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Ethical Problems Involved in Undercover Operations Against Lawyers—The Congressional Testimony of Monroe Freedman

I. Written Testimony of Professor Monroe H. Freedman Before the Subcommittee on Criminal Law United States Senate Committee on the Judiciary Regarding *S. 804—Undercover Operations Act* May 16, 1984

Mr. Chairman, and Members of the Subcommittee:

Thank you for inviting me to testify regarding S. 804—The Undercover Operations Act. I have been asked to provide relevant biographical information and have done so in a footnote.[1]

My principal concern with S. 804 relates to undercover operations directed against corruption in the administration of justice. I do not mean that such investigations necessarily raise more serious problems than those directed against, say, political organizations, religious groups, or news agencies; indeed, some of my suggestions may be applicable to those areas as well. As one who has a particular interest in the professional responsibilities of lawyers and judges, however, I believe that I can be most useful to the Committee by focusing on that area.

A. The Special Need For Undercover Operations against Lawyers and Judges

There is surely no need to belabor the importance of integrity in the administration of justice, or the necessity to pursue any corruption vigorously. At the same time, we must recognize that undercover operations directed against lawyers and judges, if inadequately controlled, could have an even more severe impact on the administration of justice than whatever corruption exists.

1. Monroe H. Freedman is Professor of Law and former Dean of Hofstra University Law School. He has testified on several occasions before the Judiciary Committees of the United States Senate and House of Representatives, and has qualified as an expert witness on lawyers' ethics in federal and state proceedings, serving in one case as an expert on behalf of the United States Department of Justice. He has been chairman of three committees on legal ethics, and a member of the Governing Board of the District of Columbia Bar. He was also Reporter and principal draftsman of the *American Lawyers' Code of Conduct*, and his book, *Lawyers' Ethics in an Adversary System*, won the American Bar Association's Gavel Award Certificate of Merit. Professor Freedman also served as legislative consultant to Senator John L. McClellan.

I would like to be able to say that undercover operations are unnecessary because the bar is effectively policing lawyers and judges. That is not so. For example, the Code of Professional Responsibility is in force, substantially, in most jurisdictions in the United States. Disciplinary Rule 1-103(A) of that Code requires a lawyer to report unprivileged knowledge of dishonesty on the part of another lawyer. Yet that essential self-policing requirement has never to my knowledge been enforced. Also, in the District of Columbia, DR 1-103(A) was denounced as an "informer" provision, and the requirement to reveal dishonesty by another lawyer was deleted from the Code by a substantial majority vote of the bar.

In addition, the Code affords judges a special solicitude. Even if a lawyer has knowledge of judicial corruption, under DR 1-103(B) the lawyer is required to reveal that knowledge only upon "proper request" of an authorized investigatory agency. That is, in the absence of a specific request, lawyers are permitted to withhold knowledge of judicial corruption.[2]

Of necessity, moreover, the disciplinary rules relate to the limited situation in which a lawyer has received knowledge of dishonesty. There is not, nor should there be, a rule requiring lawyers to investigate each other, or judges, in order to seek out evidence of dishonest conduct.

If, therefore, we are to take seriously the problem of corruption in the administration of justice—and we must—there are going to be situations in which undercover operations are the only way to go about it. If there is probable cause to believe that a judge is soliciting bribes, that a lawyer is suborning (that is, corruptly inducing) perjury, or that a lawyer is manufacturing false claims and filing fraudulent complaints, then an undercover operation may be the only method to obtain the necessary proof to support a prosecution. Also, such an operation, to be successful, may require sham cases,[3] the filing of fraudulent claims, and the presentation of false testimony.[4]

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2. The proposed Model Rules of Professional Conduct, Rule 8.3, would require a lawyer to inform the appropriate authority about dishonesty on the part of judges as well as lawyers. However, Rule 8.2 would have a chilling effect on any lawyer contemplating informing on a judge. Also, there is no reason to believe that the proposed rule would be enforced any more vigorously or effectively than the present one.

3. For an illustration of a sham case, and the delicate issues that may be raised, see the careful opinion of Judge William G. Young of the Massachusetts Superior Court in Commonwealth v. Shulman (attached as Appendix A).

4. It is nonsensical to suggest that a prosecutor who presents false testimony as a necessary part of an undercover operation is knowingly using perjured testimony

B. The Special Dangers of Undercover Operations against Lawyers and Judges

The dangers to the administration of justice that are presented by undercover operations against lawyers and judges would be difficult to overstate. I frequently speak to bar groups throughout the country, and discussion turns, almost invariably, to anxieties about sting operations directed against lawyers. Those discussions have convinced me that the possibility that a lawyer in any case may be facing a sham client in an undercover role has already had a chilling effect upon the effective assistance of counsel to which clients are entitled under the Sixth Amendment.

I have found lawyers who, in their interviews with clients, are fearful of being quoted (or tape-recorded) out of context; lawyers who are fearful of seeking to gain a client's trust by words of sympathetic understanding that might later be distorted and misconstrued; and lawyers who are so intent upon covering their own flanks that their professional obligation of zealous dedication to the client's cause has been compromised. I have also seen significant evidence that some criminal defense lawyers have become fearful of offending prosecutors by vigorous representation of their clients.

When the right to counsel is thus impaired, other fundamental rights suffer. In criminal cases, denial of effective assistance of counsel results in the loss of due process of law and of equal protection of the laws, impairs the right to trial by jury, and may cause the loss of the privilege against self-incrimination, rights of autonomy, and protection against unlawful search and seizure. In a civil case, the client may also be deprived of the First Amendment right to petition for redress of grievances through the judicial system.

Thus, the devastating impact of undercover operations against lawyers are already being felt in the administration of justice, and the deleterious effects on some of our most precious rights are potentially enormous.

Other serious problems in the administration of justice are exacerbated by inadequately controlled under-cover operations against lawyers and judges. Justice Robert Jackson (a former Attorney General) referred to the discretion to investigate as "the most dangerous power of the prosecutor," because it enables the prosecutor to "pick people he

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or false evidence within the meaning of DR 7-102(A)(4). One might as well charge a firefighter with arson for setting a backfire to contain a forest fire.

thinks he should get rather than pick cases that need to be prosecuted." Thus, law enforcement "becomes personal," with the risk that "the real crime becomes that of being . . . personally obnoxious to or in the way of the prosecutor himself."[5] Since those words were spoken, we have seen a "Get Hoffa Squad" in the Department of Justice and an Enemies List drawn up in the White House.

It is realistic, therefore, to be deeply concerned about abuses of prosecutorial discretion to target those who are "in the way of the prosecutor himself"—a group that could well include judges who are conscientious in respecting the constitutional rights of criminal defendants, and defense lawyers who are zealous in representing their clients. Serious conflict-of-interest problems are raised, therefore, whenever a prosecutor's office initiates an undercover operation against a judge before whom members of that office have lost motions or cases, or against a lawyer who has defended clients prosecuted by that office.

Other common problems of prosecutors' professional responsibilities are heightened in such cases. As this Committee has seen, unlawful leaks to the press of secret grand jury information, and other prejudicial pretrial publicity, can be most severe in cases of undercover operations.[6] In Operation Greylord, for example, there were a number of grand jury leaks to the press, and United States Attorney Dan K. Webb held a dramatic pretrial press conference in which he condemned the defendants-to-be without due process, and unethically vouched for the probity of the witnesses he would be producing at trial.

Also, incomplete tape recordings of conversations between lawyers and clients can be particularly misleading when taken out of the full context of complex lawyer-client dialogues that may have extended over many weeks, or even years. For example, a lawyer who is properly reminding a forgetful or inarticulate client of facts related by the client in an earlier interview, may well appear, on a partial tape recording, to be prompting the client to testify falsely. Lawyers who are concerned about undercover investigations will therefore be inhibited in fulfilling their professional responsibilities.

"Trading up"—where a prosecutor bribes a defendant or a convict with leniency in exchange for evidence against someone whom the

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5. Address by Justice Jackson, Second Annual Conference of U.S. Attorneys, April, 1940.

6. It is no doubt futile to hope that a United States Attorney will conduct a sting operation in his or her own office, to identify the sources of grand jury leaks and other improper pretrial publicity.

prosecutor wants to get—is a particularly vicious practice when it involves turning a client against his lawyer. The inducements to false testimony are often overwhelming, the reliability of the testimony under such circumstances is highly suspect,[7] and the adverse impact on the lawyer-client relationship in general, as a result of even one such case, could be considerable.

C. Proposed Revisions of S. 804

Remarks at the outset of this testimony should have made it clear that I consider some undercover operations against lawyers and judges to be necessary to maintain integrity in the administration of justice. I therefore agree with the goals of the sponsors of S. 804. In addition, I admire the conscientious effort they have made to cope with the awesome problems involved in such a complex and delicate matter. I believe, however, that certain additional safeguards should be included in the Undercover Operations Act, at least with respect to investigations directed against lawyers and judges.

The standard expressed in §§ 3803(a)(3) and (4) of S. 804 is a sound and essential one: there must be a finding of "*probable cause* to believe that the operation is *necessary* to detect or prevent specific acts of criminality" before certain undercover activities may be undertaken. (Emphasis added) The activities properly subject to that standard include infiltration of a court and situations in which a government agent, informant, or cooperating individual "will pose as an attorney . . . and there is a significant risk that another individual will enter into a confidential relationship with that person. . . ."

In addition, §§3803(b)(6) through (9) prevent the head of a field office from conducting undercover operations on mere "reasonable suspicion" in similar circumstances posing threats to the proper administration of justice. In particular, § 3803(b)(7) relates to a situation in which an undercover employee or cooperating individual "will attend a meeting between a subject of the investigation and his lawyer."

Those are necessary and wise provisions. Yet serious problems remain, of both procedure and substance.

For example, the only oversight with respect to exercise of pro-

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7. Witnesses who are found to have given false evidence in support of a prosecution are virtually never prosecuted for perjury, obstruction of justice, contempt of court, etc. (unless, of course, the prosecution perjury comes to light because the witness has recanted). That circumstance is another instance of a prosecutor's conflict of interest.

secutorial discretion and observance of the standards under S. 804 is by the Undercover Operations Review Committee, established in § 3801(b)(6). That Committee must consist of at least six voting members, at least one of whom is an Assistant Director of the FBI and one a representative of the Office of Legal Council of the Department of Justice. The bill does not require, however, that the vote authorizing an undercover operation be unanimous—as it should be, at least in operations directed against lawyers and judges. In fact, there is not even an expressed requirement of a majority vote, nor a requirement that the two officials specifically designated in the statute must vote in support of an investigation in order to authorize it.

In addition, under § 3803(e) there is no possibility of judicial review of any failure to comply with the standards or of any abuse of discretion; and under § 3803(a) civil action is expressly denied for any injury caused by "operational or management decisions relating to the conduct of the undercover operation."

In short, therefore, prosecutorial discretion to target an individual—what Justice Jackson called "the most dangerous" power of all—is unfettered by any judicial oversight or sanction whatsoever. That is so even if the individual who is targeted is a judge who has earned the enmity of a prosecutor's office by conscientious concern for defendants' rights, or a lawyer who has been properly zealous in representing clients. Moreover, the lack of any after-the-fact sanction for targeting by an Enemies List is compounded by the absence of any requirement of a judicial warrant at the outset. Thus, the only control of prosecutorial (executive department) abuse of discretion is voluntary compliance by the prosecutors (executive department) themselves. Yet an area as sensitive as undercover operations is one that especially demands application of the fundamental American constitutional concept of checks and balances by one branch of government against another.

At the very least, therefore, provisions should be added that require a judicial warrant to initiate an undercover operation against judges or lawyers, and any prosecution resulting from a failure to abide by the standards or by an abuse of discretion should be subject to dismissal on that ground.

Also, the provision in § 3804 for a tort claim against the Untied States relates to any person who suffers "injury to his person, or property, or death." That provision should expressly include injury to professional reputation; also, because the defamatory effects would be so hard to prove in dollars and cents (even though unquestionably pre-

sent), punitive damages should be expressly allowed, even if limited by a statutory maximum amount.

In addition, § 3804(a) covers injury resulting from non-criminal "*negligence* . . . in the supervision or exercise of control over an undercover operation" (emphasis added); but that section does not cover non-criminal conduct that *wilfully* causes injury to person, property, or reputation. Harm wilfully caused in the supervision, control, or conduct of an undercover operation should be explicitly included under § 3804(a).

Another important sanction against abuse is immunity from prosecution for any crime that is discussed in an apparently privileged context by an accused with an undercover operative posing as that person's lawyer, or where a privileged discussion between an accused and his or her lawyer is monitored by an undercover agent.

I stress sanctions, of course, because experience has shown that to establish standards without effective sanctions is, at best, a meaningless exercise, and can lull affected people into a false sense of security.

Perhaps the most dangerous omission of coverage in S. 804 relates to the problem of the sham client. I referred earlier to the severely adverse effect of such practices on the lawyer-client relationship of confidence and trust, an effect that I have already observed in various parts of the country. (As lawyers have expressed it, to me, "I have to keep asking myself, 'Is this a real client, or is someone trying to set me up?'")

Under § 3803(a)(4) the "probable cause . . . necessary" standard must be applied by the Undercover Operations Review Committee before authorizing an operation in which an agent, informant, or cooperating individual poses as an attorney. That standard is not required, however, in the equally serious situation in which the undercover operation involves a sham client. In that event, the lessor standard of "reasonable suspicion" applies, under § 3803(a)(1) and (2).

Similarly, under § 3803(b)(8) the head of a field office could not bypass the Committee entirely (also using the lesser standard of "reasonable suspicion") where an agent, informant, or cooperating individual is to pose as an attorney; but the head of a field office could act independently and unsupervised in authorizing (on mere "reasonable suspicion") an operation involving a sham client.

Those provisions should be rewritten, therefore, to permit authorization only by the Undercover Operations Review Committee, and to require application of the "probable cause . . . necessary" standard, in any case involving an approach to a lawyer by a sham client.

Extremely serious, also, is the possibility of infiltration of a law firm by an agent, informant, or cooperating individual taking the role of secretary or other staff member. In my view, that kind of undercover operation is never justifiable, and should be expressly forbidden. (One reason is that confidences of clients who are innocent of wrongdoing would almost certainly be compromised by such an operation.)

Unfortunately, that kind of operation is not forbidden by S. 804. Indeed, infiltration of a law office could be undertaken on "reasonable suspicion," and by the decision of a field office head on his or her sole authority. By contrast, § 3803(a)(3) properly requires the "probable cause . . . necessary" standard for cases involving infiltration of "any political, governmental, religious, or news media organization or entity;" and § 3803(b)(1) properly forbids a decision by a field office head alone where the operation "will involve an investigation of possible corrupt action by a public official or political organization, or the activities of the news media."

§ 3803(b)(7) does relate to an undercover employee or cooperating individual who "will attend a meeting between a subject of the investigation and his lawyer." That provision should be broadened, however, to include cases in which the undercover operative will be in a position to overhear discussion between an attorney and client, or to see or hear other privileged information.

More basically, I urge that undercover infiltration of a law office be expressly forbidden. At the very least, §§ 3803(a)(3) and (b)(1) should be revised to insure that any such operation will be authorized only by the Undercover Operations Review Committee, and on the "probable cause . . . necessity" standard.

Earlier in my testimony, I referred to the problem of "trading up," that is, the situation in which a prosecutor may offer overwhelming inducements of leniency to one who has just been convicted, to induce him to provide incriminating evidence against his former lawyer. Such evidence is inherently suspect, because of the psychological and other pressures on the former client, and the unconscionable, even coercive, nature of the inducement. In addition, such practices, by sowing mistrust between lawyers and clients, could have an adverse effect, in general, on the lawyer-client relationship of trust and confidence and on the Sixth Amendment right to the effective assistance of counsel.

Accordingly, I recommend that S. 804 provide that neither probable cause nor reasonable suspicion can be established against a lawyer by evidence given by one or more clients or former clients, unless such

evidence is corroborated by substantial independent evidence of a reliable kind.

Further, there is a drafting inconsistency that could have substantial (and presumably unintended) effect. Under §§ 3803(a)(3) and (4) the phrase used is "a Government agent, *informant*, or cooperating individual. . . ." (Emphasis added) However, under §§ 3803(b)(2) through (10), the word "informant" is omitted. (Also, in some subsections the phrase "cooperating *private* individual" (emphasis added) is used instead of "cooperating individual." Presumably, no distinction is intended there either, and the discrepancy should be eliminated.)

More fundamental proposals for revision relate to the serious problems of conflict of interest that are inherent in targeting judges before whom members of the Department of Justice have appeared, and in targeting lawyers who have been in an adversarial role with the Department. It is essential, as we all know, that justice appear to have been done, as well as that it be done. I think it is bad policy, therefore, to have undercover operations against judges and lawyers initiated and carried out exclusively by members of the Justice Department, especially when there is room for an inference of retaliatory motives.

I have already recommended a judicial warrant requirement. In addition, I would urge that a special prosecutor, independent of the Justice Department, be appointed by a federal judge to supervise any undercover operation directed against a lawyer or judge.

Once again, Mr. Chairman, and members of the Subcommittee, I appreciate your invitation to testify on this important legislation, and thank you for your interest in my views.

II. Oral Testimony of Professor Monroe H. Freedman Before the Subcommittee on Criminal Law United States Senate Committee on the Judiciary Regarding *S. 804—Undercover Operations Act* May 16, 1984

Senator Mathias. Professor Freedman.

Mr. Freedman. Thank you, Mr. Chairman, for the invitation to testify here.

I agree with the goals of the sponsors of S. 804. I admire the conscientious effort of the Subcommittee in a complex, delicate matter, and I commend the Subcommittee and its staff for their achievement in producing S. 804 and the extremely important report that accompanies it. But I do believe that some additional safeguards should be included, and, in making these recommendations, I am going to focus on undercover investigations that are directed against lawyers and judges.

Some of these recommendations may well be applicable to other sensitive areas as well, but I will restrict myself to the area that I have been working in most intensively for the last 15 or 20 years.

Let me begin by telling you about a lawyer in New York, named Harry Levine. He was in his law office one day and he got a telephone call. The man at the other end said, "Mr. Levine, I am in my bedroom. I have just shot my wife. She is dead on the floor. I am standing here holding the smoking gun. What should I do?" After only a moment's hesitation, Levine replied, "Oh, you want Harry Levine the *lawyer*!" (Laughter.)

It illustrates a problem that I see increasingly as I speak to bar groups across the country, that is, lawyers who are becoming afraid to be lawyers, afraid to provide the effective assistance of counsel that the Sixth Amendment guarantees to their clients, afraid to give the zealous representation that the Code of Professional Responsibility demands, and afraid, in short, to be what the American Bar Association has called, the client's "champion against a hostile world."

More than one lawyer has said to me, "I have to keep asking myself when I am talking to a client, 'Is this really a client or is somebody trying to set me up?'" When you have that kind of impairment of the Sixth Amendment right to counsel, innumerable other basic rights are compromised.

We do have to maintain integrity in the administration of justice, and I think to that end some undercover operations are necessary. There is a basic problem, however, with prosecutorial discretion to target particular individuals—what Justice Jackson referred to as the most dangerous power of the prosecutor, where the crime becomes being obnoxious to the prosecutor or getting in the way of the prosecutor.

That problem of prosecutorial discretion is compounded by an extremely serious conflict of interest, for example, when the judge who is targeted is one who has been conscientious in upholding the constitutional rights of criminal defendants who have appeared before the judge, or when the lawyer who is targeted by the prosecutor is one who has been zealous in defending his or her client's rights. Even if, in fact, there is no improper prosecutorial motive, we have an extremely serious and undeniable appearance of impropriety, and of conflict of interest in such cases.

That prosecutorial power, with its potential for abuse, has already begun to undermine the independence of the bar, which is essential to a free society.

This committee has achieved a significant insight and a major suc-

cess in S. 804 in developing two standards for undercover operations. One is for ordinary situations, in which reasonable suspicion can be decided by the head of a field office. The other is for the more sensitive situations, for example, dealing with political and religious groups or with the press, where the standard is "probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality," and the decision to conduct the investigation in those particularly sensitive cases must be made by the Undercover Operations Review Committee.

There are two kinds of operations, however, which are not covered by that higher standard and, I think, must be. One is the case of the sham client, where the undercover operative is posing as a client and misleading the lawyer into thinking that the lawyer is dealing with someone who genuinely is in trouble and in need of legal services.

The other is a case, indeed, where I think that undercover operations should be forbidden altogether, but which is not covered in this bill, and that is infiltration of a lawyer's office. As I say, I think it should be forbidden altogether, but at the very least, that kind of undercover operation, if it takes place, should be subjected to the higher standard of "probable cause" and "necessary."

Other recommendations that are made in my prepared testimony include concern that the statute provides no judicial oversight of prosecutorial discretion at the beginning, through a warrant requirement. Indeed, throughout the undercover operation, it is entirely a matter of executive discretion and control, with no provision for dismissal of a prosecution for abuse of discretion, and, at the conclusion, no sanctions whatsoever through civil action or otherwise against abuse of discretion.

What we have therefore, in a government that prides itself on separation of powers and checks and balances, is the most sensitive kind of government intrusion of all, undercover operations, with the discretion exclusively in the executive department.

I would recommend that all three of those bases be covered, first, that there be a warrant requirement, second, that there be dismissal on a showing of an abuse of discretion in targeting, and third, that there be provision for civil action as well.

Also, none of the provisions in the statute deal directly with the conflict of interest on the part of the prosecutor, including the case of operations directed against judges and lawyers. I would recommend that there be a requirement of a judicially appointed special prosecutor, independent of the Department of Justice, and, therefore, free of any

conflict of interest, to supervise all undercover operations that are directed against judges or lawyers.

Another serious problem relates to what prosecutors call trading up. Assume, for example, that a criminal defendant is convicted and is offered overwhelming inducement, indeed, unconsionable and cohersive inducement—it may be ten years of liberty—if that convict will give evidence against his or her own former lawyer.

That kind of practice is destructive of the essential relationship of trust and confidence between lawyer and client, and I would recommend, therefore, that the statute say explicitly (whether the standard that is being applied be reasonable suspicion or probable cause) that it cannot be met by evidence received from a client alone, without substantial corroborative evidence from an independent source.

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In addition, I think that the legislation should expressly forbid pretrial publicity by prosecutors and other law enforcement officials, including press conferences to announce indictments—which serve to smear the accused and to convict him in the eyes of family, friends, neighbors and business associates without due process of law.

There should also be provision expressly for injury to reputation. That is one of the concerns that runs through the committee reports, of both the House and the Senate. Under Supreme Court decisions, however, reputation may well be found not to be included under the phrase "injury to the person." There should be a specific reference, therefore, to injury to the person through defamation, with provision for punitive damages because of the extreme difficulty of identifying in dollars and cents the kind of injury that we are talking about.

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Of fundamental importance, also, is that codification with no sanctions whatsoever is not going to be any improvement over FBI or Justice Department guidelines that can be followed or ignored as the executive department chooses. As I noted before, this bill does not provide for any realistic sanctions, none whatsoever that relate to abuse of discretion in initiating these operations and in targeting particular individuals.

Senator Mathias. But let me ask you this, Professor Freedman. Is there any inhibition in the present state of the law against an agent impersonating a lawyer? Maybe this is a confession that I would prefer not to make, but is there anything in Senate Bill 804 that will strengthen or weaken the expectation that a client now has that the lawyer he

is talking to is really his lawyer and not an agent, or that the lawyer speaking to the client can have the expectation that there is a bona fide client out there?

Mr. Freedman. Mr. Chairman, under the law as it is now, it seems to me that a criminal defendant would have a strong argument under the Due Process Clause and the Sixth Amendment for dismissal of any charges if the defendant finds that he or she has been dealing with a sham lawyer. However, when you have Congress saying, in so many words, that it shall not be a defense, I think you leave that client who has been dealing with a sham lawyer in a worse rather than a better position.

If I had to litigate it, I would rather litigate it directly under the Constitution without this kind of help, than to be faced with the argument that the Congress agrees with the executive that there should be no defense to the defendant in such a circumstance.

Senator Mathias. Let me follow up with Professor Freedman. Is there any evidence that law enforcement agencies are actually using some of these tactics that you are worried about?

Mr. Freedman. Yes. Attached to may testimony, for example, is a case from Massachusetts, *Commonwealth v. Shuman*, in which sham clients were sent to a lawyer in order to gather evidence against the lawyer.

In the context of that case, as I note in may testimony, I have no objection to that. I think that the integrity of the administration of justice is of sufficient importance that some undercover operations are necessary, even directed against judges and lawyers, but, Mr. Chairman, not without adequate safeguards, and particularly with regard to judges and lawyers, that most sensitive area, there is a gap in this proposed legislation. That is, there are highly desirable provisions, in my view, relating to operations directed against news media, against political organizations, and against religious organizations, that do not cover infiltration of a law office, for example, by having an undercover agent pose as a secretary or a paralegal, and the sham client situation.

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Senator Mathias. Would a warrant make you feel any better?

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Mr. Chairman, I would not find a warrant to be the solution to the problems that I have identified, but it certainly is not going to hurt.

What concerns me is legislation that says, in Section 3803(e), "failure to comply with the provisions of this section shall not provide a defense in any criminal prosecution or create any civil claim for relief."

Then in Section 3804(a), "no action may be brought under this section for injury caused by operational or management decisions relating to the conduct of the undercover operation."

Again, we are talking about what Justice Jackson referred to as "the most dangerous power" that the prosecutor wields, and here it remains totally unfettered, and, if we are talking about actions against judges or lawyers, in the clearest kind of conflict of interest situation.

Now, it may be that there will be a conflict of interest if a prosecutor targets a newspaper or a television announcer or commentator who has criticized the prosecutor. I am not suggesting that the only conflict of interest relates to judges before whom the prosecutor has appeared or defense lawyers whom the prosecutor has opposed in an adverserial role. But those are certainly of extreme sensitivity, and a warrant is going to help, but the other safeguards that I suggest, including the appointment of a special prosecutor by the judiciary, I think, would go a lot further toward resolving the kinds of problems I am concerned about.

Senator Mathias. God forbid that I discourage creating business for lawyers. I may have to earn an honest living some day. (Laughter.) But what you are proposing is judicial enforcement of the standards, and that is going to lead to a plethora of motions to suppress evidence and all of that kind of activity.

Mr. Freedman. That is what we call due process, Mr. Chairman. It is not expeditious. Due process has never been praised for its expeditiousness.

Senator Mathias. Well, that is a forthright answer.

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Senator Mathias. This last panel has been worth waiting for. It has been very enlightening to me. I think it has brought some fresh concepts to this discussion. I am very grateful to all of you.

The committee stands in recess subject to the call of the chair.

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss SUPERIOR COURT
CRIMINAL NO.
80-403

COMMONWEALTH
V.
HARRY N. SHUMAN

MEMORANDUM OF DECISION

Prior to his trial, both this defendant (Shuman) and a co-defendant (Dr. Shwartz) moved for appropriate relief upon the ground that they had been entrapped by public officials. After hearing, this court denied the motion and the matters went to trial, both defendants being convicted. Dr. Shwartz has not appealed but Shuman has and this matter is thus ripe for the entry of a Memorandum of Decision setting forth the facts found during the pre-trial hearing and the legal analysis upon which this court has relied. *Commonwealth v. Cook*, 351 Mass. 231, 234 (1966) (Kirk, J.).[1]

1. This court is not unmindful of the fact that in *Commonwealth v. Collins*, Mass. App. Ct. Adv. Sh. (1981) 29, 33, "the [trial] judge reserved the right to make specific findings 'if necessary or appropriate' at a later time" and the Appeals Court observed "that he should have done so at the time of the *voir dire* or before the end of the trial." While this passage may be read as disapproving the practice followed here, I do not believe it was intended to be construed so broadly. As support for its observation, the Appeals Court relied on *Commonwealth v. Garcia*, Mass. Adv. Sh. (1980) 21, 26 which does not hold that findings and rulings must be made during the course of the trial but simply expresses the need for such documentation prior to the hearing of the appeal. The matter is, however, specifically addressed by Mr. Justice Kirk in *Commonwealth v. Cook, supra*, where the Supreme Judicial Court holds that "to require . . . that the judge file his specific findings simultaneously with his ruling on admissibility, would result in delay in the progress of the trial and the imposition of a needless burden on the trial judge. If a defendant is found not guilty, or, if found guilty, does not appeal, the delay in the trial and the effort of the judge might serve no purpose." It would appear that the Supreme Judicial Court continues to adhere to these views, see *Bruno v. Bruno*, Mass. Adv. Sh. (1981) 1572, 1577 ("[F]indings were made from the bench at the close of the case. Certain matters which might have been dealt with were not mentioned. Although expenditious disposition of contested matters is desirable, there are often situations in which reflection,

During the summer of 1978, information concerning a possible insurance fraud came to the attention of the Major Crimes Unit of the Massachusetts State Police. Proceeding under orders of Captain Robert Enos, State Police troopers obtained two motor vehicles and without the knowledge of the insurance companies involved, insured them under false names. They then staged an accident and another state trooper, privy to the undercover operation but not directly involved in it, filed a false report of accident which stated, "no visible sign of injury but claim of injury by an individual involved." He issued a false citation and a fine was paid pursuant thereto. False accident reports were then filed with the insurance companies by the undercover troopers claiming to have been involved in the accident. The State Police reasonably believe that all this was necessary to lay a credible groundwork to uncover the suspected scheme of insurance fraud.

The undercover troopers went first to Dr. Shwartz. Various inculpatory statements were made by Dr. Shwartz in their presence but they need not be recounted here as this court does not rely upon them in determining the motion with respect to Shuman.[2]

Following a visit to Dr. Shwartz, the undercover troopers made an appointment with Shuman, an attorney. When they kept the appointment, Shuman introduced himself, took them into a conference room, and asked, "What are the extent of your injuries?" The troopers simply laughed jovially and Shuman joined in the laughter.

One of the undercover troopers said, "Ask Shwartz." Shuman responded, "I'll call him." Shuman proceeded to tell the troopers that it would look better if they did not return to work and, when they agreed to stay at home, he said, "Good. We can add this to the claim."

Shuman then said, "You have to get your medical bills up over $500 to collect" and recommended that the undercover troopers see certain specialists to which he would refer them. Further inquiry as to the injuries of one trooper went like this:

Shuman: "You must have hit your head, right?"

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aided by written requests for findings of fact, is the better course"), and, indeed, the wisdom of the present practice is illustrated by the fact that Dr. Shwartz did not appeal and findings with respect to him would be of no consequence.

2. It may well be that the statements of Dr. Shwartz are, in fact, the statements of a co-conspirator made during the course of an in furtherance of a conspiracy, which statements are thus admissions upon the part of both co-conspirators. *Commonwealth v. White*, 370 Mass. 703, 708-709 (1976) (Kaplan, J.). This court need not decide the point as part of a ruling upon a pre-trial motion, however, since the ruling as respects Shuman will stand upon a consideration of his own admissions taken separately.

> Undercover trooper: "No."
> Shuman: "You must have hit your head on the windshield and have terrible headaches."
> Undercover trooper: "Oh yes, I remember, If [the specialist to whom you are sending us] is an expert, won't he know?"
> Shuman: "He knows how to play the game. You see, hypothetically you're going to see [the specialist] fifteen to twenty time but actually you won't have to go see him."

One month later, in a telephone conversation between one of the undercover troopers and Shuman, Shuman said, "[The other undercover trooper] has gone to the specialist but complained of no injury. He must be straight as an arrow. I'll have to send him to another specialist."

Further, the court finds that each time the undercover troopers were queried by Shuman about their injuries, they laughed in a manner which denoted the absence of any such injuries. The court infers that Shuman, after these conversations, conferred with Dr. Shwartz and took further steps to make claim against the insurance companies for injuries he knew to be nonexistent.

> Entrapment is a defense which may be asserted when a defendant is intentionally induced by the government or its agents into committing all the elements of a criminal offense. *United States v. Russell*, 411 U.S. 423, 435 (1973). The defense arises only if the criminal conduct was the product of the "creative activity" of law enforcement officers or agents, *Sorrells v. United States*, 287 U.S. 435, 451 (1932) . . . [but] no "entrapment exists 'if the accused is ready and willing to commit the crime whenever the opportunity might be afforded,'" *Commonwealth v. Miller*, 361 Mass. 644, 651 (1972), quoting from *United States v. Groessel*, 440 F.2d 602, 605 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971) [.]

Commonwealth v. Thompson, Mass. Adv. Sh. (1981) 209, 213-214.

The key to the entrapment defense is thus government inducement, more specifically, the employment of persuasion or inducement to create a substantial risk that the offense will be committed by a person other than one who is ready to commit it. Model Penal Code § 2.13(1). Gilbert, *Criminal Law*, § 223 (1976). Compare *State v. Boccelli*, 105 Ariz. 495 for the minority view that "reprehensible police conduct" will support an entrapment defense on the theory that the primary purpose of this defense is to control police conduct and the accused's predisposition to commit the crime is therefore immaterial. Here, no such government inducement or persuasion is present. Here there is

no evidence of persuasion, importuning, a play on sympathy or other emotion, or any other factor beyond the simple opportunity for criminal gain afforded by the circumstances created by the undercover troopers. Compare:

> *Sherman v. United States*, 356 U.S. 369, 371 (1958) (defendant only agreed to sell narcotics illegally "after a number of repetitions of the request, predicated on [the informant's] presumed suffering"). *Sorrells v. United States*, 287 U.S. 435 (1932) (defendant sold whiskey to agent only after repeated requests and pleas based on common loyalty to a military unit). *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978) (inducement found where undercover agents solicited guns from defendant twenty times).

Commonwealth v. Thompson, supra at 215. Upon these facts, therefore, Massachusetts law will not support the entrapment defense.

Despite the traditional analysis, the defendant here argues strenuously that, as an attorney, it is especially reprehensible to "set him up" and then use against him the statements he made in discharge of his duty to zealously advance the cause of those he reasonably took to be his clients. It's difficult to understand just what legal significance the defendant attaches to this plaint. I take it that he is urging that the statements he made to the undercover troopers be suppressed upon the theory that, in context, it is wrong to "sting" a lawyer and thereby chill the profession's willingness to zealously advocate the client's cause.

While original, this argument is hardly frivolous. Our adversary system is one which sometimes encourages, and at least tolerates, the use of subterfuges to get at the truth. Keeton, *Trial Tactics and Methods*, 326-327 (2d Ed. 1973). Indeed, nowhere are an attorney's obligations to the truth and his obligations to his clients so sorely tested as in the area of information gathering from clients and witnesses and preparation of their testimony. There is general agreement that "witness preparation for trial purposes is not discovery. This is not the time to learn 'what the case is all about' or to obtain interesting information. Witnesses favorable to your side must be prepared for testifying in court to those facts which will support your theory of the case." Mauet, *Fundamentals of Trial Techniques*, 11 (1980). A learned and skillful trial lawyer speaks of the need to "horseshed the witness and . . . brush him up before he testifies. . . .Do not hesitate to suggest . . . more effective answers. You and the witness are going over his testimony to develop that kind of answer. If you shy away from making suggestions, you are not doing your job. . . .Press the witness if need be. In extreme cases, put the situation to the witness bluntly." Vetter,

Successful Civil Litigation, 280, 284-285 (1978). Others frankly recognize that an attorney has "the opportunity to shape the witness' testimony, often to the point of recreating it in an image closer to that which the lawyer desires than to that which the truth requires. . . .[P]reparation of one's own witness for trial is hardly, under our adversary system, a public ceremony." Levin & Cramer, *Trial Advocacy*, 30 (1968). Judges and lawyers alike must admit that the line between "facilitating" communication on the one hand and fabricating evidence or suborning perjury on the other is not well marked.[3] Perhaps the most careful analyst of this area is Monroe Freedman in *Lawyers' Ethics in An Adversary System*, 67-69, 71, 74-75 (1975) ("There is no conceivable ethical requirement that the lawyer trap the client into a hasty and ill-considered answer before telling him the significance of the question"). See Bellow & Moulton, *The Lawyering Process*, 247-272 (1978).

Yet even the most expansive and indulgent acquiescence in the norms essential to an adversary system cannot justify Shuman's conduct here. While he may not be faulted for informing his clients of the legal requirements necessary to support their claim, he cannot be excused for expressly suggesting to them the fabrication of medical visits and treatments that were never intended to take place. Any legal system which condoned such conduct by the officers of its courts would not be worthy of the name. Thus, recognizing that the line between propriety and impropriety in attorney-client relationships is difficult and not always clear, Shuman has nevertheless transgressed far beyond the conduct expected of the most zealous but honest advocate.

Accordingly, Shuman's motion was denied.

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3. Indeed, our present rule governing the conduct of an attorney in a criminal case who learns that his client intends to testify falsely, DF 13(b) of Supreme Judicial Court Rule 3:08 (formerly Rule 3:22A), is a candid compromise between the extremes on either side . . . [of a] controversy [which] is not one capable of solution by any formula which will be satisfactory to all disputants." Statement of Quirico, J. concerning SJC Rule 3:22A published with the Rule, pp. 5-6 (February 14, 1979).