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PERJURED ALIBI TESTIMONY: THE DEFENSE ATTORNEY'S CONFLICTING DUTIES

*People v. Schultheis*¹

One of the most difficult problems encountered by a criminal defense attorney is a client's desire to present perjured alibi testimony at trial.² When a client insists on presenting perjured testimony, counsel is faced with the frequently conflicting requirements of the Code of Professional Responsibility,³ the constitutional right to effective assistance of counsel, and the

1. 638 P.2d 8 (Colo. 1981).

2. In *Maddox v. State*, 613 S.W.2d 275 (Tex. Crim. App. 1980), the court stated:

The problem of representing a defendant who insists on . . . [presenting false testimony] has been called, correctly, one of the hardest questions a criminal defense lawyer faces. The attorney is faced simultaneously with a duty to represent his client effectively, . . . a duty not to disclose the confidential communications of his client, a duty to reveal fraud on the court, and a duty not to knowingly use perjured testimony (as well as the possibility of criminal liability for perjury). The difficulty is increased by the defendant's right to put the prosecution to its burden of overcoming the presumption of innocence by proof beyond a reasonable doubt. "In practice, . . . the duties have come to be in perhaps uncontrollable conflict."

Id. at 280 (quoting G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 129 (1978)). This Note will focus on the dilemma faced by counsel when he knows in advance that his client intends to present perjured witness testimony. It does not address the problems raised when a client intends to commit perjury himself. *See* *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978); *Allen v. State*, 518 S.W.2d 170, 172 (Mo. App., St. L. 1974); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Comment, *The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 WASH. L. REV. 211 (1979); Comment, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545 (1978); Annot., 64 A.L.R.3d 385. This Note also will not discuss the attorney's duties after a client or witness has committed unanticipated perjury or fraud. *See* Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1), (B)(2) (1979).

3. "A lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979). "A lawyer should preserve the confidences and secrets of a client." *Id.* Canon 4. The Code also provides that "a lawyer shall not knowingly . . . [u]se a confidence or secret of his client to the disadvantage of the client." *Id.* DR 4-101(B)(2). But a

attorney-client privilege.⁴ In *People v. Schultheis*,⁵ the Colorado Supreme Court developed an approach to the problem that, while not alleviating the conflict, realistically balances the attorney's duties to his client⁶ and to the court.⁷

Glen Schultheis was charged with the murder of a fellow inmate while incarcerated in the Denver County Jail. He first pleaded not guilty by reason of insanity but later entered a plea of not guilty after psychiatric examination. On the morning of his trial, Schultheis objected to the proceeding on the ground that his court-appointed attorney was inadequate and unprepared. He asserted that his attorney had refused to subpoena two alibi witnesses. In the presence of the trial judge, defense counsel explained that he refused to affirmatively present evidence he knew to be fabricated. He moved to withdraw on the ground of irreconcilable differences, but the motion was denied.⁸ Schultheis and his counsel made a record, out of the presence of the trial judge, which showed that counsel believed he had an ethical duty to refrain from calling the two witnesses who would claim Schultheis had been with them at the time of the murder.⁹ Counsel continued to represent Schultheis at the trial. The alibi witnesses were not called,

lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." *Id.* DR 4-101(C)(3).

4. The attorney-client evidentiary privilege generally states that "[a]n . . . attorney may not divulge to others confidential communications, information, and secrets imparted to him by the client or acquired during their professional relation, unless he is authorized to do so by the client himself." 7 AM. JUR. 2D *Attorneys at Law* § 120 (1980). The attorney-client privilege is more limited than the lawyer's ethical obligation "to guard the confidences and secrets of his client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1979). The lawyer is also expected to act in a manner that preserves the privilege. *Id.*

5. 638 P.2d 8 (Colo. 1981).

6. The basic duty of the lawyer for the accused "is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to the law." STANDARDS FOR CRIMINAL JUSTICE § 4-1.1(b) (2d ed. 1980).

7. In *State v. Henderson*, 205 Kan. 231, 468 P.2d 136 (1970), the court stated: The high ethical standards demanded of counsel in no way mollify the fair, full and loyal representation to which an accused is entitled as a part of due process. They are entirely consistent with the objective of our legal system—to ascertain an accused's guilt or innocence in accordance with the established rules of evidence and procedure designed to develop the facts truthfully and fairly. Counsel, of course, must protect the interests of his client and defend with all his skill and energy, but he must do so in an ethical manner.

Id. at 236, 468 P.2d at 141.

8. 638 P.2d at 10.

9. *Id.* Counsel based his belief that the witnesses' testimony would be fabricated on his own conversations with the defendant and on the defendant's conversations with the examining psychiatrists. *Id.* at 11.

and Schultheis was convicted of first degree murder.¹⁰

The Colorado Court of Appeals reversed the trial court's decision and remanded the case, holding that a lawyer has an affirmative duty to withdraw from a case in which his client is intent on presenting perjured witness testimony, and that under such circumstances the court must grant the motion to withdraw. To do otherwise, the court held, is a denial of constitutionally required effective assistance of counsel.¹¹ The Colorado Supreme Court, in turn, reversed,¹² holding that the defendant's right to effective assistance of counsel was not violated by counsel's refusal to present perjured witness testimony and the denial of the motion to withdraw.¹³ The supreme court set forth a four-part approach to guide defense attorneys faced with similar conflicts. First, a lawyer cannot offer testimony of a witness that he knows is false, fraudulent, or perjured.¹⁴ Second, when counsel cannot dissuade his client from insisting that the fabricated testimony be presented, counsel should request permission to withdraw.¹⁵ Third, counsel should not reveal to the trial judge the specific facts or the specific Code provisions behind his motion to withdraw.¹⁶ Fourth, if the motion to withdraw is denied, counsel must continue to defend his client so as not to deprive him of effective assistance of counsel.¹⁷

The first part of the *Schultheis* approach restates the traditional rule that, although the lawyer owes his client the duties of zealous advocacy¹⁸ and confidentiality,¹⁹ he has a professional duty not to perpetrate a fraud on the court by knowingly presenting perjured testimony or other false evidence.²⁰ As an officer of the court, a lawyer's duty to the court is commen-

10. *Id.* at 10.

11. *People v. Schultheis*, 618 P.2d 710, 714-15 (Colo. Ct. App. 1980), *rev'd*, 638 P.2d 8 (Colo. 1981). The court of appeals reasoned that by continuing his representation of the defendant after the disagreement as to the presentation of the alibi testimony, defense counsel departed from his role as an advocate and became, in effect, an amicus curiae. *Id.* See *State v. Trapp*, 52 Ohio App. 2d 189, 195, 368 N.E.2d 1278, 1282 (1977) ("denial of a substantial portion of defense counsel's function is as much a violation of constitutional rights to counsel as the total denial of all assistance of counsel").

12. 638 P.2d at 15.

13. *Id.* at 12.

14. *Id.* at 11.

15. *Id.* at 13.

16. *Id.*

17. *Id.*

18. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979).

19. See *id.* Canon 4; MO. REV. STAT. § 491.060 (1978).

20. See *People v. Pike*, 58 Cal. 2d 70, 97, 372 P.2d 656, 672, 22 Cal. Rptr. 664, 680 (1962); *People v. Radinsky*, 176 Colo. 357, 360, 490 P.2d 951, 953 (1971); *Herbert v. United States*, 340 A.2d 802, 804 (D.C. 1975); *State v. Lloyd*, 48 Md. App. 535, 541-42, 429 A.2d 244, 247-48 (1981); *Allen v. State*, 518 S.W.2d 170, 172 (Mo. App., St. L. 1974); *In re King*, 7 Utah 2d 258, 262, 322 P.2d 1095, 1097 (1958). See

surate with his duty to represent the accused.²¹ Perjury is also a criminal offense,²² and the lawyer who knowingly introduces perjured testimony could be prosecuted for subornation of perjury and obstruction of justice.²³

An attorney should present any admissible evidence unless he knows it to be fabricated.²⁴ A lawyer's belief that his client intends to present false testimony should not be based on a mere inconsistency in the client's story, but rather on "an independent investigation of the evidence or upon distinct statements by his client or the witness which support that belief."²⁵ Defense counsel should not dictate "what is true and what is not unless there is compelling support for his conclusion."²⁶ An important question—

also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4), DR 7-102(A)(4), (6), (7); STANDARDS FOR CRIMINAL JUSTICE § 4-7.5(a) (2d ed. 1980).

21. See *Herbert v. United States*, 340 A.2d 802, 804 (D.C. 1975). One commentator has noted:

The tension between the defense lawyer's role as an officer of the court and his duty to act as a zealous advocate and representative of his accused client creates the lawyer's dilemma. Any solution to this dilemma which fails to protect the integrity of the truth-finding function of the adversary system of justice is inadequate.

Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 77 (1981). But see Comment, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 547 (1978) ("it is . . . [the attorney's] primary responsibility to champion his client's cause by presenting the facts in a light most favorable to his client").

22. See, e.g., 18 U.S.C. § 1621 (1976); COLO. REV. STAT. § 18-8-502 (1973); MO. REV. STAT. § 575.040 (1978).

23. *Herbert v. United States*, 340 A.2d 802, 804 (D.C. 1975) (citing *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966)).

24. "A lawyer should . . . present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony is false, fraudulent, or perjured." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26 (1979). See also *State v. Zwillman*, 112 N.J. Super. 6, 16-17, 270 A.2d 284, 289 (1970).

25. 638 P.2d at 11.

26. *State v. Lloyd*, 48 Md. App. 535, 542, 429 A.2d 244, 248 (1981) (citing *State v. Whiteside*, 272 N.W.2d 468, 469 (Iowa 1978)). In *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977), the court stated:

If an attorney faced with this situation were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that belief, he would be violating the duty imposed upon him as defense counsel. While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client. It is the role of the judge or jury to determine the facts, not that of the attorney.

Id. at 122. One commentator notes:

[B]ecause of the unique character of the relationship between attorney

unanswered by *Schultheis*—is whether an attorney has a duty to investigate the truthfulness of testimony. Generally, it has been held that no such duty exists.²⁷

When counsel cannot dissuade his client from insisting that perjured testimony be presented, he should seek to withdraw from the case.²⁸ *Schultheis* makes it clear, however, that the lawyer's duty to seek withdrawal does not arise when he first learns of his client's intention to present false testimony but only when a serious disagreement arises as to the presentation of the testimony.²⁹ Other courts have required an attorney to withdraw upon learning of the intended perjury.³⁰ North Carolina has imposed an affirmative duty to withdraw when "an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court,"³¹ and failure to withdraw warrants censure. The *Schultheis* court points out that mandatory withdrawal is not always practical because the disagreement with the client may not take place until the

and client, a strong argument can be made that the level of certainty of wrongdoing an advocate should reach before revealing the client's alleged wrongs is even higher than the level of certainty required of the trier of fact in a criminal proceeding Unlike the trier of fact, the attorney is charged with a unique form of loyalty to his client and a special relationship to earn and maintain his client's trust The relationship between client and attorney that our system promotes is thus more than fiduciary; it also involves an acutely personal form of dependence. Great violence would be done to that relationship and the values it reflects if clients could not be confident that their lawyers would not turn against them unless their wrongdoings were completely indisputable.

Brazil, *supra* note 2, at 609.

27. Brazil, *supra* note 2, at 610. See *State v. Zwillman*, 112 N.J. Super. 6, 16, 270 A.2d 284, 289 (1970). But see *Wolfram, supra* note 2, at 843 ("The attorney should not be able to evade the responsibility of correcting false testimony by willfully remaining ignorant where known facts call for further investigation").

28. 638 P.2d at 13.

29. *Id.* In *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976), the court stated:

A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. Trial counsel, whether court-appointed or privately employed, is not the mere lackey or "mouthpiece" of his client. He is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them.

Id. at 66, 224 S.E.2d at 179.

30. See *In re Palmer*, 296 N.C. 638, 650, 252 S.E.2d 784, 791 (1979); *State v. Trapp*, 52 Ohio App. 2d 189, 194, 368 N.E.2d 1278, 1282 (1977).

31. *In re Palmer*, 296 N.C. 638, 650, 252 S.E.2d 784, 791 (1979) (attorney censured by court for failure to withdraw after his advice to tell truth was rejected by client).

time of trial and new counsel may not be immediately available without continuing the trial date.³² In addition, the *Schultheis* court reasoned that "if each successive lawyer was faced with an ethical disagreement with the accused, mandatory withdrawal would always allow the defendant an unlimited number of continuances. This situation could ultimately result in a perpetual cycle of eleventh-hour motions to withdraw."³³

When making his motion to withdraw, defense counsel should never be required to cite the specific provisions of the Code that prohibit the use of perjured testimony or false evidence.³⁴ Instead, counsel may only state that he has an irreconcilable conflict with his client.³⁵ The court reasoned that defense counsel should not "be required to divulge a privileged communication to the trial court during trial."³⁶ This part of the *Schultheis* approach is narrower than the Code's directives. While DR 4-101(B)(2) states that "a lawyer shall not knowingly use a confidence or secret of his client to the disadvantage of the client,"³⁷ DR 4-101(C)(3) states that "a lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime."³⁸ Although the Code provides that a lawyer *may* reveal his client's intentions, it does not dictate revelation.³⁹ The *Schultheis* decision is in direct opposition to the Kansas Supreme Court's

32. 638 P.2d at 14.

33. *Id.* The court also noted:

If the trial court was required to grant every motion to withdraw, new counsel might fail to recognize the problem of fabricated testimony for alibi witnesses, and false evidence would be presented to the court. Or, counsel may view his ethical obligation as requiring neither a withdrawal nor any indication that the problem of potential false evidence exists. We cannot sanction either result, for in both cases, fraud is committed upon the court.

Id. at 14-15.

34. *Id.* at 13.

35. *Id.* at 14. The court said that "although no record of the disagreement is required for the trial judge, counsel should proceed with a request for a record out of the presence of the trial judge and the prosecutor if the court denies the motion to withdraw." *Id.* This prohibition against disclosing reasons for withdrawal has received some criticism:

[S]ince the defense lawyer is prohibited from disclosing his reasons for withdrawal, denial of the motion is inevitable. Inquiry by the court into the lawyer's motives for withdrawal forces the lawyer either to disregard his confidential relationship with his client or to stand mute. In either event, the court will conclude that the defendant intends to commit perjury and, therefore, will consider the defendant's conduct an obstruction of justice.

Erickson, *supra* note 21, at 83.

36. 638 P.2d at 13.

37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(2) (1979).

38. *Id.* DR 4-101(C)(3).

39. Erickson, *supra* note 21, at 80.

decision in *State v. Henderson*:⁴⁰

We perceive nothing violative of the confidentiality inherent in the attorney-client relation by [the attorney] making known to the court the defendant's avowed intention of presenting perjured testimony. While as a general rule counsel is not allowed to disclose information imparted to him by his client or acquired during their professional relation, unless authorized to do so by the client himself, the announced intention of a client to commit perjury, or any other crime, is not included within the confidences which an attorney is bound to respect.⁴¹

Henderson seems to disregard the extreme prejudice that can result from informing a judge of the client's intention to present perjured testimony since that judge may later hear the case and sentence the defendant. As the *Schultheis* court stated, "Even when counsel makes a motion to withdraw, the defendant is always entitled to an impartial trial judge, untainted by accusations that the defendant had insisted upon presenting fabricated testimony."⁴²

If the motion to withdraw is denied, counsel should continue to represent the client without presenting the perjured testimony; such representation does not deprive the client of effective assistance of counsel.⁴³ The constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."⁴⁴ This has been interpreted to mean the right to *effective* assistance of counsel.⁴⁵ Effective assistance "contemplates the guidance of a responsible, capable lawyer devoted to his client's interests."⁴⁶ Courts are given wide discretion in determining what constitutes ineffective assistance of coun-

40. 205 Kan. 231, 468 P.2d 136 (1970). In *Henderson*, the defendant informed counsel of his intention to present perjured testimony. Counsel conveyed this intention to the judge in support of his motion to withdraw. The motion was denied, and counsel continued to represent the defendant. The court held that denial of the motion was not an abuse of discretion. *Id.* at 239, 468 P.2d at 143.

41. *Id.* at 237, 468 P.2d at 141. In *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977), the court said, "It is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate. When an attorney unnecessarily discloses the confidences of his client, he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation." *Id.* at 122.

42. 638 P.2d at 13.

43. *Id.*

44. U.S. CONST. amend. VI. This right was made applicable to the states in *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

45. The sixth amendment was so construed in *Glasser v. United States*, 315 U.S. 60, 76 (1942), where the court appraised "the quality of the defense" to determine that representation was ineffective. *See also White v. Ragen*, 324 U.S. 760, 764 (1945).

46. *State v. Henderson*, 205 Kan. 231, 237, 468 P.2d 136, 141 (1970).

sel.⁴⁷ They are extremely reluctant to second-guess an attorney's conduct at trial and usually dismiss claims of ineffective assistance at trial unless there is no reasonable basis for the attorney's acts.⁴⁸ The decision to call or not call certain witnesses is a matter of trial tactics to be determined by defense counsel.⁴⁹ A defendant cannot compel defense counsel to present witnesses whose testimony is fabricated,⁵⁰ and counsel's refusal to present the testimony does not constitute ineffective assistance of counsel.⁵¹ It is axiomatic that a client's right to effective assistance of counsel does not include the right to compel counsel to knowingly participate in the commission of perjury or the presentation of false evidence.⁵²

The Code provides general standards for attorneys faced with the perjured testimony dilemma,⁵³ but it fails to give an attorney direction when his motion to withdraw, if made, is denied.⁵⁴ Similarly, the proposed Model Rules of Professional Conduct⁵⁵ give no guidance to the attorney in his continued representation of the client.⁵⁶ *Schultheis* sets forth a step-by-

47. For an overview of the various standards in use today, see Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 493-99 (1976). See also STANDARDS FOR CRIMINAL JUSTICE §§ 4-3.6(a), 4-3.8, 4-4.1, 4-5.1 (2d ed. 1980).

48. See, e.g., *Barba-Reyes v. United States*, 387 F.2d 91, 93 (9th Cir. 1967); *Williams v. Beto*, 354 F.2d 698, 703 (5th Cir. 1965).

49. *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976).

50. *United States v. Gutterman*, 147 F.2d 540, 542 (2d Cir. 1945).

51. 638 P.2d at 12 ("defendant's constitutional right . . . does not include the right to require his lawyer to perpetrate a fraud on the court"). *Accord* *Herbert v. United States*, 340 A.2d 802, 804 (D.C. 1975).

52. *In re Palmer*, 296 N.C. 638, 650, 252 S.E.2d 784, 791 (1979) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975)).

53. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9; DR 1-102(A)(1), (4); DR 2-110(C)(1)(c); DR 4-101(B)(2), (C)(3); DR 7-102(A)(4).

54. See Note, *North Carolina's View of the Lawyer and the Perjurious Witness*, 55 N.C.L. REV. 321, 331 (1977) ("the Code is strangely silent on the subject of what the lawyer should do if permission to withdraw is denied").

55. (Proposed Final Draft 1981). The Model Rules were drafted by the ABA Commission on Evaluation and Professional Standards and are intended to be a comprehensive reformation of the current Model Code of Professional Responsibility. MODEL RULES OF PROFESSIONAL CONDUCT Introduction at 3 (Proposed Final Draft 1981), reprinted in 67 A.B.A. J. 1299 (1981). At the time of this writing, the Model Rules had not been adopted or approved by the ABA House of Delegates and do not represent the policy of the ABA. See Stark, Review Essay, 12 CONN. L. REV. 948 (1980) (reviewing MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981)).

56. The Model Rules provide: "[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (Proposed Final Draft

step approach that guides the attorney from the time he learns of his client's intent to present perjured testimony until the disposition of the trial. This approach is not only superior in the guidance it provides to attorneys, but also in balancing the attorney's loyalties to the court and to his client.

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1981). If withdrawal is denied, the Model Rules only provide that "a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id.* Rule 1.16(c).