “REASONABLE REMEDIAL MEASURES”

What *is* a lawyer to do when he discovers that his client has committed perjury or is about to? From the very first days of lawyer regulation, the various versions of the legal ethics codes have contemplated some sort of action by a lawyer to rectify a client’s fraud or perjury. The actions—whether mandated or merely suggested—have spawned a cottage industry of interpreters because no agreement exists on what the rules mean.⁴

The 1908 aspirational Canons of Professional Ethics stated:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that [he] may take appropriate steps.⁵

Sixty-five years later, the Model Code of Professional Responsibility directed that:

[a] lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.⁶

This mandatory rule, as opposed to the Canons’ aspirational goal, first requires the lawyer to ask—“call upon”—his client to correct the perjury. If the client refuses, the lawyer must disclose the fraud. The unqualified disclosure requirement seems to have been unintended by the drafters, for five years later, the ABA amended this disciplinary rule to read that the lawyer “shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged

⁴ See generally Nathan M. Crystal, *False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U. ILL. L. REV. 1529 (2003); Steven H. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885 (1989); Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989); Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041 (1997); Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 209 (2006); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521 (1987); J. Kevin Quinn, Nancy K. Kubasek & M. Neil Browne, *Resisting the Individualistic Flavor of Opposition to Model Rule 3.3*, 8 GEO. J. LEGAL ETHICS 901 (1995); George Rutherglen, *Dilemmas and Disclosures: A Comment on Client Perjury*, 19 AM. J. CRIM. L. 267 (1992); Joseph P. Williams, *Client Perjury and the Duty of Candor*, 6 GEO. J. LEGAL ETHICS 1005 (1993).

⁵ CANONS OF PROF’L ETHICS Canon 41 (1908).

⁶ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1969) (amended 1974). What constitutes a “privileged communication” under the Model Code has also been a source of confusion to lawyers. See *infra* Part C.1.

communication.”⁷ After that amendment, the disciplinary rule seemed to require disclosure only when the lawyer’s knowledge of the perjury came from information that was not protected as a client confidence or secret—a rare occurrence.⁸

By 1983, the drafters of the Model Rules of Professional Conduct tried to capture this idea of a lawyer’s response to client perjury in a term of art: “[i]f a lawyer has offered *material* evidence and comes to know of its falsity, the lawyer *shall take reasonable remedial measures*.”⁹ Although phrased in the past tense (“has offered”), the rule made no express distinction between past and future fraud on a court,¹⁰ but commentators and courts treated the term as covering both.¹¹

The original version of the Model Rules, published in 1983, nowhere defined “reasonable remedial measures,” revealing, perhaps, the drafters’ belief that the phrase was a term of art, already understood by the relevant judicial players. Drafting the rules on the mistaken assumption of such an understanding, or taking easy way out by leaving the interpretation to courts and commentators, was an abdication of the drafters’ responsibilities to lawyers, lawyers’ clients, and the judges before whom they appeared.¹² Rather than do the hard work of defining the term, the drafters deferred to Rule 3.3’s comments to illuminate the phrase—entirely new to the bar with the Model Rules—and succeeded only in casting darkness where they should have been shedding light. The non-binding, supplementary commentary following the rules was unorganized, intellectually sloppy, tentative, and internally contradictory. Here are some highlights:

- Comment 5 theorizes that upon learning that “material” evidence was false, “the lawyer *should* seek to persuade [his] client that the evidence *should* not be offered;” if the evidence had already been offered, the lawyer *should* seek to persuade the client to come clean with the court.¹³ If persuasion were ineffective, “the lawyer *must* take *reasonable remedial measures*.”¹⁴ Until the final sentence, the guiding commentary

⁷ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1974).

⁸ Some commentators have concluded that once it was amended this way, the Model Code “hardly ever” requires the lawyer to disclose the perjury to the court. *See, e.g.*, Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 820 (1978). *But see infra* Part C.1.

⁹ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1983) (amended 2002) (emphasis added).

¹⁰ *See* MODEL RULES OF PROF’L CONDUCT R. 3.3 (1983) (amended 2002).

¹¹ *See, e.g.*, *People v. Jennings*, 83 Cal. Rptr. 2d 33, 38 (Ct. App. 1999) (conflating remediation of past perjury with prevention of future perjury by including narration among other reasonable remedial measures); ANN. MODEL RULES OF PROF’L CONDUCT R. 3.3, *Legal Background* (1996); Mary C. Daly, *Identifying and Resolving Ethical Problems that Arise in Trying Commercial Cases*, 502 PLI/LIT 185 (1994); David D. Dodge, *When Your Client Wants to Lie: How to Protect Yourself, Your Client and the Judicial System*, 35 ARIZ. ATT’Y 12, 34-36 (1998).

¹² *See generally* Wolfram, *supra* note 8.

¹³ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 5 (1983) (amended 2002) (emphasis added).

¹⁴ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 5 (1983) (amended 2002) (emphasis added).

is aspirational only.¹⁵ When the comment does become directive, it uses the term to define the term, a lazy technique that the drafters also employ in other parts of the ethics codes.¹⁶

- Comment 6 claims that the “generally recognized” rule is that if disclosure to the court is necessary to rectify the fraud, then the lawyer “must” disclose the fraud—except in the defense of a criminal defendant.¹⁷ But six paragraphs later, Comment 12 gives the reader whiplash when it states that the general disclosure rule *does* apply to defense counsel in criminal cases.¹⁸ The quick change of heart may have revealed the drafters’ fear of exempting a large portion of the bar from the rule’s reach, a simple proofreading error, or a genuine lack of understanding of what they were trying to require.
- Comment 11 officially addresses the term “remedial measures,” establishing an unofficial behavioral landscape for managing client perjury: the “proper course” “ordinarily” is to remonstrate with the client confidentially. If that fails to produce rectifying results, the lawyer “should” seek to withdraw. “If withdrawal [would] not remedy the situation or is impossible, the [lawyer] *should*” disclose the perjury to the court.¹⁹ Of course, the comment’s moral imperative of “should”²⁰ creates the appearance that withdrawal and disclosure are choices for the lawyer, not mandates, but this language proves a trap even for the wary.

Together with the Model Rules of Professional Conduct, the ABA publishes the Annotated Model Rules of Professional Conduct, a volume that collects case annotations of the rules and extended commentary on their meaning. The authors of this annotated volume congratulated the drafters on resolving the Model Code’s ambiguity regarding the action required when a lawyer learns that he has offered false evidence.²¹ These writers are the only ones who could have believed that congratulations were in order. No one actually operating under a version of these rules could have thought so. The years between 1983 and 2000 witnessed an outpouring of analysis and criticism of the Model Rules on confidentiality and

¹⁵ “Should” indicates a moral imperative. See WEBSTER’S NEW COLLEGIATE DICTIONARY 778 (1949).

¹⁶ See generally Susan E. Thrower, *How Can I Confuse Thee? Let Me Count the Ways: An Argument for a Due Process-Based Reality in the Ethics Rules Governing Lawyer Confidentiality and Candor*, 34 J. LEGAL PROF. 329 (2010).

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 6 (1983) (amended 2002).

¹⁸ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 12 (1983) (amended 2002).

¹⁹ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002) (emphasis added).

²⁰ See generally Thrower, *supra* note 16.

²¹ See ANN. MODEL RULES OF PROF’L CONDUCT R. 3.3, *Model Code Comparison* (1996).

candor and on their labyrinthine and internally inconsistent language.²² The claimed impetus behind the Ethics 2000, a wholesale review of the 1983 Model Rules, was to address some of this criticism.²³ The project was a failure from this perspective. Unlike the 1983 version, the 2002 Model Rules expressly differentiated between past perjury and prospective perjury and prescribed “reasonable remedial measures” for both.²⁴ Under new Rule 3.3(a)(1), “a lawyer *shall not knowingly*: (1) make any false statement of fact”—the rule dropped 1983’s qualifier “material,” surely an improvement²⁵—but he must now correct a previous false statement of “material” fact—qualifier undefined.²⁶ Neither the rule nor its explanatory commentary provided a rationale for this differentiation between past and future falsity.

The undefined “material” makes another appearance in Rule 3.3(a)(3) in setting up the reasonable remedial measures principle: the rule applies if the lawyer learns that he, his client, or his witness has offered false “material evidence.”²⁷ Further obfuscating the ethical picture, this rule injected yet another degree of uncertainty into the lawyer’s deliberations of whether to disclose the falsity with the undefined qualification of, “if necessary”: “the lawyer shall take reasonable remedial measures, including, *if necessary*, disclosure to the tribunal.”²⁸

This concept of necessity had made its way from the 1983 version’s Comment 6 into the 2002 rule language. The migration of language from a non-binding comment to a binding rule should have been a normative good for purposes of statutory interpretation, but in this case, the drafters succeeded in increasing, not decreasing, uncertainty. Although the new rule itself does not state what the disclosure would be “necessary” for, the 1983 and 2002 comments imply that the necessity is to rectify the situation of a court being misled by false evidence.²⁹ Utterly opaque is how the lawyer is to determine if disclosure is, indeed, “necessary.” The rest of the rule is a blank on this point. Perhaps the witness’s lie is so patent that the judge sees through it at once and needs no warning. But if the lawyer does not know of the judge’s awareness and employs the necessity rule to disclose the falsity, he violates his duty of client confidentiality and opens himself to professional discipline.

²² See generally Goldberg, *supra* note 4; Hazard, *supra* note 4; Quinn, Kubasek & Browne, *supra* note 4.

²³ See, e.g., Crystal, *supra* note 4, at 1531-50 (presenting various problems and omissions of 1983 Rules and showing attempts at clarification in 2002 version).

²⁴ MODEL RULES OF PROF’L CONDUCT R. 3.3(b) & R. 3.3 cmts. 6 & 10 (2002); see also Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel’s Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 635-36 (2005).

²⁵ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2002) (emphasis added).

²⁶ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2002); see Walfish, *supra* note 24, at 635-36 & nn.129, 133.

²⁷ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2002).

²⁸ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2002) (emphasis added); see also Walfish, *supra* note 24, at 636 & n.131.

²⁹ See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 6 (1983) (amended 2002); MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2002).

This is a result unworthy of the drafters because it was foreshadowed by cases interpreting the Model Code and so could have been avoided during the drafting of the Model Rules. In *Butler v. United States*,³⁰ a criminal defendant changed his story and, in doing so, caused his lawyer to believe that he would commit perjury if allowed to testify.³¹ The lawyer's remonstrations with his client were having no effect, so during an *in camera* meeting, the lawyer explained to the judge why he could not put his client on the stand.³² The judge agreed wholeheartedly that the lawyer's participation in perjury would be a violation of his professional ethics.³³ Upon the defendant's conviction, the appeals court was especially hard on the judge for not certifying the case to another judge once learning of the lawyer's disbelief in his client's case.³⁴ It also criticized the lawyer for *unnecessarily* betraying his client's confidences to the judge, implying that the betrayal constituted ineffective assistance of counsel and led to the deprivation of the client's due process.³⁵ The appeals judge strongly sided with the duty of confidentiality, but both the lawyer and trial judge had thought that the merits of the dilemma were with the duty of honesty.³⁶ The formal capture of the "if necessary" caveat to the 2002 Model Rule 3.3 is predictably playing out in courts with *Butler*-like confusion.

Although the 2002 version still provides no definition of "reasonable remedial measures" in either the Terminology section or within the body of Rule 3.3, its Comment 10 did become a bit more expansive in explaining those steps that a lawyer is to take upon having offered "material" perjurious evidence. This comment spells out a routine for the lawyer to follow when the lawyer "knows" that the client or witness has perjured himself—either on direct examination or cross-examination or at a deposition.³⁷ The fact that the rule itself actually identifies none of these litigation activities creates yet another ambiguity.³⁸ But forging ahead, now the "proper" course for a lawyer is to (1) remonstrate confidentially; (2) advise the client of the lawyer's duty of candor; and (3) seek the client's cooperation with respect to withdrawal or correction of the falsity. If that fails to prompt the client to come clean, the lawyer must go further: (4) seek withdrawal; and (5) if withdrawal is refused or will not undo the effect of the falsity, disclose the fraud as is "reasonably necessary" to remedy the fraud, even if the disclosure will reveal confidential information.³⁹

³⁰ *Butler v. United States*, 414 A.2d 844 (D.C. 1980).

³¹ *Id.* at 845.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 852-53.

³⁵ *Id.* at 851.

³⁶ *Id.* at 845. *See also infra* notes 82-92 and accompanying text.

³⁷ *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2002).

³⁸ *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002).

³⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2002). *But see* Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1953 (1988). Professor Freedman, famously opposed to any sort of disclosure, argued that if remonstration fails and withdrawal is not an option, "the lawyer must present

The “proper course,” though appearing to be detailed, still suffers from the flaw of ambiguity. For both committed and prospective perjury, the actual rule language mandates the lawyer: he “shall” take reasonable remedial measures.⁴⁰ Confoundingly, the non-binding comments amplifying the rule equivocate, mandating that a lawyer take reasonable remedial measures for past falsity,⁴¹ but merely encouraging measures for prospective perjury: the lawyer “should” seek to persuade the client to refrain from committing it.⁴² The rules say “shall,” but the comments mix “should,” “must,” and “may.”⁴³ The comments come back together once the lawyer’s measures have failed to rectify the fraud, telling the lawyer that he “must” disclose the perjury to the court.⁴⁴

Remonstrate, withdraw, disclose: boiled down to their essentials, this is what the Rule 3.3 comments advise for the lawyer facing client perjury.⁴⁵ Beyond their non-binding nature, the real measure of the comments’ impotence in guiding lawyers is their porous language: “proper” course, not *mandatory course*;⁴⁶ “ordinarily,” not *always*;⁴⁷ “should” seek to withdraw, not *must* seek to withdraw;⁴⁸ “should” disclose perjury, not *must* disclose perjury;⁴⁹ “must disclose” as “is reasonably necessary”;⁵⁰ “must refuse” to offer false evidence,⁵¹ but “should” resolve doubts in the client’s

the client’s testimony in the ordinary way and remain true to the lawyer’s pledge of confidentiality.” *Id.*

⁴⁰ MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002).

⁴¹ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2002).

⁴² MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 6 (2002) (“If . . . the client intends . . . , the lawyer should . . .”).

⁴³ Cf. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmts. 1-11 (2002).

⁴⁴ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (1983) (amended 2002); MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2002).

⁴⁵ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmts. 7 & 11 (1983) (amended 2002); MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2002); see also Wolfram, *supra* note 8, at 846-66. Professor Wolfram synthesized the steps of remonstration into five elements: (1) the lawyer should advise his client that perjury is a crime; (2) the lawyer should advise his client of the risks that he faces by testifying falsely or by promptly rectifying his perjury; (3) the lawyer should urge the client to testify truthfully or to disclose fully the true facts when he has already committed perjury; (4) the lawyer should inform his client that failure to follow his advice would force the lawyer to withdraw from the representation; and (5) in jurisdictions that require disclosure, the lawyer should tell his client that he will have to reveal his client’s perjury. *Id.* at 846-47.

⁴⁶ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002).

⁴⁷ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002).

⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002). The actual rule language omits any mention of a reasonableness standard for the necessity principle.

⁴⁹ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002).

⁵⁰ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2002).

⁵¹ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 6 (2002).

favor, yet “cannot” ignore “obvious” falsehoods.⁵² The entire scheme is a rat’s nest. With such conflicting duties to follow, lawyers and commentators must question the drafters’ intent to be effective at prescribing the expected behavior. What is a lawyer to do when he finds himself in one of the non-“ordinary” situations? How is a lawyer even to perceive that he is in one of those non-ordinary situations? The comments are silent.

This open question followed the similar gaping hole created when the ABA’s Standing Committee on Ethics and Professional Responsibility carelessly tossed off this dicta in a formal opinion construing the Model Code of Professional Responsibility: “The tradition [of exempting client confidences, and not just information protected by the attorney-client evidentiary privilege, from disclosure in cases of client perjury] . . . is so important that it should take precedence, *in all but the most serious cases*, over the duty [of disclosure of perjury].”⁵³ The Committee made no further effort to illuminate what those “most serious cases” might be. At the end of that opinion, the Committee announced that its interpretation of the rule to preserve confidential information from disclosure “minimizes the problems” of lawyers with lying clients,⁵⁴ giving no heed to the lawyers who would fall through the cracks due to the rules drafters’ faulty thinking and writing. Apparently, some undeserved lawyer discipline is acceptable to them.

The language of the ABA’s rules, comments, and interpretive opinions is simply not designed to do the one job that it has: to tell those governed, “Do this, and you will fulfill your duty; disobey this, and you will violate your duty.” Noting similar interpretive problems with Model Rule 1.6 on confidentiality, one scholar expressed a similar sentiment:

Model Rule 1.6(b), within its context of the entire Model Rules, does not preclude a lawyer from inferentially revealing client confidences to protect victims of a client’s continuing or planned fraud. On the other hand, there is a potentially strong argument that the profession would be better served by relying less on a collateral rule to modify and limit inferentially the specific language of the very rule that is designed to address the disclosure question. For this reason . . . the profession might well give serious consideration to the development of a revised rule that says what it means, means what it says⁵⁵

Another question the drafters left unaddressed is how quickly after discovering perjury or fraud a lawyer must begin the reasonable remedial measures. While Rule 3.3 and Comment 13 set the conclusion of the proceeding as an outside limit on the duration of the duty to remediate,⁵⁶ the drafters provide no starting gun by which a lawyer is to launch the measures. The Supreme Court of Idaho suspended a

⁵² MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 8 (2002).

⁵³ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 341 (1975) (emphasis added).

⁵⁴ *Id.*

⁵⁵ Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. TEX. L. REV. 727, 739 (1994).

⁵⁶ MODEL RULES OF PROF’L CONDUCT R. 3.3(b) & R. 3.3 cmt. 13 (1983) (amended 2002); MODEL RULES OF PROF’L CONDUCT R. 3.3(c) & R. 3.3 cmt. 13 (2002).

prosecutor thirty days for not beginning measures fast enough.⁵⁷ The prosecutor had not been paying attention to a witness' specific testimony because he was reading his notes, preparing for his next questions, when the witness lied.⁵⁸ The prosecutor learned of the witness' false testimony only when a fellow prosecutor alerted him to it later that day.⁵⁹ He visited the witness right after learning of the problem and prepared to call him to the stand the next day to correct the falsity, but by then, the defense lawyer had learned of the perjury, and the judge had declared a mistrial.⁶⁰ The disciplinary board ruled that the lawyer should have invoked reasonable remedial measures at the moment the witness told the lie.⁶¹ As the lawyer was unaware of the existence of the falsity when it occurred, he could never have satisfied this standard. In the absence of any rule on this timing issue, lawyers apparently must act immediately, even when they are unaware of a problem.⁶² Only in two jurisdictions must those subject to rule act in the absence of knowledge: Wonderland and the realm of legal ethics.⁶³

The disparity between Rule 3.3 and its comments, and the absence of answers to legitimate questions unanswered by the rules, are not mere academic abstractions. The Scope section of the Model Rules states that the “[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”⁶⁴ When the comments—meant to provide lawyers with guidance—are inconsistent with the rules or with each other, they fail to fulfill their purpose. Does the mix of mandate and aspiration in the comments relating to potential perjury mean that a lawyer could take some, but not all, of the measures—or different measures—in seeking to persuade a client to refrain from perjuring himself and still satisfy the rule's mandatory language? A lawyer must find out on his own, for the rule drafters have not seen fit to tell him. The drafters were either unable or unwilling to say what they mean and mean what they say.⁶⁵

A. Narration

Lawyers struggled with the 1969 Model Code's absolute conflict between the duties of revealing fraud but maintaining client confidential information. Some sources of would-be guidance did appear along the way, but they were not much

⁵⁷ See *Idaho State Bar v. Warrick*, 44 P.3d 1141 (Idaho 2002).

⁵⁸ *Id.* at 1143, 1146-47.

⁵⁹ *Id.* at 1147.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *But see Newcomb v. State*, 651 P.2d 1176, 1177 n.1 (Alaska Ct. App. 1982) (finding lawyer acted with “reasonable dispatch” in informing the trial court of defendant's potential perjury, even though “it would have been nicer” to have learned of potential ethical issue on the same day the lawyer did; trial court recognized that lapse of one day permitted lawyer to research his ethical duties).

⁶³ “Sentence first, verdict afterwards.” LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 187 (London, MacMillan & Co. 1898) (1865).

⁶⁴ MODEL RULES OF PROF'L CONDUCT, *Scope* para. 14 (2002).

⁶⁵ *Cf. Weinstein*, *supra* note 55, at 739.

help. Identifying the peril that this conflict represented for criminal defense lawyers in particular, a separate constituency in the ABA tried to fill the gap. In the early 1970s, members of the ABA Standing Committee on Association Standards for Criminal Justice drafted the Standards Relating to the Prosecution Function and the Defense Function.⁶⁶ The Defense Function Standards were to serve as guidelines for the criminal defense bar to follow when a criminal defendant announces the intent to commit perjury. Standard 4-7.7 requires that the lawyer first remonstrate with his client against lying.⁶⁷ If remonstrance is unsuccessful and trial has not started, the lawyer may withdraw, if feasible.⁶⁸ If the court will not permit withdrawal, the lawyer “should” make a file record of the failure of his remonstrance “in some appropriate manner without revealing the fact to the court.”⁶⁹ At trial, the lawyer is to confine his examination to identifying the client and permitting him to make a statement to the finder of fact—no direct examination, no later arguing the client’s version of the facts.⁷⁰ The lawyer is not afterward to refer to or rely on known perjury in his argument to the fact-finder, but he is not otherwise to reveal the falsity of the client’s testimony.⁷¹

The authoring committee withdrew these suggested Standards before they came before the ABA House of Delegates for consideration and adoption,⁷² but the concept of permitting the criminal defendant to “make a statement” to the fact-finder had some staying power, making its way into the 1983 Model Rule 3.3 comment 9.⁷³ It appears to have been a compromise position along the way from the 1969 Model

⁶⁶ See STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971); cf. *People v. Johnson*, 72 Cal. Rptr. 2d 805, 813-14 (Ct. App. 1998); STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 258 (2007).

⁶⁷ STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Standard 4-7.7(a) (1971).

⁶⁸ See *id.*; see also *Johnson*, 72 Cal. Rptr. 2d at 813-14; GILLERS & SIMON, *supra* note 66, at 258; Barry R. Vickrey, *Tell It Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct*, 60 N.D. L. REV. 261, 270 (1984). The Defense Function Standards advise a lawyer not to give the judge the reason for the withdrawal request. See GILLERS & SIMON, *supra* note 66, at 258; Wolfram, *supra* note 8, at 861.

⁶⁹ STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Standard 4-7.7(c) (1971).

⁷⁰ *Id.*

⁷¹ *Id.*; see Brent R. Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1921-22 (1988); Wolfram, *supra* note 8, at 826-27. A more modern reader can see in these steps the shape of what would later become the Model Rules’ reasonable remedial measures.

⁷² See GILLERS & SIMON, *supra* note 66, at 259. The second edition of the ABA Standards of Criminal Justice, published in 1979, omitted Standard 4-7.7. See ANN. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. *Utilizing the Narrative Approach when Client Intends Perjury* (1992).

⁷³ “Three resolutions of this dilemma [of a lawyer’s participation in perjury] have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer’s questioning.” MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 9 (1983) (amended 2002).

Code's single directive of disclosure to the court⁷⁴ to the Model Rules' more stepped-progression "reasonable remedial measures." The approach allows the client to take the stand and freely narrate his story, without questioning by the lawyer.⁷⁵ The theory of the approach is that because the lawyer is not guiding the client by questioning him, he is not "offering" evidence that he knows to be false.

The ABA has been particularly torn over the use of the "free narrative approach" for the potentially perjuring criminal defendant. By the time the House of Delegates had approved Model Rule 3.3 in 1983, the drafters had become nervous about the practice of narration: comment 9 recognizes the existence of the approach⁷⁶ and then immediately rejects its use as a denigration of both the principles of confidentiality and candor.⁷⁷

Despite this 1983 rejection, courts quickly took to the practice. Federal and state courts from Washington, D.C., to Alaska, from the mid-1970s past the turn of the twenty-first century, adopted narration as a decent, if imperfect, solution to the perjury dilemma.⁷⁸ Accordingly, the commentary to the 2002 Model Rules retained the recognition of the approach and acknowledged the practice among the nation's courts.⁷⁹ Comment 7 noted that in a contest between a court mandate of narration and Rule 3.3's prohibition on knowingly offering false evidence, the lawyer's

⁷⁴ Before the 1974 amendment, no exception existed regarding disclosure of information protected by the attorney-client privilege. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1969) (amended 1974).

⁷⁵ STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Standard 4-7.7 (c) (1971); *see also* Appel, *supra* note 71, at 1921-22; Lefstein, *supra* note 4, at 541; Wolfram, *supra* note 8, at 826-27.

⁷⁶ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 9 (1983) (amended 2002).

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 9 (1983) (amended 2002).

⁷⁸ *See, e.g.*, Lowery v. Cardwell, 575 F.2d 727, 731 n.4 (9th Cir. 1978); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); Coleman v. State, 621 P.2d 869, 881 (Alaska 1980); People v. Guzman, 755 P.2d 917 (Cal. 1988) (holding use of narrative leading to conviction did not constitute ineffective assistance of counsel nor violation of client confidentiality); People v. Johnson, 72 Cal. Rptr. 2d 805, 817 (Ct. App. 1998) (stating the narrative approach represented best accommodation of competing interests of lawyer and client); People v. Gadson, 24 Cal. Rptr. 2d 219, 226 (Ct. App. 1993) (stating that the lawyer's use of narrative was reasonable attempt to solve "a dilemma to which there was no clear solution"); Thornton v. United States, 357 A.2d 429 (D.C. 1976); Herbert v. United States, 340 A.2d 802 (D.C. 1975); Sanborn v. State, 474 So. 2d 309 (Fla. Dist. Ct. App. 1985) (endorsing the narrative approach when criminal defendant demands to testify and lawyer believes defendant will perjure himself); State v. Waggoner, 864 P.2d 162 (Idaho Ct. App. 1993); People v. Taggart, 599 N.E.2d 501 (Ill. App. Ct. 1992) (rejecting convicted defendant's claim of Sixth Amendment violation after trial judge ordered him to testify in narrative); People v. Lowery, 366 N.E.2d 155 (Ill. App. Ct. 1977); State v. Fosnight, 679 P.2d 174 (Kan. 1984); People v. DePallo, 754 N.E.2d 751 (N.Y. 2001); People v. Salquerro, 433 N.Y.S.2d 711 (Sup. Ct. 1980); Commonwealth v. Mascitti, 534 A.2d 524 (Pa. Super. Ct. 1987), *rev'd*, 546 A.2d 619 (Pa. 1988) (ordering criminal defendant to testify by narrative, judge sounded rare note of concern for lawyer in confidence/perjury dilemma); *In re* Goodwin, 305 S.E.2d 578, 580 (S.C. 1983); State v. Layton, 432 S.E.2d 740, 755 (W. Va. 1993); *see also* Crystal, *supra* note 4, at 1547-48.

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 7 (2002).

obligation under the Rule must give way to the judge's order.⁸⁰ The ABA's Standing Committee on Ethics and Professional Responsibility likewise dismisses narration as a method of insulating a lawyer from a charge of assisting a client's perjury.⁸¹ This stutter-step reveals the ABA's own internal conflict with the principles that should guide and govern lawyers facing possible perjury. Lawyers and courts have, not surprisingly, mirrored that confusion and inconsistency.

*Butler v. United States*⁸² illustrates one such mess. The criminal defendant had once told his lawyer that he had had a gun during the commission of the crime and then later told his lawyer that he had not.⁸³ The lawyer remonstrated with his client unsuccessfully.⁸⁴ When the lawyer urged his client to accept the prosecution's plea offer, the client then accused the lawyer of ineffective assistance of counsel.⁸⁵ At that point, the lawyer disclosed to the judge the merits of his client's case and his belief that his client would commit perjury, in defense of the ineffective assistance claim.⁸⁶ At the client's insistence, the case went to trial, and the lawyer did not call the client to testify, but he suggested to the judge that the judge let the client narrate his story.⁸⁷ Ultimately, the court did not make that offer to the client, and the client did not testify.⁸⁸

During the appeal of the conviction, the appeals court considered the client's claim of ineffective assistance of counsel.⁸⁹ The court concluded that the record did not support the inference that the lawyer knew that his client was going to commit perjury.⁹⁰ At that point, the lawyer knew only that his client had made inconsistent statements, not that he would perjure himself.⁹¹ The lawyer, the trial judge, and the appeals court all came to different conclusions as to what should have happened. According to the appeals court, the lawyer had unnecessarily betrayed his client's confidences to the trial judge.⁹² In turn, the trial judge should have certified the case to another judge once he had learned of the defendant's potential perjury.⁹³ The appeals court concluded that the cumulative effect of the lawyer's actions deprived

⁸⁰ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 7 (2002). This comment was unhelpful, given that state bar counsel spared no pains in prosecuting lawyers for alleged violations of the rules despite court orders to proceed in opposition to them. *See infra* Part II.B.

⁸¹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353 (1987).

⁸² *Butler v. United States*, 414 A.2d 844 (D.C. 1980).

⁸³ *Id.* at 845.

⁸⁴ *Id.*

⁸⁵ *Id.* at 845-46.

⁸⁶ *Id.* at 848.

⁸⁷ *Id.* at 847-48.

⁸⁸ *Id.* at 848 n.6.

⁸⁹ *Id.* at 848-50.

⁹⁰ *Id.* at 850.

⁹¹ *Id.*

⁹² *Id.* at 851. *See also supra* notes 30-36 and accompanying text.

⁹³ *Butler*, 414 A.2d at 851.

the defendant of due process.⁹⁴ The *Butler* court thought that the lawyer, instead, should have followed Defense Function Standard 4-7.7 and permitted his client to testify in a narrative,⁹⁵ despite the fact that no governing body had ever adopted the Standards.

[T]he courts [that] have weighed the dilemma of a defense counsel, faced with the unenviable position of representing a client whom he knows will commit perjury, have approved (for jury trials at least) the recommended accommodation of the ABA Standards[,] which meets both ethical requirements of protecting clients' confidences and refraining from wrongdoing.⁹⁶

The court iterated its conclusion from earlier cases that Standard 4-7.7 is meant to be used when the lawyer knows—not merely suspects—that the defendant's testimony is false.

Other courts have rejected this stringent and largely unprovable knowledge standard or simply have been unconcerned with the lawyer's certainty before invoking narration. In one Pennsylvania trial for child sexual abuse, the lawyers participated in an in-chambers hearing, during which the defendant's lawyer informed the judge that he believed that the defendant intended to testify falsely.⁹⁷ During prior plea negotiations, the defendant had authorized his lawyer to reveal confidential communications that were in direct conflict with a claim of complete innocence, but later, the defendant said that he planned to deny all sexual contact with the victim.⁹⁸ The court denied the lawyer's motion to withdraw and informed the defendant that he would have to testify by narrative, rather than by direct examination.⁹⁹ In admonishing the defendant against perjury and explaining the process of narration, the trial judge sounded the single note of concern for a lawyer in a perjury dilemma, telling the defendant that

I'm not going to require [the lawyer] to call you as a witness [because] he can't be sure . . . until you've testified whether you're going to testify truthfully or not But in order to protect [the lawyer], . . . you will testify in a narrative form.¹⁰⁰

The court's unstated assumption—that the lawyer could prevent the criminal defendant from taking the stand if the lawyer “knew” that he would commit perjury—is undercut by the law, by all scholarship on the topic, and by common

⁹⁴ *Id.* at 851-52.

⁹⁵ *Id.* at 849-50.

⁹⁶ *Id.* at 850.

⁹⁷ *Commonwealth v. Mascitti*, 534 A.2d 524, 526 (Pa. Super. Ct. 1987), *rev'd*, 546 A.2d 619 (Pa. 1988).

⁹⁸ *Id.* at 527.

⁹⁹ *Id.* at 526.

¹⁰⁰ *Id.* at 528 (emphasis omitted).

sense: a lawyer can never *know* what a client will do, any more than one human being can ever *know* what another human being will do on any subject.¹⁰¹

Following other jurisdictions,¹⁰² the appeals court concluded that the trial judge had not abused his discretion in directing the defendant to testify in a narrative format, rather than permitting the lawyer to withdraw and declaring a mistrial.¹⁰³ Unlike the *Butler* court, the *Mascitti* court did not consider the adequacy of the lawyer's knowledge of potential perjury nor the steps he had or had not taken prior to raising the issue with the trial judge.¹⁰⁴ And that made sense because the lawyer could not have known what his client would do.

Indeed, in *People v. Johnson*,¹⁰⁵ the lawyer told the trial judge that he could not call his client to the stand due to "an ethical conflict."¹⁰⁶ Without probing the lawyer's reasoning, the judge assumed that the lawyer was concerned about possible perjury.¹⁰⁷ Agreeing that preventing the defendant's testimony would be the only way to avoid perjury, the judge agreed with the lawyer's approach, and the defendant did not testify.¹⁰⁸ Upon his conviction, the appeals court concluded that the trial court's approach had attempted an "impossible task"—determining whether the defendant would, indeed, perjure himself.¹⁰⁹ Perhaps in recognition of the futility of ever knowing any future event, the *Johnson* court did not discuss the standard of knowledge that a lawyer would have to have before communicating his concerns to the trial judge. It favored narration because the danger of perjury is reduced by cross-examination and impeachment.¹¹⁰ The court concluded that the narrative approach represented the "best accommodation of the competing interests" of lawyer and client¹¹¹ and that the lower court should have used the method, rather than barring the defendant from testifying entirely.¹¹²

¹⁰¹ Cf. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987) (holding explicitly that criminal defendant has constitutional right to testify on own behalf); *People v. Taggart*, 599 N.E.2d 501, 521 (Ill. App. Ct. 1992) (allowing narration upon lawyer's "good faith" determination of perjury); *Hazard*, *supra* note 4, at 1051 ("[J]udges assume that an advocate can identify client perjury."); *Thrower*, *supra* note 16, at Part III.B; *Wolfram*, *supra* note 8, at 842 ("[A]n attorney will rarely be in a position to determine confidently whether particular testimony is perjurious."). Putting lawyers in desperate straits, "many courts have shown little sympathy for the argument that an attorney is powerless in the face of client perjury." *Id.* at 837.

¹⁰² See, e.g., *People v. Lowery*, 366 N.E.2d 155, 157 (Ill. App. Ct. 1977); *State v. Fosnight*, 679 P.2d 174, 180 (Kan. 1984); *People v. Salquerro*, 433 N.Y.S.2d 711, 714 (Sup. Ct. 1980).

¹⁰³ *Mascitti*, 534 A.2d at 529.

¹⁰⁴ *Id.* at n.1.

¹⁰⁵ *People v. Johnson*, 72 Cal. Rptr. 2d 805 (Ct. App. 1998).

¹⁰⁶ *Id.* at 806.

¹⁰⁷ *Id.* at 810 n.6.

¹⁰⁸ *Id.* at 807.

¹⁰⁹ *Id.* at 818.

¹¹⁰ *Id.* at 817.

¹¹¹ *Id.*

¹¹² *Id.* at 817-19. Cf. *Thrower*, *supra* note 16, at Part III.B.

This endorsement—twenty years into the Defense Function Standards—rested on two obvious fallacies: (1) the ABA hates its own Standard 4-7.7, only grudgingly acknowledging its existence and refusing multiple times to adopt it as an official rule;¹¹³ and (2) a lawyer’s silent presence in the courtroom while his client perjures himself can hardly be characterized as refraining from offering known false evidence—the standards invoked by both the Model Code and the Model Rules. The lawyer is there, listening to the client’s narration of a false story and not objecting or correcting.¹¹⁴ The fact that the lawyer is not directing the client’s testimony with questions does not remove his behavior from the clear language of the rule;¹¹⁵ rather, the lawyer is passively aiding perjury by using the narrative approach. Neither Model Rule 3.3, nor its sister Rule 1.2(d) on counseling and assisting a client, differentiate between active and passive assistance.¹¹⁶ The reasonable remedial measure of narration is a fiction: the sin of allowing a client to perjure himself cannot be cured—from either an ethical or common sense perspective—by the lawyer’s silence at counsel table and his later omission of the testimony from closing argument.¹¹⁷ A lawyer who follows this approach—even when adopted by judges in the state in which he practices—opens himself to an ethics prosecution, one that appears would be endorsed by the United States Supreme Court. In its landmark *Nix v. Whiteside*¹¹⁸ decision, in a long discussion of the range of acceptable conduct by a criminal defense lawyer confronted with a potentially perjurious client, and considering withdrawal and narration as options, the Court intoned that “in no sense” can a lawyer “honorably be a party to or in any way give aid to presenting known perjury.”¹¹⁹

¹¹³ See *supra* Part II.A.

¹¹⁴ But see Wolfram, *supra* note 8, at 854 (recommending lawyer use corrective questions to rectify perjury).

¹¹⁵ But see Lefstein, *supra* note 4, at 522-36 (endorsing narrative approach, rejecting withdrawal, and advising lawyers to refrain from “calling” client as witness or questioning around perjurious matters).

¹¹⁶ See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1983) (amended 2002); MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).

¹¹⁷ See Appel, *supra* note 71, at 1922 (rejecting free narrative approach); Vickrey, *supra* note 68, at 270 (stating that ABA Defense Function Standard 4-7.7 is “particularly misguided” in addressing the situation in which withdrawal is not possible, striking “a compromise that fails to achieve any of the proper objectives of the legal system”); Wolfram, *supra* note 8, at 851 (identifying contradiction between ABA-endorsed “free narrative” approach and disciplinary cases prohibiting any cooperation in client perjury).

¹¹⁸ *Nix v. Whiteside*, 475 U.S. 157 (1986).

¹¹⁹ *Id.* at 171 (analyzing Sixth Amendment standards of effective assistance of counsel necessary for federal habeas relief, set by *Strickland v. Washington*, 466 U.S. 668 (1984)). Compare *State v. Waggoner*, 864 P.2d 162, 168 (Idaho Ct. App. 1993) (“By presenting his

With narration off the table as a reliable remediation measure, lawyers were left with three others to try: remonstration—essentially pleading with the client to tell the truth—withdrawal, and disclosure of the perjury. Remonstration is always a safe bet from a disciplinary perspective because the lawyer will not be in danger of violating other ethics mandates by employing it. The problem with it is that it is often ineffective, leaving the lawyer with withdrawal and disclosure as tactics to employ in preventing perjury and its effects. Neither is a workable solution.

B. Confusion About Withdrawal

Aside from the overarching questions about reasonable remedial measures, specific confusion underlies the rules on withdrawal from representation. Neither Model Code Disciplinary Rule 7-102 nor Model Rule 3.3 mentions withdrawal as a step that a lawyer must take upon discovering client fraud.¹²⁰ As it has developed, the withdrawal practice appears to be meant as a sort of release valve for the lawyer with a lying client, but it only adds to the unnecessary cognitive dissonance of a lawyer's life already produced by the ABA's legal ethics framework. Many scholars have identified the theoretical and practical problems raised by the withdrawal rules.¹²¹ One of the fundamental problems is that no ABA ethics rule has ever required withdrawal as a response to client perjury, yet plenty of judges and disciplinary panels behave as if they do. Perhaps this is because the ABA rules drafters and commentators seem to believe so, as well.¹²²

Withdrawal as a response to client perjury has its roots in a lawyer's duty of confidentiality. Canon 37—the original duty of confidentiality—announced that a lawyer *should* not continue employment when he discovers that he cannot fulfill his obligation to his client.¹²³ Later rules would expressly mandate withdrawal, but until then, lawyers could take no directive guidance from the merely aspirational canon. The Canons included no glossary or interpretive comments to shed any light on what the authors meant by “should”; indeed, it is a moral imperative only and carries no mandate.¹²⁴

The apparent mandate arrived in 1969 with the Model Code. Neither the Model Code's nor the later Model Rules' duties of client confidentiality and candor to the court anticipate a lawyer's withdrawal on the basis of his inability to fulfill either obligation. Both ethics systems, though, do capture an overriding duty of withdrawal in separate rules: Model Code Disciplinary Rule 2-110 and Model Rule

client's testimony in narrative form, counsel did not assist the perjury by his client.”), *with* *People v. Andrades*, 828 N.E.2d 599, 604 n.3 (N.Y. 2005) (expressly rejecting narrative approach as incompatible with lawyer's obligation to reveal fraud to court).

¹²⁰ See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1974); MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002).

¹²¹ See, e.g., Crystal, *supra* note 4, at 1538-40; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475-77 (1966); Goldberg, *supra* note 4, at 917; Lefstein, *supra* note 4, at 525-27; Wolfram, *supra* note 8, at 855.

¹²² Cf., e.g., ANN. MODEL RULES OF PROF'L CONDUCT R. 3.3, *Legal Background* (1983).

¹²³ CANONS OF PROF'L ETHICS Canon 37 (1908) (amended 1937).

¹²⁴ See WEBSTER'S NEW COLLEGIATE DICTIONARY 778 (1949).

1.16 both express rules governing mandatory and permissive withdrawal.¹²⁵ Both mandate withdrawal if continued employment causes the lawyer to violate another disciplinary rule:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if . . . [h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.¹²⁶

“[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law”¹²⁷

The comments following Model Rule 3.3 advise a lawyer to seek to withdraw from the representation of a client who insists on testifying falsely: “[i]f perjured testimony or false evidence has been offered, . . . the advocate should seek to withdraw if that will remedy the situation.”¹²⁸ This 1983 comment retains the old Canons’ suggestion that the lawyer *should* seek to withdraw—not that he must.¹²⁹ The 2002 version is similarly vague: “the advocate’s proper course is to . . . seek the client’s cooperation with respect to the withdrawal”¹³⁰

These non-binding supplements to the Model Rules all treat withdrawal as if it were the cure-all for a lawyer with a lying client. But the ABA’s efforts to prevent or remediate perjury by removing the lawyer from the scene suffer from multiple broad-spectrum failures. As do the rules on client confidentiality and candor toward a tribunal, the statements on withdrawal conflict with other ethical principles and with everyday legal practice.¹³¹

1. The Withdrawal Rules Are Internally Contradictory

One fatal conflict is that Model Code Disciplinary Rule 2-110 and Model Rule 1.16 are contradictory, both on their faces and as applied; thus, they are unconstitutionally ambiguous.¹³² Disciplinary Rule 2-110(B)(2) *requires* withdrawal if a lawyer “knows” that continued representation will result in a violation of a “Disciplinary Rule,”¹³³ but DR 2-110(C)(1)(b) *permits* withdrawal if the client

¹²⁵ MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110 (1969) (amended 1974); MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110 (1974); MODEL RULES OF PROF’L CONDUCT R. 1.16 (1983) (amended 2002); MODEL RULES OF PROF’L CONDUCT R. 1.16 (2002).

¹²⁶ MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(B)(2) (1974).

¹²⁷ MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(1) (1983) (amended 2002).

¹²⁸ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002).

¹²⁹ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002).

¹³⁰ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2002).

¹³¹ For a discussion of the several ways that the rules on client confidentiality and candor toward a tribunal conflict with each other and with other ethical and Constitutional principles, see generally Thrower, *supra* note 16.

¹³² See *id.* at Part IV.

¹³³ MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(B)(2) (1974). *But see* Wolfram, *supra* note 8, at 832 (asserting that the Model Code does not mandate withdrawal when

“seeks to pursue an *illegal* course of conduct.”¹³⁴ Comparably, Model Rule 1.16(a)(1) *requires* withdrawal if the representation “will result” in violation of another *Rule of Professional Conduct*,¹³⁵ but Rule 1.16(b) *permits* withdrawal if the lawyer “reasonably believes” that the client’s course of action is “criminal or fraudulent.”¹³⁶

There’s more. The behavioral choice provided by Model Code DR 2-110(B) and 2-110(C) is dependent on verb tenses that have no meaningful difference. DR 2-110(B)(2) *mandates* withdrawal if the lawyer “*knows* or it is *obvious* that his continued employment *will* result in violation of a Disciplinary Rule.”¹³⁷ DR 2-110(C), on the other hand, *permits* withdrawal if the lawyer’s “continued employment *is likely to* result in a violation of a Disciplinary Rule.”¹³⁸

In parsing the ambiguities, the lawyer’s level of knowledge is a good place to begin. The Model Code requires that a lawyer base his withdrawal on his ability to predict the future: “will” versus “likely.” The Model Rule requires that a lawyer make his withdrawal decision based on the level of his knowledge of his client’s bad behavior—knowledge (“will”) versus reasonable belief. Both of these standards are precursors to the impenetrable morass of Model Rule 3.3’s regime of mandating or permitting a lawyer’s response to his client’s perjury based on his actual knowledge versus his reasonable belief of the lies.¹³⁹ As with Rule 3.3, Rule 1.16’s system of mandatory and permissive withdrawal based on the lawyer’s ability to read tea leaves is unworkable.¹⁴⁰

Similarly, no meaningful difference exists between “will result” and “is likely to result.” “Will” signifies future certainty or likelihood.¹⁴¹ “Likely” implies probability,¹⁴² and, hence, also refers to the future. If a measurable difference between the two exists, a mathematician—not a lawyer—would have to make the call. Lawyers, not traditionally trained in the science of statistics, cannot justifiably be held to pinpoint-level accuracy in discerning the difference between the two. This false choice of action based on the lawyer’s level of knowledge is a pervasive theme in modern ethics frameworks.¹⁴³

lawyer is surprised by client perjury, despite conclusions drawn in several disciplinary opinions).

¹³⁴ MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(C)(1)(b) (1974) (emphasis added).

¹³⁵ MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(1) (2002).

¹³⁶ MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(2) (2002).

¹³⁷ MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(B)(2) (1974) (emphasis added).

¹³⁸ MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(C)(2) (1974) (emphasis added).

¹³⁹ *See* MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002).

¹⁴⁰ For more on the unworkability of Rule 3.3’s scheme, see generally Thrower, *supra* note 16.

¹⁴¹ THE AMERICAN HERITAGE DICTIONARY 1968 (4th ed. 2000).

¹⁴² *Id.* at 1014.

¹⁴³ *See, e.g.,* Crystal, *supra* note 4, at Part I.B.1; Freedman, *supra* note 39, at 1940-46; Goldberg, *supra* note 4, at Part II.B; Green, *supra* note 4; Lefstein, *supra* note 4, at Part II.C; Thrower, *supra* note 16, at Part III.B; Wolfram, *supra* note 8, at Part V.A.

Ambiguities also infect the governance of the lawyer's response. The difference in the lawyer's withdrawal approach depends on the type of bad act by the client. Because falsehoods are the subjects of Model Code Disciplinary Rule 7-102 and Model Rule 3.3, a client's perjury would violate a Disciplinary Rule and a Rule of Professional Conduct and would, therefore, mandate the lawyer's withdrawal under DR 2-110(B) and Rule 1.16(a). Because perjury is a crime in every state in the country,¹⁴⁴ the lawyer's withdrawal would merely be permitted—not mandated—under DR 2-110(C) and Rule 1.16(b), which cover an “illegal course of conduct” and a “criminal or fraudulent” course of conduct, respectively.¹⁴⁵ So with regard to perjury, the question of an ethics rule violation on the one hand and a criminal act on the other is a distinction without a difference.

Because a client's perjury is criminal conduct that constitutes an ethics violation when known to the lawyer, this one act invokes two rules simultaneously.¹⁴⁶ Given that mandatory withdrawal is the sanctioned response to a violation of another ethics rule,¹⁴⁷ but permissive withdrawal is the sanctioned response to criminal or fraudulent conduct,¹⁴⁸ a lawyer could reasonably be expected to draw the conclusion that withdrawal is either mandated or permitted under Rule 3.3 for client perjury. Faced with two equally viable choices under the ethics rules, a lawyer should be able to choose the permissive rule and decide not to withdraw, yet this analysis will lead to trouble for him. It is more of the same unresolvable conflict that the rules present between keeping a client's confidence and being candid with the court.¹⁴⁹

In re A.,¹⁵⁰ decided under the Model Code, aptly represents the sheer injustice of placing that burden on a lawyer. In that case, a son had committed welfare fraud in handling his declining mother's finances.¹⁵¹ After receiving payments on her behalf and keeping them unlawfully, an attack of conscience led him to arrange to repay the funds.¹⁵² His mother died before he could accomplish the reimbursement.¹⁵³

¹⁴⁴ Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987) (“Although Rule 3.3(a)(2), unlike 3.3(a)(4), does not specifically refer to perjury or false evidence, it would require an irrational reading of the language: ‘a criminal or fraudulent act by the client,’ to exclude false testimony by the client. While broadly written to cover all crimes or frauds a client may commit during the course of the proceeding, Rule 3.3(a)(2), in the context of the whole of Rule 3.3, certainly includes perjury.”).

¹⁴⁵ This dance between the levels of a lawyer's knowledge and the concomitant level of his requirement to act models the tease posed by other ethics rules on the lawyer's knowledge and reasonable belief. See Thrower, *supra* note 16.

¹⁴⁶ From a purely practical perspective, the mandatory rule probably swallows the permissive rule: the lawyer *must* withdraw when confronted by client perjury. Still, this is not what the rules say.

¹⁴⁷ MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(B)(2) (1969) (amended 1974); MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2002).

¹⁴⁸ MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(C)(1)(b) (1969) (amended 1974); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(2) (2002).

¹⁴⁹ See Thrower, *supra* note 16.

¹⁵⁰ *In re A.*, 554 P.2d 479 (Or. 1976).

¹⁵¹ *Id.* at 480.

¹⁵² *Id.*

The son's divorce case proceeded simultaneously, and the judge there asked the son a question indicating that the judge did not realize that the mother had passed.¹⁵⁴ When the son permitted the judge to keep his erroneous impression, the son's lawyer stayed silent.¹⁵⁵ The lawyer rightly understood that his client would be subject to prosecution for welfare fraud if he had corrected the judge's misimpression.¹⁵⁶ He remained quiet to avoid revealing a confidence that would result in his client's exposure to prosecution, an outcome certainly "detrimental" to the client and required to be kept confidential under Model Code Disciplinary Rule 4-101(B).¹⁵⁷ Later, the lawyer urged his client to correct the judge's misimpression that the mother was still living, and the client refused; he did not want to be prosecuted for welfare fraud.¹⁵⁸

The first-level disciplinary trial committee in Oregon found that the lawyer had violated his duty to reveal his client's fraud to the court, but the prosecuting bar counsel actually urged the review committee to find that the lawyer's violation was a failure to withdraw, not a failure to disclose.¹⁵⁹ Because DR 7-102, the Model Code's candor rule, did not require withdrawal in the face of perjury, bar counsel must have been relying on withdrawal rule DR 2-110(B)(2), though the opinion gives no indication of the rule on which the trial committee rested its decision.¹⁶⁰

In a fractured opinion recommending a public reprimand, the members of the Oregon review committee revealed broad confusion over the duty to withdraw.¹⁶¹ Two members concluded that the lawyer had participated in his client's intentional misdirection of the court. Those members opined that, at a minimum, the lawyer "should" have withdrawn from representation because he knew that the client had misled the court, and the client confidentiality rule must yield to the candor rule.¹⁶² They offered no rule in support of their analysis.¹⁶³

Another member of the review committee concurred in the lawyer's reprimand, finding that the lawyer had been duty-bound to insist that the client permit him to correct the deception and, "failing that, to withdraw from the case."¹⁶⁴ This panel member recognized that the lawyer had an ethical duty to not "blow the whistle" on his client, but he was uncomfortable that the lawyer had not "immediately

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 481.

¹⁵⁵ *Id.* at 481-82.

¹⁵⁶ *Id.* at 483-84.

¹⁵⁷ *Id.* at 484.

¹⁵⁸ *Id.* at 482-83.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 484-85.

¹⁶² *Id.* at 484.

¹⁶³ *See id.*

¹⁶⁴ *Id.*

disassociate[d] himself from [the deception].”¹⁶⁵ As did his concurring colleagues, this member offered no rule in support of his analysis.¹⁶⁶

Two other members of the committee dissented. They concluded that the lawyer’s greater duty was not to the court but was to his client through the maintenance of the confidential relationship and the unbridled advocacy of his client’s interests.¹⁶⁷ The dissenters drily noted that the lawyer “would have been criticized by someone regardless of what he did.”¹⁶⁸

On appeal, the Oregon Supreme Court applied DR 2-110(B)(2), which requires withdrawal if the lawyer “‘knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.’”¹⁶⁹ The court seemed to think that the only thing obvious about the lawyer’s situation was that he could not simultaneously satisfy both confidentiality and candor rules. Given that Oregon’s version of the candor rule did not require withdrawal upon the discovery of perjury, the court concluded that “it certainly could not have been ‘obvious’ . . . that the [lawyer’s] continued employment would violate a disciplinary rule, . . . [t]herefore, the accused was not [r]equired to withdraw under DR2-110(B)(2).”¹⁷⁰

The court dismissed the complaint,¹⁷¹ but by that point, the lawyer had had to endure the expense, the professional embarrassment, and the trauma of a disciplinary inquiry, hearing, and appeal. Lawyers are not clairvoyant. Rules that are inscrutable, that force an instant choice on lawyers that disciplinary panelists and judges cannot make with certainty after months of consideration, violate fundamental principles of due process.¹⁷²

2. The Model Rules’ Comments Conflict with Each Other and with the Rules

From whence does the ironclad idea of withdrawal *upon perjury* come? It comes from the corona formed by the non-binding ABA Ethics Committee opinions and the explanatory comments. This corona exposes another deep flaw in the Model Rules’ scheme: the allegedly explanatory comments exacerbate the confusion regarding withdrawal and its aftermath. Supplied by the Model Rules drafters as non-binding explanatory helpers, the comments are not the rules, but are meant to illustrate the rules.¹⁷³ Nowhere do the actual rules state that the comments may amplify a lawyer’s obligations, and, yet, this is exactly what the comments trend toward. Model Rule 3.3 Comment 11 (1983) and Model Rule 3.3 Comment 15 (2002) identify withdrawal as among the reasonable remedial measures that a lawyer should

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* DR 2-110(B) seems likely to have been on this committee member’s mind.

¹⁶⁷ *Id.* at 484-85.

¹⁶⁸ *Id.* at 485.

¹⁶⁹ *Id.* (quoting MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(B)(2) (1974)).

¹⁷⁰ *Id.* at 486.

¹⁷¹ *Id.* at 487.

¹⁷² *Cf.* Wolfram, *supra* note 8, at 845 (stating few cases in Oregon cast such an extreme burden on lawyers, yet they are prosecuted anyway).

¹⁷³ MODEL RULES OF PROF’L CONDUCT, *Scope* (2002).

take in order to rectify client fraud. These comments conflict with the comments following Rule 1.16 on withdrawal.¹⁷⁴ Three examples reveal the depth of the flaw.

a. The Comments Toggle Between Mandate and Permission

Comment 15 to the 2002 Model Rule 3.3 advises that if a lawyer requests leave to withdraw under Rule 1.16(b)'s permissive withdrawal rule regarding his client's "criminal or fraudulent" conduct, the lawyer "may" reveal information relating to the representation "only to the extent reasonably necessary to comply with" the duty of candor.¹⁷⁵ What does this language mean? "Compliance" with the duty of candor implies a mandate and is at odds with the comment's use of the permissive "may." What "extent" would be "reasonably necessary" to comply with the duty? Would a revelation of information to comply with all of the reasonable remedial measures be permitted, or would a lawyer have to carefully tailor his revelation to the "extent reasonably necessary" to succeed only on his motion for withdrawal?¹⁷⁶

Given that the revelation of confidential information is typically viewed by courts, clients, and lawyers as an extreme step, why did the drafters choose to bury this nugget in a comment meant to "explain[]" and illustrate[] the meaning and purpose of the [r]ule"?¹⁷⁷ In dissenting from an ABA opinion on a related topic, one member of the ABA Standing Committee on Ethics and Professional Responsibility bitterly predicted that "[b]y making mandatory what is at most permissive, the opinion has thus given aid and comfort to those who would increase the exposure of otherwise innocent lawyers to both disciplinary and civil penalties . . ."¹⁷⁸

b. The Comments Inadvertently Raise the Question of Whether Withdrawal Really Is Required

Comment 10¹⁷⁹ identifies withdrawal as one of the reasonable remedial measures that a lawyer "shall" take upon discovering the use of false evidence, but Comment 15¹⁸⁰ backtracks from the idea that withdrawal is obligated after a lawyer discloses perjury.¹⁸¹ It notes, instead, that Rule 1.16(a) requires a lawyer to seek to withdraw once he has complied with the duty of candor *if* that compliance causes his relationship with his client to deteriorate.¹⁸² This implies that the lawyer could have

¹⁷⁴ Cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (dissent) (noting Ethics Committee's dysfunction in relying on unenforceable comment to Model Rule 1.6 as support for its insistence on mandating "noisy withdrawal" in face of client fraud, when text to Rule 1.6 mandates no such duty).

¹⁷⁵ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 15 (2002).

¹⁷⁶ See Crystal, *supra* note 4, at 1543.

¹⁷⁷ MODEL RULES OF PROF'L CONDUCT, *Scope* para. 21 (2002); see Rutherglen, *supra* note 4, 267-68 (favoring withdrawal over disclosure, explaining that Rule 3.3 disclosure compromises lawyer's role as advocate).

¹⁷⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (dissent).

¹⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2002).

¹⁸⁰ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 15 (2002).

¹⁸¹ See also Crystal, *supra* note 4, at 1539.

¹⁸² MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 15 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (2002).

complied with Rule 3.3 *without* withdrawing, the withdrawal becoming relevant only *if* that compliance later destroys the attorney-client relationship. Accordingly, if the drafters did not really consider withdrawal to be a required action, Comment 10's inclusion of it in a list of "remedial measures" that lawyers "shall take" causes confusion and can lead to disciplinary scrutiny.¹⁸³

c. The Comments Are Confused About Lawyer-Client Relations

Comment 15's loose use of mandatory language is another problem for lawyers. The comment states that the lawyer "may be required" by Rule 1.16(a) to seek withdrawal upon the deterioration of the lawyer-client relationship,¹⁸⁴ when Rule 1.16 mandates nothing of the sort. Rule 1.16 says withdrawal is mandatory only upon (1) actions that result in a violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition that impairs his ability to represent his client; or (3) the client's discharge of the lawyer.¹⁸⁵ All of the other enumerated situations lead only to the lawyer's permissive withdrawal, and the disintegration of the attorney-client relationship is not among the reasons listed.¹⁸⁶

3. The Rules Conflict with Actual Legal Practice

A final flaw demonstrating the failure of the rules governing withdrawal is the infrequency of withdrawal as a factual matter. The ethics rules' blithe treatment of withdrawal as a lawyer's sword or shield indicates that the rules drafters had little practical experience with the issue in a real courtroom. While the comments to the candor rule appear to accept withdrawal as a foregone conclusion,¹⁸⁷ actual judges are singularly unwilling to permit a lawyer to withdraw once a case has made it past its initial stages.¹⁸⁸ Rule 1.16 Comment 3 hints at some recognition of the contradiction between the rule and reality: "[d]ifficulty [in obtaining court approval]

¹⁸³ Scholars are divided on the issue of whether withdrawal in the face of perjury is even a good idea. *See, e.g.,* Lefstein, *supra* note 4, at 525-27, 549-50 (rejecting withdrawal as solution to client perjury because it inevitably requires lawyer to disclose confidential information in service of withdrawal request); Wolfram, *supra* note 8, at 854, 860-62 (recommending use of "corrective questions" during examination and recommending withdrawal for civil action); *see also In re A.*, 554 P.2d 479 (Or. 1976).

¹⁸⁴ *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 15 (2002).

¹⁸⁵ MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (2002).

¹⁸⁶ *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2002).

¹⁸⁷ *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmts. 10 & 15 (2002).

¹⁸⁸ *See, e.g.,* Wolfram, *supra* note 8, at 860. Professor Wolfram's investigation revealed that judges permit withdrawal in criminal defense cases only if the trial has not yet begun. *Id.* at 855; *see also* *People v. Taggart*, 599 N.E.2d 501 (Ill. App. Ct. 1992) (refusing lawyer's motion to withdraw but allowed lawyer to "disassociate" himself from defendant's testimony by ordering narration); *Commonwealth v. Mascitti*, 534 A.2d 524 (Pa. Super. Ct. 1987), *rev'd*, 546 A.2d 619 (Pa. 1988) (denying lawyer's motion to withdraw from representation of criminal defendant he believed would testify falsely); *Sanborn v. State*, 474 So. 2d 309 (Fla. Dist. Ct. App. 1985) (denying lawyer's motion to withdraw made before jury selection had begun); *State v. Trapp*, 368 N.E.2d 1278, 1281-82 (Ohio Ct. App. 1977) (holding trial court erred in refusing to grant any of lawyer's five motions to withdraw when his criminal defense client insisted on presenting alibi based on perjury).

may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct."¹⁸⁹ The rules drafters seem to have recognized that lawyers do not come by withdrawal easily, and yet they made withdrawal the focal point of the reasonable remedial measures, thus setting up a behavioral framework that is destined to fail and lead to lawyer discipline.

A lawyer's primary difficulty in gaining leave to withdraw is the uncertainty of how much to tell the judge in order to persuade him of the merits of the withdrawal request. What resources are available to a lawyer to guide him in clarifying this uncertainty? Under the plain language of the 1974 version of the Model Code, a lawyer may not disclose his client's privileged communications, even to rectify fraud on a court.¹⁹⁰ It seems unlikely, then, that a Model Code jurisdiction would permit a lawyer seeking to withdraw to reveal client confidences in the service of his withdrawal explanation. The Model Rules, which do require disclosure of client confidences in the case of perjury, place the heavy burden on the lawyer to assess accurately when disclosure is "necessary" to that rectification or face discipline for making the wrong call: if the lawyer knows that he is responsible for submitting false evidence, he "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."¹⁹¹ Jurisdictions that follow unadopted Defense Function Standard 4-7.7¹⁹² may permit the lawyer to withdraw prior to trial, but the lawyer may not tell the court why he is seeking to withdraw.¹⁹³

Despite the Model Rules' mandate of a lawyer's disclosure of client confidences to rectify perjury, a court will often deny a lawyer's request to withdraw when his reason is to avoid involvement with his client's perjury: courts want to avoid the appointment of another lawyer and the inevitable delay of the trial and, perhaps, another withdrawal down the road when substitute counsel learns of his client's intended perjury.¹⁹⁴ Accordingly, in order to dance on the head of this pin, a lawyer must usually equivocate and tell the judge only that an "ethical problem" exists or that "professional considerations" require termination, not that he suspects client perjury.¹⁹⁵ How often this undifferentiated excuse will convince a judge to permit

¹⁸⁹ MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 3 (1983) (amended 2002); MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 3 (2002); *see also* Crystal, *supra* note 4, at 1539; Rutherglen, *supra* note 4, at 269.

¹⁹⁰ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1974); *see also infra* Part II.C.

¹⁹¹ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002); *see infra* Part II.C.

¹⁹² STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Standard 4-7.7 (1971); *see supra* Part II.A.

¹⁹³ STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Standard 4-7.7(b) (1971); *see* Vickrey, *supra* note 68, at 270.

¹⁹⁴ For a description of this withdrawal-appointment circle *see* Lefstein, *supra* note 4, at 525-26.

¹⁹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 3 (2002); *cf.* United States v. Henkel, 799 F.2d 369, 370 (7th Cir. 1986) (stating that lawyer moved to withdraw because he could not "professionally . . . proceed"); People v. Johnson, 72 Cal. Rptr. 2d 805, 806-07 (Ct. App. 1998) (stating that lawyer explained he could not call client to stand due to "ethical conflict"); People v. Schultheis, 638 P.2d 8 (Colo. 1981) (holding that request to withdraw should state that lawyer had "irreconcilable conflict" with client and nothing more). *But see* Wolfram,

the request is left to the reader's skeptical consideration.¹⁹⁶ And because Rule 1.16(c) comes down on the side of continued representation when the judge denies a motion to withdraw,¹⁹⁷ that denial places the lawyer in the position of having to choose between following a court order—continue the representation—and following a rule of professional responsibility—do not participate in client perjury; he cannot fulfill both. This is the essence of unconstitutional ambiguity, a violation of due process.¹⁹⁸

Despite Rule 3.3 commentary's identification of withdrawal as part of the reasonable remedial measures that constitute a lawyer's "proper course" upon his discovery of client perjury, the rules and their comments are utterly divorced from the realities of withdrawal in an actual courtroom.¹⁹⁹ Perhaps understandably, judges usually proceed in their courtrooms on the assumption that the ethics rules are subordinate to their orders, often mandating that the lawyer put the client on the stand or disclose confidential information, or refusing to permit the lawyer to withdraw from representation.²⁰⁰ One scholar articulated the clear dilemma faced by every criminal defense lawyer at some point in his career: if a judge directs a lawyer to proceed with direct examination, the lawyer "will have to choose between obeying

supra note 8, at 863-66. Professor Crystal notes that other popular phrases such as "conflict of interest" and "privileged reason" also function as tip-offs to a court that the lawyer's client plans to commit perjury. Crystal, *supra* note 4, at 1543.

¹⁹⁶ See, e.g., *Henkel*, 799 F.2d at 370 (denying withdrawal when lawyer could not "professionally . . . proceed"); *Johnson*, 72 Cal. Rptr. 2d at 806 (denying withdrawal when lawyer explained he could not call client to stand due to "ethical conflict"); *In re Decker*, 606 N.E.2d 1094 (Ill. 1992) (ignoring lawyer's motion to withdraw "due to professional and personal ethics" and fielding several other motions and subpoena demanding privileged information, ultimately leading to entry of contempt citation and order of imprisonment against lawyer seeking to protect client confidences); *People v. Taggart*, 599 N.E.2d 501 (Ill. App. Ct. 1992) (ruling against lawyer's motion for withdrawal based on "ethical considerations"). In the same vein, providing no reason at all ensures denial of the lawyer's motion to withdraw. See, e.g., *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). Professor Lefstein argues that seeking withdrawal places the lawyer in a dangerous position because in explaining why he wants to withdraw, the lawyer usually discloses confidential information. Lefstein, *supra* note 4, at 549.

¹⁹⁷ Model Rule 1.16(c) orders lawyers to "comply with applicable law requiring notice to or permission of a [court] when terminating a representation." It also mandates the lawyer to continue his representation when a court denies his withdrawal request. MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2002).

¹⁹⁸ See Thrower, *supra* note 16, at Part IV.

¹⁹⁹ Professor Lefstein raises the concern that a judge will not permit withdrawal. Lefstein, *supra* note 4, at 547; cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (dissent) (criticizing majority opinion mandating "noisy withdrawal" as "an artificial construct divorced from the reality predicated by the opinion's own hypothetical").

²⁰⁰ *Rubin v. State*, 490 So. 2d 1001 (Fla. Dist. Ct. App. 1986); *Decker*, 606 N.E.2d at 1108; *Lucas v. State*, 572 S.E.2d 274 (S.C. 2002); *In re Goodwin*, 305 S.E.2d 578, 580 (S.C. 1983); see Wolfram, *supra* note 8, at 832 (lamenting court's divergence from principles of professional responsibility as described in ethics rules); *id.* at 838 (noting some courts' insistence that lawyer disclose client perjury or fraud regardless of privileged nature of information).

the court's order and complying with the ethical proscription not to assist a witness in presenting what [the lawyer] knows to be perjury."²⁰¹

Two South Carolina cases, decided under different ethics codes, illustrate the judicial indifference to this legal dilemma. In the first, a Model Code case, a public defender became aware, during the course of a criminal trial, that her client planned to perjure himself.²⁰² She immediately moved to withdraw.²⁰³ During an *in camera* hearing to discuss her motion, the lawyer did not disclose her concerns of perjury but, instead, explained that Disciplinary Rule 2-110(B) required her withdrawal to avoid her violation of DR 7-102(A)(4) through the presentation of perjured testimony.²⁰⁴ The judge denied her motion to withdraw and ordered the lawyer to proceed with the trial.²⁰⁵ When she refused, the judge ordered her trial partner to proceed, and he likewise refused.²⁰⁶ The judge held both lawyers in contempt of court for disobeying his order to proceed²⁰⁷ and enjoined the county public defender's office from paying their salaries.²⁰⁸ On appeal, the South Carolina Supreme Court concluded that the trial judge had not erred by ordering the lawyers to proceed, nor by holding them in contempt, rationalizing that a withdrawal would only have resulted in a continuous stream of lawyers moving, in succession, to withdraw, thus depriving the defendant of his right to counsel.²⁰⁹ "Worse, new counsel might fail to recognize the problem and unwittingly present false evidence."²¹⁰ How an unwitting participation in perjury would be worse than a strongly suspected participation was a question that the court did not address.

The court apparently found it preferable to force the current lawyers into knowingly presenting false evidence than for a successor lawyer to do the same unknowingly. The court breezily noted that "motions to withdraw must lie within the sound discretion of the trial judge," who "must balance the need for the orderly administration of justice with the fact that an irreconcilable conflict exists between counsel and the accused."²¹¹ The lawyers simply had no choice but to comply with court orders.²¹² The supreme court expressed sympathy for the defendant, the trial judge, and any substitute counsel but had little concern for the two lawyers who had tried to avoid participating in perjury, gamely protected their client's confidences,

²⁰¹ Lefstein, *supra* note 4, at 547.

²⁰² *Goodwin*, 305 S.E.2d at 579.

²⁰³ *Id.*

²⁰⁴ *Id.*; see MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(4) (1974).

²⁰⁵ *Goodwin*, 305 S.E.2d at 579.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See id.* at 580.

and suffered the professional detriment of being held in contempt and sacrificing a paycheck.²¹³

Decided under the Model Rules' version of the duties of confidentiality and candor, *Lucas v. State*²¹⁴ similarly supported a trial judge who had denied a lawyer's motion to withdraw to avoid presenting perjury. Turning a blind eye to the ethics rules' insistence on a lawyer's withdrawal from representation of a perjurious client, South Carolina's high court recognized that the same possibility of a withdrawal cycle existed under the Model Rules as had supported its decision in the Model Code-based *Goodwin* contempt case twenty years before.²¹⁵

Although commentators posit that withdrawal from civil cases is a smoother drive than is withdrawal from criminal cases,²¹⁶ *Norris v. Lee*²¹⁷ demonstrates that the grass is not always greener on the civil side of the road. In *Norris*, the plaintiffs' lawyers moved to withdraw because they had come to doubt their clients' veracity.²¹⁸ The court denied their motion.²¹⁹ While warning the lawyers that they could professionally neither adduce nor argue false evidence,²²⁰ the judge told them quite plainly to set aside their squeamishness²²¹ and get on with their job: "I recognize that for the young lawyer or law student, these realities sometimes make for a hard swallow. But that is the way the law is practiced in the real world"²²²

In the real world, the lawyer is usually just out of luck. When the judge does not want his show disrupted, the lawyer must swallow hard and forge ahead with his devil's choice, but if the lawyer chooses a path with which judge or bar counsel disagrees, he faces a contempt citation from the judge or disciplinary charges from bar counsel. One cryptic sentence, found at the end of Comment 7 to Model Rule 3.3, acknowledges that "even if counsel *knows* that the testimony or statement will be false," the lawyer's obligation to act in one way under the ethics rules is subordinate to a judge's order to act in the opposite way.²²³ This purported subordination of the ethics rules has not prevented subsequent disciplinary actions or appellate scrutiny of those lawyers' actions through ineffective assistance of counsel

²¹³ *Id.*; see also *In re Decker*, 606 N.E.2d 1094 (Ill. 1992) (vacating contempt citation imposed two and one-half years earlier by trial court and affirmed by appeals court when lawyer had tried to protect confidential client information).

²¹⁴ *Lucas v. State*, 572 S.E.2d 274 (S.C. 2002).

²¹⁵ *Id.* at 277.

²¹⁶ See, e.g., Wolfram, *supra* note 8, at 860-61.

²¹⁷ *Norris v. Lee*, Civ. A. No. 93-0441, 1994 WL 143119 (E.D. Pa. Apr. 15, 1994).

²¹⁸ *Id.* at *1.

²¹⁹ *Id.* at *2.

²²⁰ *Id.*

²²¹ *Id.* at *1 (citing PA. RULES OF PROF'L CONDUCT R. 3.3).

²²² *Id.* at *2.

²²³ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 7 (2002) (emphasis added); see *supra* Part II.A.

and fair trial claims.²²⁴ Indeed, one state supreme court has expressly announced that lawyers should invite a contempt citation from the bench as a reasonable method of resolving this dilemma.²²⁵ Other courts have imposed the contempt sanction on lawyers seeking to fulfill their professional obligations, even when the lawyers had sought *certiorari* review and pursued every procedural avenue available to have their ethical concerns heard.²²⁶

Why the lawyer should be the one judicial participant to have to sacrifice even an hour of his livelihood or reputation while the judge and client insist on their prerogatives is unclear. Dismay can be the only response to anyone who thinks it appropriate for a lawyer to bear the burden of these poorly drafted and unresolvable rules.²²⁷ No matter which way a lawyer turns in a possible withdrawal situation, the ethics rules present him with a conflict. Of all the tics and conflicts in the ethics rules, the conflict between the withdrawal rules as written and the mechanics of withdrawal in the courtroom may be the saddest and most preventable example of the drafters' disconnect between reality and their expectations of proper lawyerly conduct. Their selection of withdrawal as a "reasonable remedial measure" to avoid or correct perjury is one of the ethics frameworks' most notable failures—both unreasonable and unremediable.

C. Confusion About Disclosure

The directive that a lawyer inform on his lying client in order to rectify fraud on a court may be the single biggest producer of cognitive dissonance in the entire ethics enterprise. Although the direct conflict between maintaining a client's confidences and disclosing his fraud has existed since the first written American ethics code, lawyers have never found a way to fulfill these opposing requirements simultaneously, and the ABA has never produced a cogent framework, or explanation, for how they can.²²⁸

²²⁴ See, e.g., *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (noting that lawyer's request to withdraw during bench trial led judge as fact-finder to understand that lawyer believed the defendant was lying, depriving defendant of fair trial); *Norris*, 1994 WL 143119; *Lucas v. State*, 572 S.E.2d 274 (S.C. 2002); *In re Goodwin*, 305 S.E.2d 578 (S.C. 1983); see also *supra* Part II.A.

²²⁵ "[I]n some circumstances, . . . contempt procedures are an appropriate method by which to test orders [that] are collateral to the principal action." *In re Decker*, 606 N.E.2d 1094, 1107 (Ill. 1992) (quoting *In re Decker*, 562 N.E.2d 1000, 1003 (Ill. App. Ct. 1990)).

²²⁶ See, e.g., *Rubin v. State*, 490 So. 2d 1001 (Fla. Dist. Ct. App. 1986) (denying lawyer's pre-voir dire motion to withdraw due to client's insistence on perjury and held him in contempt for refusing to continue representation of perjurer). *But see* *Commonwealth v. Wolfe*, 447 A.2d 305, 310 n.7 (Pa. Super. Ct. 1982) (yielding to lawyer's insistence on withdrawing, even on pain of being cited for contempt; court noted that "there is no easy answer to the dilemma facing a lawyer whose client wishes to offer perjured testimony"). *Cf.* David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 496 (1986).

²²⁷ *But see* Rutherglen, *supra* note 4, at 278 (pronouncing that "[i]f the client does testify falsely, the only [lawyer] likely to be disciplined would be his counsel at the time of the testimony").

²²⁸ See Thrower, *supra* note 16.

1. The Disclosure Rules Conflict with Each Other

The 1908 Canon of Professional Ethics 37 required a lawyer to “preserve his client’s confidences,” while Canon 29 required the lawyer to reveal perjury to authorities, and Canon 41 required him to disclose that his client has committed fraud or deception.²²⁹ In 1953, the ABA Standing Committee on Ethics and Professional Responsibility attempted to resolve this conflict and concluded that the lawyer’s duty of confidentiality overrode his duty to reveal fraud or deception and his duty to disclose perjury.²³⁰ Formal Opinion 287, interpreting Canons 29, 37, and 41, stood for the proposition that a lawyer must not disclose his client’s perjury from either a civil case that has been completed or a criminal trial in progress, but he must withdraw from the representation.²³¹ While the opinion did choose one ethical principle over another, like all ABA opinions, 287 carried no precedential weight in a disciplinary hearing, so it could provide no cover for the lawyer accused of violating one rule in the service of the other.²³²

Sixteen years after the appearance of Opinion 287, the Model Code of Professional Responsibility Disciplinary Rule 7-102 forbade a lawyer from “[k]nowingly [using] perjured testimony or false evidence.”²³³ In the same vein, when the lawyer had information that “clearly established” that the client had perpetrated a fraud on the court during the course of the representation—this presumably included perjury—the lawyer was mandated to “reveal the fraud to the affected person or tribunal” if the client would not.²³⁴ Conversely, Disciplinary Rule 4-101 required a lawyer to maintain his client’s confidences and secrets.²³⁵ So despite Formal Opinion 287’s choice of confidentiality over honesty, the lawyer’s Code-mandated obligation remained servant to two masters—confidentiality and honesty—each of which demanded sole fealty.

For five years, lawyers in Model Code states labored under this impossible situation, until the ABA amended DR 7-102 to exempt from a lawyer’s disclosure duty any information that was protected as a “privileged communication.”²³⁶ What does “privileged communication” include? DR 7-102 gave no definition and no examples of the term. DR 4-101 on confidentiality defines “confidence” as falling

²²⁹ Canon 37 required a lawyer to “preserve his client’s confidences,” while Canon 29 required a lawyer to reveal perjury to authorities, and Canon 41 required a lawyer to turn in his client for fraud or deception. CANONS OF PROF’L ETHICS Canons 29, 37, & 41 (1908) (Canon 37 amended 1937).

²³⁰ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 287 (1953).

²³¹ *Id.* “If the client will not [disclose his perjury to the court], the lawyer should have nothing further to do with him.” *Id.*

²³² As documents that construe a model, not mandatory ethics code, the ethics opinions do not bind any other body as precedent.

²³³ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(4) (1969) (amended 1974) (emphasis added).

²³⁴ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1969) (amended 1974).

²³⁵ MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1969) (amended 1974).

²³⁶ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1974).

within the attorney-client privilege;²³⁷ perhaps the drafters of the 1974 amendment meant for DR 7-102 to capture “confidences,” but not secrets. Without a standard written into the rule, lawyers were on their own in navigating. Why the drafters did not use “confidence” or “confidence or secret,” rather than “privileged communication,” in Disciplinary Rule 7 is anyone’s guess. The context of the rules provides no clue. The bottom line, by 1974, was that the Model Code gave lawyers three levels of information about which they had to keep quiet at different times: confidences, secrets, and privileged communications. Only two of those terms came with definitions, leaving lawyers in the dark about what the 1974 amendment required of them.²³⁸

Pressed into action by the deficiencies of the Code, the ABA Standing Committee issued Opinion 341 considering the meaning and reach of the 1974 amendment to the disclosure rule. It characterizes the amended disciplinary rule as “reinstat[ing] the essence of Opinion 287,” making it “unthinkable . . . that a lawyer should be subject to disciplinary action for failing to reveal information [that] by law is not to be revealed without the consent of the client,”²³⁹ and proclaiming that “the lawyer is not now in that untenable position.”²⁴⁰ Opinion 341 concludes that the term “privileged communication” in DR 7-102 includes both confidences and secrets protected by DR 4-101²⁴¹—all confidential information gained in the course of the professional relationship.²⁴²

Unfortunately, the Committee did not leave well enough alone. It continued its exposition on the importance of confidentiality, stating that “it is clear that there has long been an accommodation in favor of preserving confidences either through practice or interpretation. . . . The tradition [of preserving confidences] . . . should take precedence, in all but the most serious cases, over the duty [of disclosure of perjury].”²⁴³ This dicta, likely included for emphasis but with no thought for impact, would leave unanswered the relevant question in every instance when confidentiality

²³⁷ MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A) (1969) (amended 1974). The attorney-client privilege is a rule of evidence that a lawyer or client must invoke in response to a question by counsel or judge. The privilege can be overcome with an exception for crime or fraud. *See also* Fried, *supra* note 226, at 468-69.

²³⁸ *See* Rutherglen, *supra* note 4, at 272-73.

²³⁹ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 341 (1975).

²⁴⁰ *Id.* Opinion 287 involved a client, represented by counsel, who had committed perjury during his divorce action and later informed the lawyer about the lie while they were consulting over support payments. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 287 (1953); *see also* Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the “New” Client Confidentiality*, 8 ST. JOHN’S J. LEGAL COMMENT. 439, 484-86 (1993).

²⁴¹ ABA, Formal Op. 341; *see* Appel, *supra* note 71, at 1920-21.

²⁴² *See* Rutherglen, *supra* note 4, at 271; *cf.* ABA, Formal Op. 341 (providing reasons against using attorney-client privilege to define scope of DR 7-102(B)).

²⁴³ ABA, Formal Op. 341.

clashes with honesty: what, precisely, would be the “most serious cases” in which the confidential information must take a backseat to disclosure?²⁴⁴

Another conflict between the rules relates to past fraud and future fraud. Disciplinary Rule 7-102 limits its reach to already-committed perjury or fraud: the rule states that a lawyer who receives information clearly establishing that his client “perpetrated” a fraud in or out of court shall take action, including disclosure, except when the information is protected as privileged.²⁴⁵ On the other hand, DR 4-101 permits a lawyer to reveal his client’s intention “to commit a [future] crime and the information necessary to prevent the crime.”²⁴⁶ One rule mandates the disclosure, while the other permits it. The rules did not explain why past fraud was subject to mandatory disclosure but present and future frauds were not. But one thing seemed clear after the 1974 amendment and the 1975 Opinion 341: the attorney-client privilege protected from revelation any communication made by a client to his lawyer regarding past criminal activity, even if that activity had happened during an interaction with law enforcement or court personnel.²⁴⁷ Indeed, if a client told a lawyer about his fraud committed before the representation began, the lawyer certainly would think that Disciplinary Rule 4-101 *obligated* him to keep that information confidential and *not* disclose it under pain of discipline.²⁴⁸ Tell that to Camelia Casby.

In *State v. Casby*,²⁴⁹ a criminal action against a lawyer for attorney misconduct, the police arrested a Peter Spedevick on vehicle offenses.²⁵⁰ Peter falsely identified himself to the arresting officer as Ben Spedevick, Peter’s brother.²⁵¹ Peter called his lawyer, Ms. Casby, from jail. Lawyer Casby had previously done legal work for Peter.²⁵² She arranged for his release from jail, signing papers identifying him and signed by him as Ben Spedevick.²⁵³ She drove Peter home, told him what her bill would be, and considered her services ended.²⁵⁴

“Peter, as Ben, appeared in court alone for his arraignment.”²⁵⁵ Later, before his pre-trial hearing, he called Lawyer Casby for advice in negotiating a plea.²⁵⁶ The

²⁴⁴ In the years that followed, with no way to pin down those “most serious cases,” courts increasingly adopted the crime-fraud exception to the evidentiary attorney-client privilege as the measure of the lawyer’s duty to reveal client fraud. *See* Fried, *supra* note 226, at 494.

²⁴⁵ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1974).

²⁴⁶ MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3) (1974).

²⁴⁷ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 341 (1975).

²⁴⁸ DR 7-102 states that the client must perpetrate the fraud “in the course of the representation.” MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1974).

²⁴⁹ *State v. Casby*, 348 N.W.2d 736 (Minn. 1984).

²⁵⁰ *Id.* at 737.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 737-38.

²⁵⁴ *Id.* at 738.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

lawyer called the prosecutor about the “Spedevick case,” though at the trial, the secretary’s message slip read “Ben Spedevick.”²⁵⁷ Later that day, the lawyer negotiated a disposition.²⁵⁸ Her confirming letter to the prosecutor referred to her client as “Mr. Spedevick.”²⁵⁹ Using the letter, Peter handled the pre-trial hearing alone, pled guilty as “Ben,” and received fines for his offenses.²⁶⁰

The lawyer was later prosecuted under a misdemeanor statute for attorney misconduct in deceiving a court.²⁶¹ At her trial, she claimed that she did not learn until over a week after the pre-trial hearing that Peter even had a brother named Ben.²⁶² The Minnesota Supreme Court found sufficient evidence that she had had actual knowledge of Peter’s use of Ben’s name by the time she arranged the disposition with the prosecutor.²⁶³ Further, the court rejected her argument that even if she had been part of Peter’s deceit, both the attorney-client privilege and the code of professional ethics precluded her from disclosing Peter’s true identity.²⁶⁴ It likewise rejected the lawyer’s argument that her client’s fraud was a past act by the time she discovered it, so it received no protection under either ethics or evidence code.²⁶⁵ It reasoned that, not only was Peter’s activity a continuing, not a past, deceit, but the lawyer also did not receive the information about his identity through her work for him, so the attorney-client privilege did not cover her knowledge.²⁶⁶ The Minnesota court felt in no way bound by the ABA Ethics Committee’s pronouncement that a lawyer’s discipline for maintaining her client’s confidence was “unthinkable.”²⁶⁷ Quite to the contrary, Ms. Casby was placed in exactly that “untenable position”²⁶⁸ and was convicted.²⁶⁹

Part of the problem with the confidence/disclosure conundrum is that lawyers receive almost no information from avenues other than the representation of their clients, so in reality, the confidentiality rule covers very little information that would not be subject to apparent protection. By the time the ABA revised the Model Code into the Model Rules, its high value for a lawyer’s confidence-keeping, expressed in

²⁵⁷ *Id.* The opinion did not comment on this opposing evidence nor consider the possibility that the secretary had inaccurately inferred one fact in the absence of other facts.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 737. Later that year, the Supreme Court of Minnesota formally entered disciplinary judgment against Casby, with a public reprimand and a two-year probation. *In re Casby*, 355 N.W.2d 704, 705 (Minn. 1984).

²⁶² *Casby*, 348 N.W.2d at 738.

²⁶³ *Id.*

²⁶⁴ *Id.* at 739.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 341 (1975).

²⁶⁸ *Cf. id.*

²⁶⁹ *Casby*, 348 N.W.2d at 739.

Opinions 287 and 341, had given way to a growing insistence on honesty to a court at all costs; hence, Model Rule 3.3 requires a lawyer who has offered any sort of material false evidence to a court to take reasonable remedial measures to correct the court's false impression, including disclosure of confidential information.²⁷⁰

The ABA backed up its new-found urgency for honesty with Formal Opinions 87-353 and 93-376. Opinion 87-353 characterizes Rule 3.3 as a "major policy change with regard to the lawyer's duty" in the face of perjury.²⁷¹ It advises lawyers to disclose the perjury if it has happened before the "conclusion of the proceeding"²⁷² and if other remedial measures have been ineffective in rectifying the fraud.²⁷³ Opinion 93-376 extends a lawyer's disclosure duty to perjury that occurs pre-trial on the theory that even though perjured discovery may not become evidence at trial, its "potential" as evidence triggers the lawyer's duty to take measures under the rule, "including disclosure if necessary."²⁷⁴ With these opinions, the ABA was walking closer and closer to the line of insisting on complete truth in court to the detriment of client confidentiality, and yet, it never has just bravely crossed over that line and come down squarely on the side on which it so obviously wants to be.

2. Disclosure and Withdrawal Form a Deathlock

When *is* disclosure "necessary" to rectify a client's perjury? Apparently, it is *always* necessary if the lawyer has not succeeded in slipping away from his client before the perjury occurs. Of course, the rules make this anything but clear. The comments to Model Rule 3.3 imply that if withdrawal will remedy the problem, a lawyer can avoid disclosing his client's confidences in the service of correcting the record.²⁷⁵ But the ABA Ethics Committee concluded as early as 1987 that "withdrawal can rarely serve as a remedy for the client's perjury."²⁷⁶ Relying on Informal Opinion 1314, the Committee writing Opinion 87-353 drew this distinction: when the lawyer has notice that the client will perjure himself and can withdraw before submission of the perjury, the withdrawal is sufficient to fix the problem, and disclosure is not necessary. On the other hand, if the lawyer is

²⁷⁰ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) & (b) (1983) (amended 2002); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) & (b) (2002).

²⁷¹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987). Professor Lefstein argues that Opinion 87-353 "conflicts with generally accepted principles of professional responsibility." Lefstein, *supra* note 4, at 536.

²⁷² ABA, Formal Op. 87-353; *see* MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (1983) (amended 2002).

²⁷³ ABA, Formal Op. 87-353.

²⁷⁴ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-376 (1993).

²⁷⁵ "[T]he advocate should seek to withdraw if that will remedy the situation. If . . . not . . . the advocate should make disclosure to the court." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 11 (1983) (amended 2002). "If withdrawal . . . [fails], the advocate must make such disclosure . . . as is reasonably necessary . . ." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2002).

²⁷⁶ ABA, Formal Op. 87-353 n.7.

surprised by the perjury, or if the client insists on perjuring himself when he gets on the witness stand, the lawyer must disclose the perjury or the intention.²⁷⁷

Five years later, Formal Opinion 92-366 showed how far the Committee was willing to torture the language of the Model Rules to force both disclosure and withdrawal on a lawyer in the service of avoiding fraud—and not only fraud in court, which had hitherto been the Committee’s greatest concern.²⁷⁸ And then Opinion 98-412 re-affirmed the withdrawal-before-perjury treatment as the only way to avoid the bitter medicine of disclosure: if the perjury happens during the representation, then the lawyer must disclose the perjury. According to this opinion, disclosure is not necessary if the lawyer can accomplish his withdrawal before the client makes false statements to the court. Once the lawyer has offered material false evidence, withdrawal “may” be insufficient to undo the harm caused by the perjury.²⁷⁹ All of this advice utterly conflicts with 1983’s Rule 3.3, which applies when the lawyer “has” already “offered” material false evidence.²⁸⁰ This “Quick—withdraw before he lies!” advice appears to be the Ethics Committee prescribing what it wishes were the rules, rather than interpreting the actual rules’ language—just as the dissenters from Opinion 92-366 charged in another context on withdrawal.²⁸¹

As it happened, the Rules did catch up with the opinions. With the 2002 revision of Model Rule 3.3, the distinction between past fraud and future fraud became a mere memory: whether the lawyer knows that the client has already offered material false evidence or is planning on it, the lawyer is required to take reasonable remedial measures, including disclosure of the perjury, “if necessary.”²⁸²

Emboldened by the ABA’s insistence on honesty at all costs, some states have gone even farther than the ABA in creating ethics environments in which lawyers are responsible for following rules that cannot be satisfied. New Jersey provides one example. Its expanded version of Rule 3.3 required disclosure by a lawyer of all material confidential information that might “tend to” mislead a court.²⁸³ The then-Vice President of the New Jersey State Bar Association accused the rule of “essentially destroy[ing] whatever confidentiality exists between lawyer and

²⁷⁷ See *id.* (construing ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1314 (1975)).

²⁷⁸ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-366 (1992). The dissent criticized the majority’s “linguistic prestidigitation” in its efforts to reach what it considered to be a desirable, but unauthorized, result. *Id.* (dissent).

²⁷⁹ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 98-412 (1998).

²⁸⁰ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1983) (amended 2002).

²⁸¹ See ABA, Formal Op. 92-366 (dissent).

This opinion attempts to reach a result considered desirable, while at the same time according deference to the text of the Rules [that] serve as our road map. We think the effort founders on the shoals of the English language as employed in the Rules and as understood when given its common and ordinary meaning.

Id.

²⁸² MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) & (b) (2002).

²⁸³ N.J. RULES OF PROF’L CONDUCT R. 3.3(a)(5) (1997); see Walfish, *supra* note 24, at 638.

client.”²⁸⁴ He also opined that every trial lawyer in New Jersey grossly violated the rule “because no lawyer can represent a client and comply with that rule.”²⁸⁵ Even after the bar expressed deep concern and New Jersey amended its standard to require disclosure if an omission is “reasonably certain to mislead” a court,²⁸⁶ the state had disciplined twenty-three lawyers for falling short of compliance with the rule.²⁸⁷ The wonder here is that the number of discipline cases was not higher. While the state changed its rule ostensibly to make interpretation and compliance less difficult, the change from “tend to” mislead to “reasonably certain to mislead” is semantic only and obviously—from the number of discipline cases—not one that lawyers could understand and fulfill.

Despite the fact that Rule 3.3 characterizes disclosure as a last resort, because withdrawal is so rarely permitted to practicing lawyers, the rule, as applied, almost always requires disclosure of client confidences to remedy fraud on a court. But instead of just writing a rule that says so, the drafters refuse to make that choice and instead force lawyers to agonize over whether to disclose perjury and subject their clients to all manner of bad results, or to maintain their confidentiality and suffer professional opprobrium. If the ABA privileges truth to a court above every other consideration—and there can be no doubt now that it does—then it should simply say so in its rules and launch a new era in lawyer regulation.

III. CONCLUSION

Withdrawal from representation and disclosure of client confidences are inherently unworkable concepts if the ABA’s goal is the prevention of a court’s action on misleading information. Comparably, the client’s narration of his story while the lawyer silently sits by is the ultimate white flag of the ABA drafters, their final, tacit admission that no lawyer can prevent perjury. Unfortunately, none of the drafters seems cognizant of the fact—or willing to admit—that no lawyer can fix it without violating other principles of legal representation. The reasonable remedial measures might be workable if the candor rule existed in a vacuum, without the conflicting rules of client confidentiality, zealous representation, and the Sixth Amendment. When layered with these other principles, and when distinguished from what goes on in real courtrooms with real judges, these measures can claim no higher ground than a safe harbor,²⁸⁸ a checklist for a lawyer seeking protection from an ethics prosecution. But even on that score, they fail.²⁸⁹ They are neither reasonable nor remedial.

²⁸⁴ See Walfish, *supra* note 24, at 641-42.

²⁸⁵ See *id.* at 642.

²⁸⁶ *Id.* at 639.

²⁸⁷ *Id.* at 645.

²⁸⁸ See Dodge, *supra* note 11, at 35-36 (suggesting safe harbor from discipline consisting of steps of remediation for both civil and criminal cases).

²⁸⁹ Even as lawyers try to work their way through the reasonable remedial measures, they may need to mind the order in which they progress through them—not that the rules themselves mention any such need. For example, some courts that have adopted the narrative solution to perjury may require the lawyer to seek to withdraw from representation before employing narration. *Cf.* Crystal, *supra* note 4, at 1547-48.

If the ABA is serious about providing lawyers with a set of rules capable of satisfaction—as opposed to what it has now, which is a series of increasingly unreachable imperatives—it will start over with one goal in mind. It will, after one hundred years, choose whether the more important goal is client confidentiality or candor to the court, and it will re-write the rules so that all mandates on lawyerly behavior point toward and can satisfy that one goal. For example, Model Rule 3.3 would work if courts and bar counsel would permit lawyers to disclose perjury without subsequent discipline for violating confidentiality. In addition, or possibly instead, removing the various levels of knowledge that a lawyer must meet before being *qualified* to reveal confidences could fix the problem. The ABA has refused to choose and has, instead, saddled lawyers with multiple conflicting goals and left it to them to sort out the mess. The multiple competing goals have produced a failed regulatory state. The ABA should exercise leadership by starting over, from the ground up, and draft a brand new version of rules. The ABA should lead, rather than placing the burden of clairvoyance and interpretation on others. Lawyers—not to mention judges and clients—simply deserve better.