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## Criminal Law—Defendant's Perjury and Its Effect on the Criminal Trial—*McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967)

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CRIMINAL LAW—DEFENDANT'S PERJURY AND ITS EFFECT ON THE  
CRIMINAL TRIAL—*McKissick v. United States*, 379 F.2d 754 (5th  
Cir. 1967).

Bobby Jean McKissick was arrested for dispensing drugs without a prescription in violation of Federal Law.<sup>1</sup> The trial began in the federal district court on November 23, 1965. Following McKissick's testimony on his own behalf, the jury was dismissed for the day. The judge, however, continued to question McKissick. At the conclusion of this questioning, it was apparent that there was a conflict with the testimony of the government witness and the judge commented, "This is the worst case of perjury in this case I have ever seen since I have been on the Bench; the drug agent or this witness, one, did it. I don't know who; I don't know which one of them did it."<sup>2</sup> The next morning, McKissick's attorney requested a conference with the judge in chambers. At this conference, in the presence of the prosecuting attorney,<sup>3</sup> the attorney for McKissick stated that his client had telephoned him the night before and admitted perjuring himself. The attorney indicated that he could not represent McKissick under these circumstances and moved for mistrial. The judge declared a mistrial on the grounds that the accused would be left without counsel.

McKissick was retried, beginning April 19, 1966, and received a two-year sentence. The instant decision is the result of his appeal from that verdict.

The Court of Appeals for the Fifth Circuit vacated the judgment and remanded the case for determination of several issues raised in the proceeding which ended in a mistrial.<sup>4</sup> The appellate court held that the attorney, if McKissick had informed him of the perjury, was under a duty to disclose it. The court also said that this situation, excluding the factors of confrontation of witnesses and representation by counsel, created a "manifest necessity" for declaring a mistrial since so long as the jury was influenced by the perjured

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<sup>1</sup> Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 331, 333 (1924), *as amended*, (Supp. I, 1965).

<sup>2</sup> *McKissick v. United States*, 379 F.2d 754, 758 (5th Cir. 1967).

<sup>3</sup> The decision was remanded to determine who was present at the conference. The record does indicate, however, that at least the judge, prosecuting attorney, and defense attorney were present.

<sup>4</sup> The issues to be determined on remand were: (1) Whether McKissick did tell his attorney that he had perjured himself; (2) Whether McKissick expressly or impliedly authorized his attorney to move for mistrial; (3) Whether McKissick was absent from the conference in chambers, and if absent, whether his absence was voluntary and whether he otherwise waived the right to be present; (4) If absent, and his absence was neither voluntary nor waived, whether it is clear beyond a reasonable doubt that he was not injured by such absence.

testimony, the perjury was a continuing offense. As to the perjury then, the second trial did not place McKissick in double jeopardy. The court, however, went further by stating that absent an intelligent waiver, McKissick had a right to be present at the conference in chambers, that he had a right to effective assistance of counsel, and that a denial of one of these rights would necessitate the setting aside of the conviction and discharging the defendant despite his perjury. The net effect was that while mistrial because of perjury is a matter of manifest necessity, it is not so if the court has committed a procedural error. A mistrial in this latter situation will allow the defense of double jeopardy on retrial and therefore absolutely discharge the accused.

The court has given the criminal defendant a procedural weapon in the form of perjury with which he can cause an endless number of mistrials. The McKissick court apparently felt compelled to do this for it said: "[T]he alternatives to mistrial were themselves fraught with difficulties and possible errors."<sup>5</sup> The purpose of this note is to examine these "alternatives" and attempt to develop from them an approach for avoiding the probable effect of this decision.

There are three areas of judgment in which a different decision could have avoided a mistrial. These are: (1) the requirement that an attorney disclose his client's communication of perjury; (2) the withdrawal of the attorney; (3) the determination of the case by a jury influenced by the defendant's perjured testimony.

#### I. THE ATTORNEY'S DISCLOSURE OF HIS CLIENT'S COMMUNICATION OF PERJURY

This discussion is concerned solely with the situation where an attorney's knowledge of his client's perjury is gained from the client himself and will involve the conflict between Canon 29<sup>6</sup> and Canon 37<sup>7</sup> of the Canons of Professional Ethics.<sup>8</sup> Communications gained from this relationship are governed by this rule:

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<sup>5</sup> 379 F.2d at 761.

<sup>6</sup> Canon 29 states in part: "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. . . ."

<sup>7</sup> Canon 37 states in part: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees. . . ."

<sup>8</sup> ABA CANONS OF PROFESSIONAL ETHICS (hereinafter cited as the Canons).

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.<sup>9</sup>

The reason generally given for the development of this rule is:

It is not on account of any particular importance which the law attributes to the business of legal professors, or any particular . . . disposition to afford them protection . . . But it is out of regard to the interests of justice . . . which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case.<sup>10</sup>

This rule has been given effect by Canon 37. However, the privilege of non-disclosure is not absolute. There are certain exceptions, the chief of which is knowledge of an "announced intention to commit a crime."<sup>11</sup> Mr. Justice Cardozo has best articulated this exception:

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.<sup>12</sup>

Such an exception to the general rule has also been incorporated within the Canons. Canon 29 states that an attorney having knowledge of perjury "owes a duty" to report it to the prosecuting authorities. Canon 41<sup>13</sup> says that an attorney should rectify a situation where fraud or deception has been practiced. Collectively, these three canons give credence to the non-disclosure rule, yet provide for the exception. While a cursory examination reveals no inconsistency between Canons 29, 41, and 37, closer examination raises some problems.

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<sup>9</sup> 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2292 (3d ed. 1940).

<sup>10</sup> *Greenough v. Gaskell*, 39 Eng. Rep. 618, 620-21 (Ch. 1833).

<sup>11</sup> *But cf. Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959) (dictum).

<sup>12</sup> *Clark v. United States*, 289 U.S. 1, 15 (1932).

<sup>13</sup> Canon 41 states in part: "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 . . ."

The problem is whether admission of perjury falls within the exception to Canon 37. There is some authority indicating that it does.<sup>14</sup> The *McKissick* court apparently adopts the "continuing crime" doctrine,<sup>15</sup> treating perjury by the accused as a "continuing offense"<sup>16</sup> so long as it is allowed to influence the jury's verdict. If perjury is a continuing rather than a past crime, then disclosure may be justified under the exception to Canon 37.

In the case of *In re Selser*,<sup>17</sup> an attorney was being tried on criminal contempt charges for refusing to answer questions relating to activities of his client, a notorious racketeer. The court held that answering these questions would not be a violation of privileged communications since they related to a "continuing" crime or conspiracy of bribing public officials. It would seem that the *McKissick* court has placed perjury within the purview of *Selser*. The result, of course, would be to remove the conflict between the attorney's duties under Canon 37 and under Canons 29 and 41; thus, not permitting the attorney to withhold his knowledge of the perjury and in this way avoid mistrial.

However, the rationale of *Selser* seems inapplicable. In the present case, we are dealing with only one act or crime and the only thing which continues is the effect of the perjury. The continuing aspect of *Selser* was a conspiracy to bribe public officials; seemingly contemplating future acts. It appears that even using the "continuing crime" doctrine, perjury does not fall within that doctrine nor, therefore, the exception to Canon 37. Thus, Canon 37 remains inconsistent with Canons 29 and 41.<sup>18</sup>

This inconsistency represents a dilemma to the attorney. In theory, the attorney, learning of his client's perjury, would have a choice of disclosing that fact or not. In reality, the attorney does not have a choice. The reason is that the courts have chosen protection of society's welfare over complete protection of attorney-client communications by requiring disclosure of perjury. The holding in *McKissick* is indicative of this decision. Other courts have also indicated this choice by severely sanctioning an attorney who

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<sup>14</sup> Stovall, *Aspects of the Advocate's Dual Responsibility*, 22 ALA. LAW. 66, 72 (1961).

<sup>15</sup> Starrs, *Attorneys in Doubt*, 8 CATH. LAW. 131 (1962).

<sup>16</sup> 379 F.2d at 761.

<sup>17</sup> 15 N.J. 393, 105 A.2d 395 (1954).

<sup>18</sup> ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953). But see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 155 (1936) which states that public policy does not permit the relation of attorney-client to conceal a continuing wrong.

has failed to disclose perjury.<sup>19</sup> The attorney is left, as was the attorney in *McKissick*, with no alternative to disclosure.

As mistrial cannot be avoided by allowing the attorney to conceal his knowledge of perjury, it is necessary to look to the alternatives open to the trial court.

## II. WITHDRAWAL OF THE ATTORNEY

Since the purpose of this note is to find an alternative to mistrial two questions in this area must be answered: Is it necessary for the attorney to withdraw upon disclosure? And if so, must withdrawal result in mistrial?

The requirements governing withdrawal of an attorney are found in Canon 44.<sup>20</sup> One of these requirements is "good cause", which is dependent "... largely on the circumstances at the time the lawyer deems it his duty to retire from the case or finds it desirable to do so."<sup>21</sup> Good cause can arise from any situations. For example, it may exist when an attorney has not been paid<sup>22</sup> or when he has other trial commitments and his physical condition is poor.<sup>23</sup> The other requirement of Canon 44 is notice to the defendant, especially in a criminal proceeding, that his attorney is going to withdraw. This helps insure that the defendant is not denied his constitutional right to counsel in a criminal trial. To do otherwise is reversible error.<sup>24</sup>

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<sup>19</sup> *In re Hardenbrooke*, 135 App. Div. 634, 121 N.Y.S. 250 (1st Dep't 1909), *aff'd per curiam* 199 N.Y. 539, 92 N.E. 1086 (1910); *In re King*, 7 Utah 2d 258, 322 P.2d 1095 (1958).

<sup>20</sup> Canon 44 states in part: "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. . . . If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer."

<sup>21</sup> H. DRINKER, *LEGAL ETHICS* 140 (1953).

<sup>22</sup> *Fairchild v. General Motors Acceptance Corp.*, 254 Miss. 261, 179 So. 2d 185 (1965).

<sup>23</sup> *People v. Kerfoot*, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674 (1960); *See also* 18 N. C. L. REV. 338, 340 (1940).

<sup>24</sup> The court in *Kerfoot* said: "Adequacy of notice is an element of due process of law. Where notice is required and particularly where it is extremely important to the defendant . . . there is no due process of law in the complete absence of any notice." 184 Cal. App. 2d at 636, 7 Cal. Rptr. at 683.

Although the court in *McKissick* did not discuss the requirement of notice, the trial judge probably considered it when he declared the mistrial on other grounds. It would seem that *McKissick* has provided for such notice in the future by requiring the defendant to be present in the chambers when withdrawal is requested. Assuming that the requirements of notice and good cause are met, the attorney must meet one more requirement before he may withdraw. The request for withdrawal by an attorney for any reason is addressed to the discretion of the court.<sup>25</sup> Hence, although the other requirements are met, an attorney seeking to withdraw from a case must still secure the approval of the court. In securing such approval a factor to be weighed is whether such trial is criminal or civil. It would seem more difficult to gain such approval in a criminal trial because of the possibility of double jeopardy attaching if such withdrawal resulted in mistrial.

One of the most important factors affecting the court's discretion is the stage of the proceedings at which withdrawal is requested. As was said in *Cascella v. Jay James Camera Shop, Inc.*,<sup>26</sup> "The right of counsel to withdraw from any case is a matter which rests with the sound discretion of the court, and this is particularly so where permission is sought during the course of the trial and in the absence of formal notice to the client."<sup>27</sup> Thus it appears that discretion is more restricted once the trial has begun. Withdrawal within a reasonable time before the trial begins would diminish chance of procedural errors. This is emphasized by the analogous situation of dismissal of an attorney by the client. In this regard it has been said that a defendant has an unqualified right to dismiss his attorney before trial begins because "at this stage, there was no danger of disrupting proceedings already in progress."<sup>28</sup> However, in a case where the defendant wanted to dismiss his attorney during the trial so that he could conduct his own defense, it was said that "change in representation, once proceedings in a case have begun, is necessarily *not absolute* under any and all conditions . . ."<sup>29</sup>

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<sup>25</sup> *Cascella v. Jay James Camera Shop, Inc.*, 147 Conn. 337, 160 A.2d 899 (1960). While this is a civil trial, the amount of discretion in the court's power should not vary in a criminal proceeding.

<sup>26</sup> *Id.*

<sup>27</sup> 147 Conn. at 340, 160 A.2d at 901.

<sup>28</sup> *United States v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

<sup>29</sup> *United States v. Fay*, 348 F.2d 705 (2d Cir. 1965), (emphasis added) *cert denied* 382 U.S. 997 (1966).

Assuming that all the requirements for withdrawal are met, and the request comes during the proceedings, the trial judge has several alternatives. One of them is to deny the request of withdrawal.<sup>30</sup> However, while this alleviates the problem of lack of counsel in the perjury situation, the new problem of a strained attorney-client relationship is created by the attorney's disclosure. The mystical bond of secrecy is broken and quite probably there is an air of distrust and friction. It becomes questionable whether the client's interests and rights can be effectively represented by an attorney who can neither believe his client nor show the "warm zeal" and "devotion" required by Canon 15.<sup>31</sup>

Another course, and the one followed by the trial court in *McKissick* is to grant the request and allow the attorney to withdraw. However, it does not follow that the court was right in its conclusion<sup>32</sup> that it had no choice but to declare a mistrial. It would seem rather, that a continuance might be granted, thus allowing the defendant enough time to obtain a new attorney. Such a course has been followed in the past and in at least one instance a court has said: "[A] change in counsel, or even a discharge, will usually point to a continuance."<sup>33</sup> A situation in which the attorney withdraws because his client has perjured himself surely may be added to the above instance.

While there is some authority which says that in this situation there is no alternative to declaring a mistrial,<sup>34</sup> the courts have not always been so shortsighted. In *People v. Blye*<sup>35</sup> an appointed attorney refused to allow his client to take the stand because he felt he would be condoning perjury. The court said:

If the defense counsel . . . felt that he could not in any sense vouch for the testimony of his client and that to permit him to state the facts as he saw them would be to approve perjury, the attorney could have requested the court to grant him leave to withdraw from the case and to appoint some other attorney to represent the defendant.<sup>36</sup>

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<sup>30</sup> 379 F.2d at 762.

<sup>31</sup> Canon 15 states in part: "The lawyer 'owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' . . ."

<sup>32</sup> The judge stated: "And I don't see that I have any alternative except to declare a mistrial in the case, because that leaves him without counsel insofar as this case is concerned." 379 F.2d at 758.

<sup>33</sup> *United States v. Mitchell*, 137 F.2d 1006, 1011 (2d Cir. 1943).

<sup>34</sup> See Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. REV. 65 (1965); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

<sup>35</sup> 233 Cal. App. 2d 143; 43 Cal. Rptr. 231 (1965).

<sup>36</sup> *Id.* at 149, 43 Cal. Rptr. at 235.

The apparent implication of this language is that midtrial withdrawal would not constitute grounds for a mistrial but be nothing more than cause for granting an extension of time to appoint another attorney. It is suggested that a continuance in this situation is a better result than a mistrial in that it is expedient, eliminates the possibility of double jeopardy, and helps to deny the defendant the ability to delay the trial indefinitely.

In the situation analogous to *McKissick* where the accused *directly* interfered with the proceedings by dismissing his attorney during the trial, a court has said:

It would be unfair to say no further choice [of attorney] is possible after the case is opened, but it would be just as unfair to say that when a defendant sees a strong case made against him he can immediately dismiss assigned counsel and then obtain a delay—and often a mistrial, at least where calendars are crowded—through the device of having new counsel assigned to him.<sup>37</sup>

The mere fact that the interference in *McKissick* is indirect should not bring a different result. Hence, delay in this situation should not be condoned either.

The trial judge had three alternatives: (1) to deny withdrawal of the attorney; (2) to allow withdrawal; (3) and if allowed, to grant a mistrial or continuance. It is suggested that his choice of mistrial was the least satisfactory and that the proper decision should have been a denial of the request for withdrawal or a continuance of the proceedings.

### III. THE DETERMINATION OF THE CASE BY A JURY INFLUENCED BY THE DEFENDANT'S PERJURED TESTIMONY

While the trial judge indicated that the reason for the mistrial was the withdrawal of the attorney, the appellate court justified the mistrial on other grounds. The appellate court placed its emphasis on that fact that the jury was infected with perjured testimony, and that a defendant should not have a right to possibly obtain a favorable decision based on this perjury. The court said, "Insofar as sufficiency of grounds for mistrial is concerned . . . the appellant had no constitutional right, overriding the public interest, to have his case determined by a tribunal whose processes he had himself thus frustrated and abused."<sup>38</sup> The opinion does not discuss withdrawal of the attorney as it affects a mistrial. Rather, the concept of double jeopardy of the accused on retrial runs throughout the

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<sup>37</sup> *United States v. Mitchell*, 137 F.2d 1006, 1010-11 (2d Cir. 1943).

<sup>38</sup> 379 F.2d at 761.

opinion; and the court in attempting to reason away from its application has placed perjury by the defendant as chief among the situations which create a manifest necessity for a mistrial under the doctrine of *United States v. Perez*.<sup>39</sup> A narrow interpretation of the court's language in *Perez* would lead to the conclusion that the use of perjured testimony by the jury would defeat the ends of public justice. However, it is suggested that under a broad interpretation of the language, the focus is expanded to include not only the perjured testimony; but also the future effect of the decision. By doing this, the court will consider all of the relevant circumstances; and the decision can follow that the defendant's perjured testimony should not create a manifest necessity for the reason that to hold otherwise would place an intolerable burden on the judicial system. Trial calendars would be hopelessly backlogged and criminal convictions based upon the merits of the case will become the exception and not the rule.

The *McKissick* court did not consider all of the circumstances. In concluding that perjury by the defendant creates a manifest necessity to declare a mistrial, it avoided the possibility that *McKissick* could successfully invoke double jeopardy on retrial. However, it was perhaps too pre-occupied with the particular facts of the case to realize the overall ramifications of the decision. This pre-occupation is clearly shown by the callous language of the opinion.<sup>40</sup>

The court in *McKissick* erred in placing a premium on a verdict free from perjured testimony. It is suggested the premium should be placed on justice free from a potentially infinite number of delays and mistrials. That the interest of the public in trials free from perjured testimony does not have the importance the *McKissick* court attached to it was well stated by Mr. Justice Black in *In re Michael*<sup>41</sup> where he said:

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<sup>39</sup> 22 U.S. (9 Wheat) 579 (1824). In that case, the jury could not agree on a verdict. They were discharged without the consent of the defendant or the United States attorney. On retrial, the defendant pleaded double jeopardy. In the decision of that case, the Supreme Court laid the groundwork for the modern day rule which governs the application of double jeopardy. In that opinion the court said: "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.* at 580.

<sup>40</sup> "[T]he appellant had no constitutional right, overriding the public interest to have his case determined by a tribunal whose processes he had himself frustrated and abused." 379 F.2d at 761.

<sup>41</sup> 326 U.S. 224 (1945).

All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of a fair trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must bear both truthful and false witnesses.<sup>42</sup>

Using this rationale, it would seem that a greater faith must be placed in the jury as a fact finding body; a body that is able to discern truth from falsehood. To follow the *McKissick* decision that a case should not be determined by a jury affected by the defendant's perjured testimony is, in effect, to invite perjury rather than deter it, especially in the case of a capital crime. There are better solutions. One of the most fruitful would perhaps be to place the defendant's withdrawn attorney on the stand to impeach the perjured testimony by relating the defendant's admission of perjury to the jury. This would not seem to be a violation of privileged communication since the court in requiring an attorney to disclose, has by definition, made such relevant communication unprivileged. It would seem that once a communication becomes unprivileged, its content should not be limited to specific parties such as the trial judge. Rather, its content should be known by all. Certainly this solution would tend to deter the defendant from perjuring himself and subsequently admitting it to his attorney. It would also make a mistrial based on defendant's perjury unnecessary. Another solution might be that the state, in the person of the court, simply "take a chance" that the jury will arrive at the correct verdict. Yet another solution would be to have the judge make a "fair comment" on the credibility of the testimony,<sup>43</sup> or at least have an instruction by the trial judge to the jury to disregard the previous testimony of the defendant.<sup>44</sup> Whichever solution or combination of solutions is chosen, one thing is clear; mistrial because of the defendant's perjury should be and can be avoided by a court placed in this situation.

The immediately preceding discussion has been limited to the effect of perjury by the defendant on the trial court. It has been established that a court faced with this situation may declare a mistrial without fear of double jeopardy on retrial. However, another element of the opinion must be analyzed and discussed in relation to the perjury problem. The language of the opinion which necessitates this discussion is:

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<sup>42</sup> *Id.* at 227-28.

<sup>43</sup> *Gobelny v. W. T. Cowan, Inc.*, 151 F.2d 810-12 (2d Cir. 1945).

<sup>44</sup> 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 19 (3d ed. 1940).

Insofar as sufficiency of grounds for mistrial is concerned, *pretermittting* at this point the factors of confrontation of witnesses and representation by counsel, the appellant had no constitutional right . . . to have his case determined by a tribunal whose processes he had himself thus frustrated and abused.<sup>45</sup>

This language, combined with the holding of the court that the defendant's conviction must be set aside and the defendant discharged if he was denied his constitutional right to effective assistance of counsel or his right to confront witnesses,<sup>46</sup> strongly re-emphasizes the need of avoiding a mistrial in this situation. The apparent ruling of the court is that perjury by the defendant creates a manifest necessity for declaring a mistrial and, therefore, the defendant will not be in double jeopardy on retrial. If, however, the court commits error in this proceeding, the granting of mistrial is improvident and the defendant cannot be retried. Such a holding as to the effect of procedural error amplifies the holding as to perjury. The possibility of such a combination of events clearly demonstrates the necessity for finding an alternative to mistrial.

### CONCLUSION

If a lawyer has discovered his client's intent to perjure himself, one possible solution to this problem is for the lawyer to approach the bench, explain his ethical difficulty to the judge, and ask to be relieved, thereby causing a mistrial. This request is certain to be denied, if only it would empower the defendant to cause a series of mistrials in the same fashion.<sup>47</sup>

This quote is the essence of the situation presented in *McKissick* with two exceptions. One is that the perjury has already been committed. The other is that such request for withdrawal which was "certain to be denied" was in fact granted, and with the predicted result—mistrial. Such a result must be avoided in future criminal proceedings. The question that follows is how?

There were alternatives to mistrial. The attorney, whether perjury is within the exception of Canon 37 or not, did not have a choice but disclosure. Any choice that is provided by the inconsistency in Canon 37 and Canon 29 is pre-empted by the position of the courts and their threat of sanction.

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<sup>45</sup> 379 F.2d at 761 (emphasis added).

<sup>46</sup> 379 F.2d at 762.

<sup>47</sup> Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477 (1965). A general discussion of many of the issues raised in *McKissick* may be found in *Symposium on Professional Ethics*, 64 MICH. L. REV. 1469 (1966).

Since the attorney must disclose, the remaining alternatives are for the trial court. A request for withdrawal in the situation in *McKissick* may be denied. Even if it is allowed, it would seem that a judge need not declare a mistrial. A simple continuance would provide a reasonable time for the defendant to obtain another attorney. By either a denial of the request or the granting of a continuance if the request is allowed, the mistrial problem of *McKissick* may be avoided.

Perjury by the defendant should not be permitted to effect a mistrial. Otherwise it gives a powerful weapon to a defendant who is in a hopeless situation, since, with it he may indefinitely delay his conviction by simply perjuring himself and then admitting it to his attorney. Such a result is not in the best interests of society. While it is within the discretion of the court to declare a mistrial as a manifest necessity, there are clearly better solutions which will better effectuate and benefit the interests of society.

*D. Steven Leininger '69*