

CARROLL, SS  
COOS, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

State of New Hampshire

v.

Nathaniel Kibby

14-CR-153, 14-CR-195, 15-CR-175

RENEWED MOTION TO WITHDRAW  
OBJECTION TO PROCEDURE OUTLINED IN ABA FORMAL OPINION  
87-353

FILED EX PARTE AND UNDER SEAL

Counsel for Nathaniel Kibby renews their motion to withdraw.

In the event the Court denies the renewed motion, counsel objects to the implementation of the procedure outlined in ABA Formal Opinion 87-353 ("the Opinion"), and hereby renew their request for the modified State v. Cigic<sup>1</sup> approach as outlined in the initial Motion to Withdraw.

Counsel grounds this motion in Mr. Kibby's rights to due process, a fair trial, to testify in his own defense, and to the effective assistance of counsel. N.H. Const. pt. I, art. 15; U.S. Const. Amends. V, VI, XIV. Given the subject matter, counsel files the motion ex parte and under seal, and requests that all orders relating to the motion be sealed. In the

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<sup>1</sup> 138 N.H. 313 (1994).

event that the Court declines to accept the motion ex parte and under seal, counsel ask that the Court return the motion.

As grounds, counsel for Mr. Kibby state:

1. On or about April 1, 2016, counsel filed a Motion to Withdraw or for Alternative Relief. Counsel filed the motion due to issues emanating from Rule of Professional Conduct 3.3(a)(3).

2. The Court held a hearing on April 12, 2016. It denied the motion to withdraw orally and in an order dated April 15, 2016 ("the Order"). The Court appointed Attorney Phil Utter to speak to Mr. Kibby as independent counsel. It asked Attorney Utter to speak to Mr. Kibby and defense counsel about the issues raised in the motion and then report to the Court.<sup>2</sup>

3. On May 12, 2016, Attorney Utter made his report to the Court during a hearing on the record. Attorney Utter's discussions with Mr. Kibby and trial counsel have not changed the dynamics of this situation as it stood on April 12, 2016.

4. The Court indicated at the April 12, 2016 hearing, and in the Order, that in the event a Rule 3.3 issue persisted, it would be inclined to follow the process set forth in ABA Formal Opinion 87-353, "Lawyer's Responsibility With Relation to Client Perjury," issued on April 20, 1987.

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<sup>2</sup> In a letter to the Court, Mr. Kibby cited disagreements he had with counsel over how to investigate the case and defend it at trial. Those issues are not the subject of this Motion to Withdraw.

Counsel had not read the Opinion and reserved their right to object to that process.

Renewed Motion to Withdraw

5. Given that the dynamics have not changed as a result of Attorney Utter's efforts, counsel renews the Motion to Withdraw.<sup>3</sup> As stated at the hearing on May 12, 2016 and again in a letter dated May 13, 2016 that Mr. Kibby wrote to this Court, the issue presented in this pleading is not hypothetical. Mr. Kibby intends to exercise his right to testify, and his trial counsel maintain that the testimony he intends to offer triggers counsels' obligations under Rule 3.3. Moreover, Mr. Kibby's anticipated testimony is not such that counsel can ask him some questions, but not others. Under these circumstances, Mr. Kibby does not have counsel that can effectively present this critical aspect of the defense case on his behalf.

6. In its April 15, 2016 order, the Court implied that withdrawal is not appropriate absent a breakdown of the attorney-client relationship. Order, at 4. As Mr. Kibby stated in his recent letter, a copy of which is attached to this motion, he does not agree with counsel's position that he cannot testify just like any other witness the defense may call. The dispute has caused the attorney-client relationship to break down. Mr. Kibby considers his counsel to be his "enemy," and that

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<sup>3</sup> On Mr. Kibby's behalf, Attorney Utter argued in favor of the Motion to Withdraw at the May 12, 2016 hearing.

the present circumstance, given the critical importance of Mr. Kibby's testimony, affects the relationship at its core.

7. Finally, the Court notes in its Order that this case is relatively old, and trial is very close. Order, at 5. Convictions on a fraction of the pending charges will likely cause Mr. Kibby to spend the rest of his life in prison. If withdrawal is appropriate due to the breakdown in the relationship, the interests in a fair trial with the effective assistance of counsel should yield to the inconvenience and delay caused by replacing the Public Defender.

8. For these reasons, counsel renews the Motion to Withdraw.

#### ABA Opinion Procedure

9. Counsel continues to believe that withdrawal is the appropriate remedy under the current circumstances. However, if the Motion to Withdraw is denied, counsel ask the Court to reconsider the process it set forth in its April 15, 2016 Order, i.e., the procedure dictated by the Opinion.<sup>4</sup>

10. The Opinion instructs a lawyer who learns that his client will testify falsely to counsel the client against that course of action. If the client's clearly stated intention is to testify falsely, "and the lawyer

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<sup>4</sup> As trial counsel stated at the May 12, 2016 hearing, Mr. Kibby needs to know what procedure the Court will follow well before trial so that he can consider how the Court's decision influences his decision on whether to testify at trial, and how to testify.

cannot effectively withdraw from the representation, the lawyer must either limit examination of the client to subjects on which the lawyer believes the client will testify truthfully; or, if there are none, not permit the client to testify; or, if this is not feasible, disclose the client's intention to testify falsely to the tribunal." Opinion, at 1. The approach, as explained by the Court at the May 12, 2016 hearing, requires counsel to bar the defendant from testifying, or if he does not, report to the Court each falsehood uttered by the defendant. Counsel disagrees with this portion of the Opinion.

11. The Opinion eschews the narrative approach, under which the lawyer who cannot dissuade his client from testifying falsely and who cannot withdraw calls the client to the stand so that he can give his own statement to the jury, without any questions from counsel, and without counsel arguing to the jury any testimony that the lawyer believes is false. Opinion, at 7. According to the Opinion, the narrative approach was rejected by Nix v. Whiteside, 475 U.S. 157 (1975). Opinion, at 8 ("the [Whiteside] Justices were unanimous in concluding that a criminal defendant does not have the constitutional right to testify falsely.").

12. This Court should not to follow the process set forth in the Opinion. First, because Whiteside did not testify falsely, the Whiteside Court's comments about counsel's ethical obligations when he believes a client will do are dicta. Id. at 177 ("[T]he Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he

will perjure himself is pure discourse without force of law. . . . [I]t is not an issue presented by this case.”) (Brennan, J., concurring); see also Shockley v. State, 565 A.2d 1373, 1378 (Del. 1989) (“Nix does not, however, answer the ethical question of what a lawyer must do when he knows unequivocally that his client intends to commit perjury; that question is governed by state law.”); State v. Jones, 923 P.2d 560, 565 (Mont. 1996) (characterizing Whiteside majority’s comments about counsel’s ethical obligations as dicta).

13. Second, the approach is not mandated by the ethical rules. See McKoski, Prospective Perjury by a Criminal Defendant: It’s All About the Lawyer, 44 Ariz. St. L. J. 1575, 1631-32 (Winter 2012) (“[T]here is nothing in Model Rule 3.3 or the comments accompanying the Rule remotely indicating that barring a defendant from testifying is an ‘appropriate solution’ to the prospective client perjury problem.”).

14. Third, courts have agreed that while the Whiteside majority was skeptical of the narrative approach, it did not, as the Opinion claims, reject that approach. People v. Johnson, 72 Cal. Rptr. 2d 805, 814 n.16 (Cal. App. 1998); State v. McDowell, 681 N.W.2d 500, 514 n.18 (Wis. 2004); see also Wilkins v. Scribner, 263 Fed. App. 638, 639-640 (9th Cir. 2008) (unpublished opinion) (noting that narrative approach is a viable option to avoid ethical issues under Whiteside). To the contrary, the narrative approach is the most commonly method of dealing with the so-called “client perjury” issue. See, e.g., United States v. Long, 857 F.2d

436, 446 (3rd Cir. 1988) (endorsing narrative approach); Johnson, 72 Cal. Rptr. 2d at 817 (“[W]e believe the narrative approach represents the best accommodation of the competing interests of the defendant’s right to testify and the attorney’s obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role.”); Shockley, 565 A.2d at 1378-80 (collecting cases; noting that narrative approach continues to predominate after the Opinion); Sanborn v. State, 474 So. 2d 309, 313 (Fla. App. 1985) (endorsing narrative approach); Miller v. State, 764 S.E.2d 135, 140 (Ga. 2014) (same) (citing Foster v. Smith, 2014 U.S. Dist. LEXIS 39418 \*32 (W.D. Mich. 2014)) (collecting cases); Brown v. Commonwealth, 226 S.W.3d 74, 84 (Ky. 2007) (“It is also appropriate for the defendant to present the contested testimony in narrative form, in his attorney’s presence, and with the attorney continuing to represent him by making appropriate objections on cross-examination regarding portions of the testimony she does not believe to be perjured.”); People v. DePallo, 754 N.E.2d 751, 754-55 (Ct. App. N.Y. 2001) (“The lawyer’s actions [in moving to withdraw and having his client present a narrative] properly balanced the duties he owed to his client and to the court and to the criminal justice system. . . .”); State v. Layton, 432 S.E.2d 740, 755 (W. Va. 1993) (narrative approach is proper); McDowell, 681 N.W.2d at 514 n. 18 (collecting cases that

endorse narrative approach). The approach endorsed by the Opinion and selected by this Court has not, to counsel's knowledge, been embraced by any court.

15. Finally, the approach fails to achieve a balance between the defendant's trial rights and counsel's ethical obligations. Johnson, 72 Cal. Rptr. 2d at 815 ("[T]his approach, while safeguarding the attorney's ethical obligations not to participate in presenting perjured testimony, results in a complete denial of the defendant's right to testify."). The approach, as conceived by the Court, eviscerates the attorney-client relationship. Counsel will either bar Mr. Kibby from testifying, or put him on the stand and notify the Court (and presumably the State) of every alleged false statement he makes. At that point, counsel functions as Mr. Kibby's prosecutor rather than an advocate guaranteed him under the Sixth Amendment and Part I, Article 15.

16. As counsel stated in his first Motion to Withdraw, the narrative approach has its own problems.

The narrative approach has also been criticized as communicating to the jury that the defendant is committing perjury. One court has stated, "This procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable." State v. Robinson, 224 S.E.2d 174, 180 (N.C. 1976). Another commentator has stated: "by telegraphing her own belief in the inaccuracy of the accused, the defendant's lawyer arguably violates the ethical prohibitions against counsel serving as a witness and against expressing a personal opinion about the client's

'credibility . . . or . . . guilt or innocence' and also contravenes the evidentiary restrictions on opinion evidence and on testimony presented without oath or affirmation or the laying of a proper foundation." (Silver, Truth, Justice, and the American Way: The Case Against the Client Perjury Rules, supra, 47 Vand. L.Rev. 339, 422, fns. omitted.)

Johnson, 72 Cal. Rptr. 2d at 814.

17. Counsel, therefore, urge the Court to adopt the approach premised, by analogy, on Cigic. Rule 3.1 precludes a lawyer from raising a frivolous issue. R. Prof. Cond. 3.1 ("A lawyer shall not . . . assert [an issue] unless there is a basis in law in fact for doing so that is not frivolous. . . ."). Before Cigic, a lawyer who briefed an issue which she believed had no realistic chance of success thus would have committed professional misconduct. In Cigic, where other options existed, the Supreme Court balanced the defendant's rights and counsel's ethical obligations, carving out an exception to the ethical rules to protect the defendant's interests. Cigic, 138 N.H. at 318 ("[I]t is our view that the procedure we adopt here . . . does not diminish a defendant's right to zealous advocacy."). Allowing Mr. Kibby to testify in a normal directed fashion, assisted by counsel eliminates the awkwardness associated with the narrative presentation and permits the defendant to address the jury. Accordingly, this process - like that in Cigic - represents a balance between conflicting interests while preserving the defendant's ability to address the jury, and to have assistance of counsel.

### Conclusion

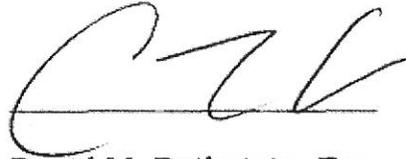
18. There is no "good solution" to the dilemma faced by trial counsel. The solution offered by the Opinion, however, is not compelled by Rule 3.3, is not endorsed by courts, and results in the abrogation of one of the defendant's core trial rights. If enforced, this option would prevent Mr. Kibby from testifying, in violation of his rights to due process and a fair trial, and would result in the dissolution of his relationship with his attorneys, in violation of his right to the effective assistance of counsel. N.H. Const. pt. I, art. 15; U.S. Const. Amends. V, VI, XIV.

WHEREFORE, Mr. Kibby respectfully requests that this Honorable Court:

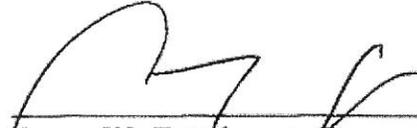
- a.) Grant his motion to withdraw; or
- b.) Reconsider its decision to employ the approach to client testimony espoused by ABA Formal Opinion 87-353; and
- c.) Permit counsel to proceed under the modified Cigic approach outlined in this motion and in his first Motion to Withdraw.

Counsel respectfully requests that the Court issue an order on this matter before trial, so Mr. Kibby can know what process the Court will employ as he decides whether he will exercise his right to testify at trial.

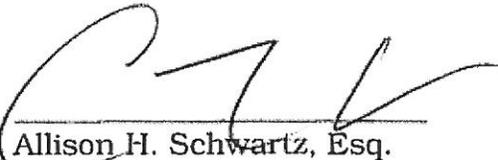
Respectfully submitted,



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