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Perjury: The Lawyer'sTrilemma

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by Monroe H. Freedman

Is it ever proper for a lawyer to present perjured testimony?

One's instinctive response is in the negative. On analysis, however, it becomes apparent that the question is exceedingly perplexing. In at least one situation, that of the criminal defense lawyer, my own answer is in the affirmative.

At the outset, we should dispose of some common question-begging responses. The attorney, we are told, is an officer of the court participating in a search for truth. Those propositions, however, merely serve to state the problem in different words: As an officer of the court, participating in a search for truth, what is the attorney obligated to do when faced with perjured testimony? That question cannot be answered properly without an appreciation of the fact that the attorney functions in an adversary system of justice which imposes three conflicting obligations upon the advocate. The difficulties presented by these obligations are particularly acute in the criminal defense area because of the presumption of innocence, the burden on the state to prove its case beyond reasonable doubt, and the right to put the prosecution to its proof.

First, the *ABA Standards Relating to the Defense Function* requires the lawyer to determine all relevant facts known to the accused, because "counsel cannot properly perform their duties without knowing the truth." The lawyer who is ignorant of any potentially relevant fact "incapacitates himself to serve his client effectively," because "an adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial."

Second, the lawyer must hold in strictest confidence the disclosures made by the client in the course of the professional relationship. The *Standards* admonish that "nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence," and that the "first duty" of an attorney is "to keep the secrets of his clients." If this were not so, the client would not feel free to confide fully, and the lawyer would not be able to fulfill the obligation to ascertain all relevant facts. Accordingly, counsel is required to establish a relationship of trust and confidence, to explain the necessity of full disclosure of all facts, and to explain to the client the obligation of confidentiality which makes privileged the accused's disclosures.

Third, Canon 22 of the *Canons of Professional Ethics* tells us that the lawyer is an officer of the court, and his or her conduct before the court "should be characterized by candor."

Defining the Trilemma

As soon as one begins to think about those responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.

Before addressing the issue of the lawyer's responsibilities when the client indicates to the lawyer the intention to commit perjury in the future, we might note the somewhat less difficult question of what the lawyer should do when knowledge of the perjury comes after its commission rather than before it. The relevant provision of the new *Code of Professional Responsibility* is Disciplinary Rule 7-102(B)(1). As originally drafted, in 1969, that provision is in two clauses—a main clause and an "and if" clause. The main clause provides that when the lawyer learns that a client has "perpetrated a fraud upon a person or tribunal," the lawyer "shall promptly call upon his client to rectify" the fraud. The second clause reads: "and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or

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tribunal." Thus, the American Bar Association at first took a position unambiguously in favor of disclosure by the lawyer contrary to the client's interest and in violation of confidentiality.

The District of Columbia was the first jurisdiction in the United States in which the practicing bar focused upon that particular provision and passed judgment upon it specifically. On my motion, DR 7-102(B)(1) was amended when the *Code* was adopted in the District to delete the "and if" clause entirely. On a mail referendum of the bar, the amendment carried by seventy-four percent of the vote, or virtually three to one. Similarly, the Quebec Bar Association, which has adopted substantial portions of the *ABA Code*, has rejected DR 7-102(B)(1). In addition, the Law Society, which oversees the conduct of solicitors in England, has taken the position that a solicitor must maintain confidentiality even upon learning from the client after the conclusion of a civil case that a witness has been paid by the client to commit perjury. Finally, the ABA itself recognized the impropriety of requiring a breach of confidentiality. In 1974, the ABA added a third clause to DR 7-102(B)(1), so that the attorney is called upon to reveal the client's fraud "except when the information is protected as a privileged communication."

Entirely apart from any consensus of the bar relative to civil practice, however, divulgence by the defense attorney in a criminal case would be controlled by such constitutional provisions as the right to counsel, the privilege against self-incrimination, the right to trial by jury and the right to due process. The *ABA Code*, even in the original draft of DR 7-102(B)(1), states flatly that that provision "is construed as not embracing the giving of false testimony in a criminal case." That is, even in those jurisdictions that may not yet have adopted the ABA's amendment to DR 7-102(B)(1), that clause does not apply to the criminal defense lawyer.

Misleading First Reading

Where the lawyer has foreknowledge of perjury, another section of the *Code* appears, at first reading, to be unambiguous. According to DR 7-102(A)(4), a lawyer must not "knowingly use perjured testimony or false evidence." The difficulty, however, is that the *Code* does not indicate how the lawyer is to go about fulfilling that obligation. What if the lawyer advises the client that perjury is unlawful and, perhaps, bad tactics as well, but the client nevertheless insists upon taking the stand and committing perjury? What steps, specifically, should the lawyer take? Just how difficult it is to answer that question becomes apparent if we review the relationship between lawyer and client as it develops, and consider the contexts in which the decision to commit perjury may arise.

If we recognize that professional responsibility requires that an advocate have full knowledge of every pertinent fact, then the lawyer must seek the truth from the client, not shun it. That means that the attorney will have to dig and pry and cajole, and, even then, the lawyer will not be successful without convincing the client that full disclosure to the lawyer will never result in prejudice

to the client by any word or action of the attorney. That is particularly true in the case of the indigent criminal defendant, who meets the lawyer for the first time in the cell block or the rotunda of the jail. The client did not choose the lawyer, who comes as a stranger sent by the judge and who therefore appears to be part of the system that is attempting to punish the defendant. It is no easy task to persuade such a client to talk freely without fear of harm.

However, the inclination to mislead one's lawyer is not restricted to the indigent or even to the criminal defendant. Randolph Paul has observed a similar phenomenon among a wealthier class in a far more congenial atmosphere. The tax adviser, notes Mr. Paul, will sometimes have to "dynamite the facts of his case out of the unwilling witnesses on his own side—witnesses who are nervous, witnesses who are confused about their own interest, witnesses who try to be too smart for their own good, and witnesses who subconsciously do not want to understand what has happened despite the fact that they must if they are to testify coherently." Mr. Paul goes on to explain that the truth can be obtained only by persuading the client that it would be a violation of a sacred obligation for the lawyer ever to reveal a client's confidence. Of course, once the lawyer has thus persuaded the client of the obligation of confidentiality, that obligation must be respected scrupulously.

Illustrating the Trilemma

Assume the following situation. Your client has been

falsely accused of a robbery committed at 16th and P Streets at 11:00 p.m. He reveals to you that he was at 15th and P Streets at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 p.m., he was six blocks away. At the trial, there are two prosecution witnesses. The first mistakenly, but with some degree of persuasiveness, identifies your client as the criminal. The second prosecution witness is an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 p.m. She has corroborated the erroneous testimony of the first witness and made conviction extremely likely.

The client then insists upon taking the stand in his own defense, not only to deny the erroneous evidence identifying him as the criminal, but also to deny the truthful, but highly damaging, testimony of the corroborating witness who placed him one block away from the intersection five minutes prior to the crime. Of course, if he tells the truth and thus verifies the corroborating witness, the jury will be more inclined to accept the inaccurate testimony of the principal witness, who specifically identified him as the criminal.

In my opinion, the attorney's obligation in such a situation would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward. Any other course would be a betrayal of the assurances of confidentiality given by the attorney to induce the client to reveal everything, however damaging it might appear.

A frequent objection to the position that the attorney must go along with the client's decision to commit perjury is that the lawyer would be guilty of subornation of perjury. Subornation, however, consists of willfully procuring perjury, which is not the case when the attorney indicates to the client that the client's proposed course of conduct would be unlawful, but then accepts the client's decision. Beyond that, there is a point of view, which has been expressed to me by a number of experienced attorneys, that the criminal defendant has a "right to tell his story." What that suggests is that it is simply too much to expect of a human being, caught up in the criminal process and facing loss of liberty and the horrors of imprisonment, not to attempt to lie to avoid that penalty. For that reason, criminal defendants in most European countries do not testify under oath, but simply "tell their stories." It is also noteworthy that subsequent perjury prosecutions against criminal defendants in this country are extremely rare, being used almost exclusively in cases in which the prosecutor's motive is questionable.

Collateral Witnesses

The discussion thus far has focused only on the lawyer's obligation when the perjury is presented by the client. Some authorities indicate a distinction between perjury by the criminal defendant who has a right to take the stand, and perjury by collateral witnesses. I agree that there is an important distinction, and that the case involving collateral witnesses is not at all as clear as that involving the client alone. In one criminal case, however, a new trial was ordered when the trial court discovered that the defendant's attorney had refused to put on the defendant's mother and sister because he was concerned about perjury. Certainly a spouse or parent would be acting under the same human compulsion as a defendant, and I find it difficult to imagine myself denouncing my client's spouse or parent as a perjurer and, thereby, denouncing my client as well. I do not know, however, how much wider that circle of close identity might be drawn.

The most obvious way to avoid the ethical difficulty of the trilemma is for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney. The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be and withhold incriminating information or the fact of guilt from the new attorney. And, of course, in a substantial number of cases, the courts will not permit counsel to withdraw.

In terms of professional ethics, the practice of withdrawing from a case under such circumstances is difficult to defend, since the identical perjured testimony will ultimately be presented. Moreover, the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but loses it in the very act of evading the ethical problem.

Another unsuccessful effort to deal with the problem appears in the *ABA Standards Relating to the Defense Function.* The *Standards* first attempt to solve the problem by a rhetorical attack, unsupported by practical analysis or verifiable research, upon those who are concerned with maintaining confidentiality. Thus, the *Standards* state that it has been "universally rejected by the legal profession" that a lawyer may be excused for acquiescing in the use of known perjured testimony on the "transparently spurious thesis" that the principle of confidentiality requires it. While "no honorable lawyer" would accept that view and "every experienced advocate can see its basic fallacy as a matter of tactics apart from morality and law," the "mere advocacy" of such an idea "demeans the profession and tends to drag it to the level of gangsters and their 'mouthpiece' lawyers in the public eye." The *Standards* conclude that that concept is "universally repudiated by ethical lawyers," although that fact does not fully repair the "gross disservice" done by the few who are "unscrupulous" enough to practice it.

Obligations of Confidentiality

At a later point, however, the *Standards* express a very different assessment of lawyers' attitudes regarding perjury by the client. Although "some lawyers" are said to favor disclosure of the perjury, the *Standards* recognize that other attorneys (not characterized in pejorative terms) hold that the obligation of confidentiality does not permit disclosure of the facts learned from the client. To disclose the perjury, it is noted, "would be inconsistent with the assurances of confidentiality which counsel gave at the outset of the

lawyer-client relationship." Thus, the *Standards* acknowledge a genuine "dilemma" in the forced choice between candor and confidentiality.

Since there are actually three obligations that create the difficulty—the third being the attorney's duty to learn all the facts—there is, of course, another way to resolve the difficulty. That is, by "selective ignorance." The attorney can make it clear to the client from the outset that the attorney does not want to hear an admission of guilt or incriminating information from the client. According to the *Standards*, that tactic is "most egregious" and constitutes "professional impropriety." On a practical level, it also puts an unreasonable burden on the unsophisticated client to select what to tell and what to hold back, and it can seriously impair the attorney's effectiveness in counseling the client and in trying the case.

The question remains: What should the lawyer do when faced with the client's insistence upon taking the stand and committing perjury? It is in response to that question in criminal cases that the *Standards* present a most extraordinary solution, which, to my knowledge, has never been advocated by anyone other than Chief Justice Burger (who served as chairman in preparing the *Standards*): If the lawyer knows that the client intends to commit perjury, the lawyer "must confine his examination to identifying the witness as the defendant and permitting him to make his statement." The lawyer "may not engage in direct examination of the defendant . . . in the conventional manner" and, moreover, "may not later . . . recite or rely upon the false testimony in his closing argument."

It is difficult to imagine a more unprofessional and irresponsible proposal. The first objection is a purely practical one: The prosecutor might well object to testimony from the defendant in narrative form rather than in the conventional manner, because it would give the prosecutor no opportunity to object to inadmissible evidence prior to the jury's hearing it. The *Standards* provide no guidance as to what the defense attorney should do if the objection is sustained.

The Jury's Assumptions

More importantly, experienced trial attorneys have often noted that jurors assume that the defendant's lawyer knows the truth about the case, and that the jury will frequently judge the defendant by drawing inferences from the attorney's conduct in the case. There is, of course, only one inference that can be drawn if the defendant's own attorney turns his or her back on the defendant at the most critical point in the trial, and then, in closing argument, sums up the case with no reference whatsoever to the fact that the defendant has testified or to the evidence presented in that testimony. Ironically, the *Standards* reject any solution that would involve informing the judge, but then propose a solution that, as a practical matter, succeeds in informing not only the judge but the jury as well.

It would appear that the *ABA Standards* have chosen to resolve the trilemma by maintaining the requirements of complete knowledge and of candor to the court, and sacrificing confidentiality. Interestingly, however, that may not in fact be the case. I say that because the *Standards* fail to answer a critically important question: Should the client be told about the obligation the *Standards* seek to impose on the attorney? That is, the *Standards* ignore the issue of whether the lawyer should say to the client at the outset of their relationship, "I think it's only fair that I warn you: If you should tell me anything incriminating and subsequently decide to deny the incriminating facts at trial, I would not be able to examine you in the ordinary manner or to argue your untrue testimony to the jury." The Canadian Bar Association, for example, takes an extremely hard line against the presentation of perjury by the client, but it also explicitly requires that the client be put on notice of that fact. Obviously, any other course would be a gross betrayal of the client's trust, since everything else said by the attorney in attempting to obtain complete information about the case would indicate to the client that no information thus obtained would be used to the client's disadvantage.

On the other hand, the inevitable result of the position taken by the Canadian Bar Association would be to caution the client not to be completely candid with the attorney. That, of course, returns us to resolving the trilemma by maintaining confidentiality and candor, but sacrificing complete knowledge—a solution which, as we have already seen, is denounced in criminal cases by the *Standards* as "unscrupulous," "most egregious," and "professional impropriety."

Thus, the *Standards*, by failing to face up to the question of whether to put the client on notice, take us out of the trilemma by one door only to lead us back by another.

The jury can draw only one inference when the attorney sums up the case with no reference to his client's testimony.

Earlier we noted that the *Code of Professional Responsibility* appears to be unambiguous in proscribing the known use of perjured testimony, but that the *Code* does not indicate how the lawyer is to go about fulfilling that obligation. Analysis of the various alternatives that have been suggested shows that none of them is wholly satisfactory, and that some are impractical and violate basic rights of the client. In addition, the *ABA Standards* rely upon unsupported assertions of what lawyers "universally" think and do. It is therefore relevant and important to consider the actual practices of attorneys faced with the ethical issue in their daily work.

A survey conducted among lawyers in the District of Columbia is extremely revealing. The overall conclusion is that "less than five percent of practicing attorneys

queried consistently acted in a manner the legal professional claims that members of the Bar act, and, under the new *Code of Professional Responsibility*, demands that they act." Specifically, when asked what to do when the client indicates an intention to commit perjury, ninety-five percent of the attorneys responding indicated that they would call the defendant and ninety percent stated that they would question the witness in the normal fashion.

A Gross Discrepancy

That rather gross discrepancy between published standards and professional action is perhaps best explained by attorneys' reactions to being asked to participate in the survey. Virtually all of the attorneys personally interviewed refused to make an on-the-record statement, although without exception they eagerly cooperated and were willing to participate in an anonymous interview.

Senior partners of two of Washington's most prestigious law firms, after refusing to allow the circulation of the questionnaire among the firm's members, permitted personal interviews on the condition that neither their names, names of the other members in the firm interviewed, nor the name of their firm would be published. Both attorneys, after apologizing for their insistence upon anonymity, explained that many of the local judges with whom they dealt daily would not look favorably upon their true views about the role of the defense attorney in a criminal case, especially if aired publicly. Their reason for not complying with the ABA's rules relating to the presentation of perjury was that those standards would compromise their role as advocates in an adversary system.

Complying with ABA rules on presenting perjured testimony conflicts with the obligation of advocates in the adversary system.

In view of those findings, which stem in substantial part from the impracticality of the published standards, we might return to the relevant provisions of the Code with a somewhat more critical eye to consider whether the rules really mean what they appear at first reading to say.

The cases cited by the codifiers provide important clues as to what is intended. The strongest of the cases against confidentiality is *In re Carroll*, 244 S.W.2d 474 (Ky. 1951), which held that an attorney "should not sit by silently and permit his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party." Two important observations can be made about that case. First, it was not a criminal case, but involved a divorce. Second, the husband, whom the attorney represented, testified that he did not own certain property, but the same attorney had been authorized by the husband to claim ownership of the property in another judicial proceeding. Thus, the bond of confidentiality had already been loosened by the client's authorization. Third, assuming that *Carroll* does stand as unqualified authority for divulgence, it is significant that the case is cited as a footnote to an Ethical Consideration (which is only "aspirational in character") and not a Disciplinary Rule (which is "mandatory in character," stating a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action"). The case citation to the applicable Disciplinary Rule, DR 7-102, is significantly different. That case, *Hinds v. State Bar*, 19 Cal. 2d 87 (1941), also involved a divorce rather than a criminal matter. In addition, the attorney had participated in preparing the perjured affidavit that was at issue. Finally, the attorney was shown to have altered the client's deed to make the attorney's daughter a grantee and apparently perjured himself in testifying in connection with the disciplinary proceeding. Putting the *Carroll* and *Hinds* cases together, therefore, we may infer that the rule—in civil cases—is that an attorney is urged, though not required, to divulge the client's fraud on the other party, at least when the client has authorized disclosure of the truth for other purposes, but the attorney is required to divulge the client's perjury, under sanction of disciplinary action, only when the attorney has participated in creation of the perjury.

There is another relevant citation in the notes to Canon 7. That case, unlike *Carroll* and *Hinds*, is a criminal case. *Johns v. Smyth*, 176 F. Supp. 949 (E.D.Va. 1959). *Johns* is in a note to the opening sentence of Ethical Consideration 7-1, which reads: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law, which includes Disciplinary Rules* . . . ." The case held that a defendant's constitutional rights had been violated because the attorney, believing his client to be guilty, did not argue the case in the ordinary manner.

Taking into account, therefore, the lack of practical guidance in the *Code*, the practical and constitutional difficulties encountered by any of the alternatives to strict maintenance of confidentiality, the consensus and the practice of the bar, and the implications of *Carroll*, *Hinds*, and *Johns*, which are the three key cases cited in the notes to Canon 7, I continue to stand with those lawyers who hold that the lawyer's obligation of confidentiality does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself. What that means—necessarily, it seems to me—is that, at least the criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.