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# CLIENTS' PERJURY AND LAWYERS' OPTIONS

Marvin E. Frankel\*

## I. INTRODUCTION

Just short of 30 years ago, a man who has been for some years a prominent member of this University's law faculty, published one of the most famous law review articles ever written. Then on the George Washington law faculty, Monroe Freedman shocked many members of bench, bar, and academy with his affirmative answers to what he labeled "the three hardest questions":

1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he will commit perjury?
3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?<sup>1</sup>

Without making a statistical check, it is safe to say that few, if any, law journal essays have led to as much debate, attack, and quotation in texts. The outraged responses descended to an assault by several judges, with then Judge Warren E. Burger notably among them, proposing Professor Freedman's suspension or disbarment.<sup>2</sup> The furor may be taken as testimony to some courage on Professor Freedman's part in supporting positions so likely to draw fire from respectable people.

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\* B.A. 1943, Queens College; LL.B. 1948, Columbia; former Professor of Law (Columbia 1962-1965) and U.S. District Judge (1965-1978); now in private practice. This paper was prepared for use as a talk in a conference on legal ethics at the Hofstra School of Law on March 10-12, 1996. The subject is one about which I've written and tested the patience of many people over a quarter-century or so. Without giving all of them credit, I offer thanks here in alphabetical order to several who have been good enough to listen about and/or look at a draft of this particular effort, correct errors, make helpful suggestions, and refrain from urging that I give up: Monroe Freedman, Stephen Gillers, Louis Henkin, Jack Hoffinger, Sydney Kentridge, and Gerald Lefcourt.

1. *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, at 1469 (1966).

2. See *id.* n.1.

Whatever accounts for the interest in Professor Freedman's foray has not abated. Despite the general rejection of his position, important defenders still appear.<sup>3</sup> One has the uneasy feeling, moreover, that the key choice Freedman posited — between helping and deserting a perjurious client — has never found a happy resolution. In any event, whatever any other "one" has been thinking, I have not found for myself an easy way to answer his questions. The generous invitation to participate in this Symposium served to supply a good occasion to revisit the subject and settle it, at least for me, once and for all. The consequence was a course of longer and more strenuous brooding than I'd bargained for. And the result, even in my favorably disposed judgment, seems a good deal more modest than all that effort should have achieved.

For better or worse, however, I want to report the result, and burden you in the process with some of the ground I've covered in the course of reaching it. Briefly stated, my conclusion is that Professor Freedman's questions, for all the continuing ruckus they created, are really either moot or immaterial. They have served as substitutes for, or diversions from, a broader and more fundamental question, namely, whether it is good or even acceptable that criminal lawyers, supposedly to defend the rights of the innocent, should routinely and expectably be engaged in thwarting the search for the truth in the courtroom. My answer to that question is No.

Stated in fuller detail, my answer could be framed as a rule. I quote as follows:

It shall be improper for an attorney who knows beyond a reasonable doubt the truth of a fact established in the state's case to attempt to refute that fact through the introduction of evidence, impeachment of evidence, or argument.

Having said "my answer" would follow the quoted rule, I should add instantly that the quotation is from a law journal article published some

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3. See, e.g., Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339 (1994). See also Formal Opinion 92-2 of the National Association of Criminal Defense Lawyers concluding that "[i]n the relatively small number of cases in which the client who has contemplated perjury rejects the lawyer's advice and decides to proceed to trial, to take the stand, and to give false testimony, the lawyer should go forward at trial in the ordinary way." *The Champion*, pp. 23, 28 (March 1993). The Opinion is somewhat equivocal, however, concluding later that "a very high standard must be met - 'actual knowledge' or 'proof beyond a reasonable doubt' - before a lawyer 'knows' a client intends to commit perjury. A lawyer who relies upon such a higher standard should not be charged with violating Model Rule 3.3 or a similar rule." This seems to leave somewhat open the case of the lawyer who relies on the high standard, determines that the client plans perjury, and then goes ahead "in the ordinary way" to ask questions, etc.

eight years ago by Professor Harry I. Subin,<sup>4</sup> and that I wound up agreeing with his conclusion after many hours of reading and trying to think. This leads fairly to the question why I should be submitting this additional essay if in the end I simply agree with Professor Subin. My answer is that there are two or three justifications for doing this:

*First*, and most important, eight whole years after the way was lighted, we seem no closer to accepting Professor Subin's sound conclusion than we were when he stated it. The notion that criminal defense lawyers, of all people, owe a duty not to obstruct the search for the truth remains a heresy, both in theory and in practice.

*Second*, my different route to Professor Subin's conclusion, and some observations along the way, may add a mite of support to the position.

*Third*, circuses like the O.J. Simpson trial may trigger sentiments among the laity that lawyers ought to promote rather than obstruct the truth. More of us ought to be prepared to face that contingency.

## II. THE POPULAR HARDEST QUESTION

Returning now to Professor Freedman's three hardest questions, I propose to argue that in a criminal process that imposes upon defense lawyers no general duty to the truth, those questions almost never present themselves as issues in the actual lives of practitioners.<sup>5</sup> I have no statistical evidence for this, but a great many years of anecdotal exploration and observation from the bench, at the bar, and in the academy. On that basis, perhaps with less hesitation than is owed, I offer a corresponding list of three propositions:

1. The cases are rare, if any exist, in which lawyers have been called on the disciplinary carpet for undertaking to discredit an adverse witness they "knew" to be telling the truth.
2. It is almost equally rare that a lawyer is assailed for presenting a witness he or she "knew" would commit perjury.
3. Lawyers regularly give advice that tempts clients to perjure themselves, but this again supplies little or no business to disciplinary committees — and Professor Freedman in any event withdrew long ago his blessing for this particular form of sleaze.<sup>6</sup>

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4. *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 Geo. J. Legal Ethics 125, 149 (1987).

5. But see *Lying in the Courtroom*, Harper's, Sept. 1973, at 10 (interview with Marvin E. Frankel) (perjury in the courtroom on important issues occurs in one quarter of cases tried).—Eds.

6. Monroe H. Freedman, *Lawyers' Ethics In An Adversary System* 59, 61, 69-70, 71-76 (1975).

So, deleting the third item as essentially noncontroversial in professed principle (if not in practice), there remain the two questions about distorting the probable truth either by discrediting an honest witness or assisting in the presentation of perjury. And these, I've submitted, have little or no bearing on the actual things lawyers do or avoid in defending criminal cases.

It is needful to interpolate here that while he is a long way from confessing error, Professor Freedman has lost the legislative battle on one of his questions in that the governing rules now denounce as unequivocally wrongful — i.e., grounds for discipline — the knowing presentation of perjured testimony.<sup>7</sup> What I'm saying, nevertheless, is that Professor Freedman's assertion on this subject is academic in a practical sense: the subject does not come up, quite certainly not in the terms of Professor Freedman's main concern, namely, the problem of *client perjury*, the model case he addresses and that I'll be addressing here.<sup>8</sup> (I put aside the distinct and separate problems of *suborning* perjury — i.e., where lawyers themselves instigate or affirmatively encourage perjury — as does Professor Freedman.)<sup>9</sup> As for the cross-examination question, the subject does not come up because Professor Freedman has won that battle — if there ever was a battle. It is expected on the highest authority, contemporaneous with the germinal Freedman article, that "defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth."<sup>10</sup>

We have been left at most with one hardest question, the question of putting on client perjury, and I'm presuming to suggest that this is not a live question in the sense that it actually confronts lawyers as a pressing concern or, *a fortiori*, as a subject of threatened discipline. Why is this so? Let us proceed via another triad:

1. Most clients plead guilty. The question of perjuring themselves does not arise, or is laid to rest without a trial.

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7. ABA Code of Professional Responsibility, DR 7-102(A)(4); ABA Model Rules of Professional Conduct, Rule 3.3(a)(4).

8. See 64 Mich. L. Rev. at 1475-78; and see text *infra* at note 11, considering the "trilemma" described by Professor Freedman in dealing with client perjury.

9. It is not my major purpose here to pursue in detail my long-standing disagreement with Professor Freedman. I should add, however, at least this footnote to a parenthesis to note a major point that Jack Hoffinger calls to my attention. How, he asks, do you follow the Freedman view, plan to present a client you know will perjure himself, and fulfill your obligation to prepare the client for cross-examination? The danger is visible and grave that you'll either fail in the duty to prepare or cross the line between presenting and suborning. Professor Freedman may have a way to clamber over the horns of this dilemma.

10. *United States v. Wade*, 388 U.S. 218, 257 (1967) (Justice White, concurring).

2. Where the prospect of perjury is clear — or clear enough for the lawyer to “know” there will be perjury — the lawyer will persuade the client that taking the stand with such a story will only dig a deeper grave. This leaves the toughest, truly problematic, but very rare case — where the lawyer “knows” only because the client proposes to swear to a changed story, as in *Nix v. Whiteside*, 475 U.S. 157 (1986) — and I postpone this for special attention later.
3. Defense lawyers do not “know” — or, if necessary, contrive not to know — that the planned testimony will be perjury.

So with one only really hardest question even in theory — and this actually of very little practical interest to anyone — why all the continued debate? There are several answers, I think. First of all, however little the precise question is a concern, it is not far away from real issues about who we are and what we do — as zealous advocates, hired guns, mouthpieces. Those realer issues have to do, among other things, with the everyday experience for most of us of insisting on the distance between us as advocates and the justice or fairness or, forsooth, the truth of the causes (and people) for which we are enlisted. For most practicing lawyers, some or most of the time, it is important that we must neither present our personal opinion of the client's cause (leaving aside the defense lawyer's ceremonial assurance of the client's innocence some days or weeks or months before joining in the plea bargain) nor be deprived of the shield that says our “obligation of loyalty to [the] client . . . implies no obligation to adopt a personal viewpoint favorable to the interests or desires of [the] client.”<sup>11</sup>

The Freedman hardest question is also engaging because it is the classic kind of conundrum for which we are specially trained and from which we draw a special kind of (probably justifiable) intellectual and professional delight. It involves conjuring with evidently conflicting values for which endless debates leave us short of a definitely satisfying balance. As Professor Freedman put it, dealing with the client proposing to commit perjury poses a *trilemma* — 50% more perplexing than a *dilemma* — “that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.”<sup>12</sup> However we threaded our way through that puzzlement, we could not come out too badly, the task being, at worst, to determine which of our virtues should prevail. At least that is the nature of the task from an in-house standpoint. People

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11. Code of Professional Responsibility, EC 7-17; see also Rule 1.2(b) of the Rules of Professional Conduct.

12. *Lawyers' Ethics in an Adversary System* 28 (1975).

not trained in the law may value less highly than we do our role as keepers of confidences.<sup>13</sup>

In any event, the bar's official resolution of the trilemma as of now would probably satisfy the lay public if the public were willing to accept this as a critical question and answer for our profession. The official solution, as I've mentioned, has repudiated Professor Freedman on the hardest question, decreeing that the lawyer *knowing* the client will lie may not join in that evil purpose by assisting in presentation of the perjury. Instead, it is variously said, the lawyer must (1) persuade the client not to lie, if necessary staying off the witness stand; or (2) withdraw from the case; and/or (3) report the intended perjury to the court; or (4) present the client to make a "narrative statement," i.e., to tell the story without the usual form of question-and-answer, thus proclaiming to every knowledgeable person in the courtroom that the lawyer believes the story to be false in material respects.

While there seems to be a wide consensus on the prohibition against the lawyer's presenting perjury, though by no means unanimity,<sup>14</sup> there is no apparent consensus on how the lawyer is to behave in dealing with a client bent on perjury. The usual prohibition in the law instructs us, automatically or by a speedily generated corollary, as to what will constitute compliance. Not so, however, with client perjury. Whether or when to withdraw if the client insists; whether or when to tell the judge; whether the narrative statement is proper — the cases and lawyers' opinions diverge in a fashion that should alarm anyone seeking guidance on so delicate a subject. Then how do we manage? The fact is we manage tolerably well for the reason already stated: the problem arises so rarely that it is readily shuffled off to the academic limbo of law journal forensics.

It is time for me to condescend on some particulars. In the sections that follow I want to talk about reasons for the virtual nonexistence of the

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13. Professor Freedman opens his book with the famous case of the lawyers who kept secret for months their client's confidences (1) that he had killed two people other than the one for whose murder he was on trial and (2) where the bodies (of child victims) were buried. "Members of the public were generally shocked at the apparent callousness on the part of the lawyers, whose conduct was considered typical of an unhealthy lack of concern by lawyers with the public interest and with simple decency." *Id.*, p. 1. Lawyers generally were divided. *Id.* Professor Freedman defends the lawyers involved on the grounds that "they would have committed a serious breach of professional responsibility if they had divulged the information contrary to their client's interest." *Id.* p. 2. On this close call, I would side with Professor Freedman though I would bottom the reluctant conclusion on the attorney-client privilege rather than the broad basis of "professional responsibility." Further, I am not prepared to say that the privilege should not be revised to change the result of that buried bodies case.

14. See, e.g., Jay Sterling Silver and NACDL Formal Opinion 92-2, note 3, *supra*.

client-perjury problem; then about the real perplexity for which this law review question is a kind of surrogate or cover; and, finally, about what, if anything, can be done about the fundamental trouble that we repress by talking about things like client perjury.

### III. WHAT LAWYERS KNOW — AND DON'T KNOW

The question when and how lawyers "know" things about their clients can become metaphysical and can sound like an evasion when lawyers profess ignorance about things everyone knows lawyers must know, or be presumed to know. However, even people willing to join in trashing members of the bar, or cynics like me, have to recognize that the matter is by no means as simple as we would like the answer to hard questions to be. No one supposes that the lawyer, whose ideal role remains that of loyal advocate, ought to be the detached judge of the client. Though the evidence looks unfavorable, the client's assurance that he or she is innocent goes a great distance in and of itself toward committing counsel to advocacy of that position. Everyone agrees, I think, that the lawyer behaves properly in our system by investing maximum energy and ingenuity in demonstrating that the client, at worst, is not to be found guilty. (Whether this is an ideal system is a subject we'll revisit later on.) In that light, the lawyer should be the very last, surely not the first, to "know" the client's planned testimony will be false. Throughout this discussion, I'm assuming, of course, that the client intends to defend the not-guilty plea and is not among the great majority pleading guilty, with a bargain or otherwise.

The upshot is that substantially the only way the lawyer may "know" proposed testimony will be perjury is that the client says so. And this, put more crudely and less realistically, means the client is now telling, or planning to swear to, a changed story, as was the typical case in *Nix v. Whiteside*.<sup>15</sup> What assurance is there, as was posited or assumed in *Whiteside*'s case, that the original story was true and the revision false? No positive assurance, we may say in general, although surrounding circumstances may give strong clues. Still, *Whiteside* himself did not "confess." But the lawyer found against him and refused to go ahead with the changed story. And that placed both client and lawyer in the pickle that found its way to the Supreme Court — in a posture that casts at most a dim slant of light on our inquiry.<sup>16</sup>

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15. 475 U.S. 157 (1986). See, e.g., ABA Formal Opinion 87-353.

16. The issue in *Nix v. Whiteside*, it will be recalled, was whether *Whiteside* was denied the effective assistance of counsel when his lawyer pressured him out of the plan to tell an altered story on the stand, threatening to withdraw, tell the judge, and even testify adversely if the client insisted.



The confrontation was not comfortable for either client or counsel. The situation was one to be avoided if at all possible. Lawyers, by circumstance and design, have been fortunate enough to avoid it almost always.

One mode of avoidance, for some unknown number of lawyers (but including some who have proclaimed the technique), is to make certain to appear to lack the knowledge that creates the problem. In formal lectures as well as taproom anecdotes, this group of lawyers practices and teaches the technique of self-protective ignorance. They refrain, they say, from asking the client-defendant to tell them the story in the initial interview. At most, this technique calls for asking the client what his or her accusers are saying, or may be saying, will be the damaging evidence as well as the material facts in a complaint or indictment.<sup>17</sup> This procedure is followed "in order to avoid being compromised in deciding whether to put [the client] on the witness stand."<sup>18</sup>

The tactic has drawn criticism from several quarters, including the ABA. As voiced by the ABA *Standards for Criminal Justice* (1994), the criticism is remarkable for its soft and tangential quality. In the Commentary to Defense Function Standard 4-3.2, we are told that this "form of intentional ignorance" is the "most flagrant" and is "most unfortunate in that the lawyer runs the risk of being the victim of surprise at trial."<sup>19</sup> This is a little reminiscent of denouncing the killing of one's parents on the ground that it results in orphanhood.

The blunter criticism, if the bar really meant that a lawyer must not offer a defendant's perjured testimony, would be that the device of deliberate ignorance is a fraud. It is a fraud because the lawyer is only pretending to conceal from himself or herself that the client possesses guilty knowledge. The lawyer would scarcely want an innocent client to conceal any iota of the details. The defense of the innocent client (though defense lawyers have been heard to describe it as the least bearable of assignments) is the case *par excellence* in which both client and lawyer will understand enthusiastically the "necessity of full disclosure of all

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See 475 U.S. at 161; see also 744 F.2d at 1326, 1327, 1328, 1329, 1330, 1331 (*Nix* in the Circuit). Although Chief Justice Burger drew a long bow on the subject of defendants' lack of any "right" to commit perjury, other Justices disassociated themselves from much of his essay for the Court while joining in the ruling that the Eighth Circuit had erred in finding ineffective assistance of counsel. See 475 U.S. at 176-77 (Brennan, J., concurring); *id.* at 177-190 (Blackmun, J., concurring, joined by Brennan, Marshall, and Stevens, JJ.); *id.* at 190-91 (Stevens, J., concurring).

17. See Stephen Gillers, *Regulation of Lawyers* 390 (4th ed. 1995).

18. *Id.*

19. ABA *Standards for Criminal Justice Prosecution and Defense Function* 153 (1994).

facts known to the client for an effective defense."<sup>20</sup> Thus, the only real use of the tactic of purposeful ignorance must be for the case in which the lawyer already knows one way or another that the client is guilty. In this sense the lawyer's own guilty knowledge is perhaps clearer than in the standard criminal case in which jurors are charged that a "defendant's knowledge of a particular fact may be inferred from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact."<sup>21</sup> But there is no need for close weighing. It suffices to say that if the profession were seen really to mean its prohibition against presenting perjured testimony, the practitioners who do not ask would feel less free to advertise this technique.

Reverting to broader and more basic principles, it is a strange profession in which featured speakers are attended to solemnly while they explain the professed practice of avoiding knowledge. None of us would be at ease with the surgeon who brandished the scalpel without waiting for an x-ray or even to hear what hurt. The analogy is silly to be sure. Maybe a comparison more apt would be to the composer of advertising jingles about smoke rings who shuns information about the effects of tobacco. More useful than comparisons is the familiar point that the defense lawyer, who is not engaged in promoting or purveying the truth, may serve the client's goals more effectively under a pact that appears to avoid the truth even in their dealings with each other.

The arrangement, for all its phoniness and the bar's gentle questioning, has an appearance of utility that probably explains the satisfied users' recommendation of it at professional gatherings. In the rare instances when lawyers have faced difficulty for presenting a client's perjured testimony, their troubles appear to have arisen almost always from the clients' statements to them, the situation illustrated by *Nix v. Whiteside*. There is empirical ground to believe, therefore, that if the lawyer doesn't ask and the client doesn't tell, this will at least be beneficial for the lawyer. While there may be a case somewhere, it does not appear that any lawyer has ever faced discipline for following this course.

What this implies in practical effect is that we do not as a profession take very seriously the prohibition against presenting perjured testimony. If we did, we would find more effective means of enforcing it and preventing its evasion.

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20. ABA Standards, *supra*, 4-3.1(a).

21. 1 Devitt *et al.*, *Federal Jury Practice and Instructions* § 17.09, p. 669 (1992).

## IV. WHAT DEFENDANTS KNOW — AND DON'T KNOW

"Clients" come in varieties, if not infinite, about as diverse as "lawyers." Nevertheless, for purposes of thinking about our client-perjury problem, they, too, can be considered in general terms.

For one important thing, clients either believe or are told early in the relationship that their confidences will be kept. This starting point of Professor Freedman's trilemma is a significant reality. How do you tell a client (correctly) that (1) an effective defense requires him or her to tell you everything, and (2) the information will be held in confidence, and then withdraw or, worse yet, report to the judge because you're convinced that the client proposes to commit perjury on the witness stand? How, especially, can you manage to withdraw or report to the judge when the client before that climactic point had only been made aware of points I've numbered (1) and (2) — which appears to have been the case for the defendant involved in *Nix v. Whiteside*?<sup>22</sup>

There are answers to these questions, varying with listeners in their satisfactoriness. As to the last question, it has been argued, though never embodied literally in the disciplinary rules, that the client must be abandoned or betrayed only if the lawyer is convinced *beyond a reasonable doubt* that the client proposes to commit perjury.<sup>23</sup> The standard is suited to the gravity of the decision. But then, should a lawyer ever be disciplined for failing to be convinced beyond a reasonable doubt that the client must be abandoned? Or be disciplined when a grievance committee finds that the lawyer stuck by the client despite being convinced beyond a reasonable doubt that the client planned, and then committed, perjury? Maybe questions like these are among the incidental reasons why this is so rarely a subject of disciplinary action. My affirmative answers (Part V, *infra*) come with some strain, but then only in the setting of revising more broadly the defense lawyer's duty to the truth.

It should be clear in any case that if the disciplinary rules on this subject are meant seriously to be enforced, clients as well as lawyers should know it. The way to see to this is to require what has been called jocularly a "*Miranda* warning" at the outset of the client-lawyer relationship. Some lawyers — I don't know how many, but speculate not many — testify that they follow this practice, and I trust that they do. Others — a preponderant majority, I speculate — do not. Whatever the number

22. See Monroe Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939, 1947 n.47 (1988).

23. See Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer* 1 Geo. J. Legal Ethics 521, 528 (1988); Harry I. Subin, *The Criminal Lawyer's "Different Mission"*, *supra*, 1 Geo. J. Legal Ethics 142, 149.

in each group, there is no requirement that such advice be given. If the disciplinary rules meant what they say, the necessity for a prescription, including the form of the advice, would seem obvious.

There are substantial arguments against such a requirement — substantial, but not decisive. For most of us, it is a chilling prospect to warn about the necessity for us to jump ship, or even to switch sides, if we are persuaded beyond a reasonable doubt that the client plans to take the stand and commit perjury. The warning is a jarring note of discord in a relationship meant to be one of trust, confidence, and zealous devotion of lawyer to client. But if we mean as a profession the rule against presenting client perjury, the need for a warning is a nettle that ought in principle to be grasped. That the client will insist on perjury known by counsel to be such is remote, we may assume, but that can be embraced in the warning. The cozier alternative, giving no warning, cannot be squared with the advice to tell all and count on our preservation of confidences.

From a different angle, it may be predicted that a warning of the suggested kind will lead in some, perhaps many, cases to the client's lying to the lawyer in preparation for lying on the stand. (How much clients lie to lawyers in any event is a regular topic, the consensus suggesting "a lot.") This is an evil that has been noted by lawyers who say they don't ask. The "invitation" in the warning, however, is of a totally different nature. It stems not from a charade, but from a frank statement of what we are assuming throughout is the lawyer's enforceable duty, subject to sanctions. To be sure, insofar as the warning may lead to concealment and disserve counsel's need to be fully informed, as well as the client's corollary need to be effectively represented, the negative consequences could be significant, even extreme. But the client, entitled to the autonomy that was always to be respected and is today properly extolled, has the right to a candidly advised choice. Autonomy also carries burdens, for clients and everyone. An informed judgment about whether to tell the truth is a proper client responsibility. And while there is no "right" to commit perjury, the lawyer, soliciting confidences, is scarcely the appropriate person to police, and perhaps to entrap, the client.

If a warning is owed to the client, and if it is not regularly being given, there is a logically indefensible gap in our so-called ethical arrangements. Arguably, of course, my unscientific hunch may be wrong: maybe most, or nearly all, defense lawyers give the warning. Even on that unlikely supposition, however, there is an unjustifiable omission in the apparatus of rules. If the client-perjury rule is intended seriously — i.e., intended to be enforced — there ought to be a corollary

rule requiring that the client be advised of it. Perhaps the simplest means of enforcing such a rule, and mitigating the uneasiness for counsel, would be a standard card or sheet stating the warning to the client. One may doubt that the bar would embrace such a suggestion. This goes along with the doubt whether the client-perjury rule is meant seriously to be obeyed and backed with sanctions.

#### V. TRUTH VERSUS THE "RIGHT" TO BEAT THE RAP

With all respect to Professor Freedman and others, it is revolting to contemplate that professionals trained to seek justice (which ought to be an apt definition of lawyers) should be committed to assist clients to lie for the purpose of thwarting just decisions in court. It is scarcely more agreeable in the present state of affairs to require that we desert or betray clients who have confided in and relied upon us. If it is necessary to choose without any change in the system, I guess I'd come out by a hair's breadth with the establishment position of the Code and the Model Rules. But the call feels too close for comfort. It is not easy to denounce as outlaws the members of the National Association of Criminal Defense Lawyers who have stated as a formal public position that counsel "should go forward at trial" and knowingly assist the client in the commission of perjury.<sup>24</sup>

After wrestling with this for a long time, I conclude that the difficulty of the question is largely a function of its isolated and incongruous place in the scheme of defense counsel's responsibilities. In all other respects, including the abuse of honest witnesses and an arsenal of techniques for concealment and evasion, defense counsel is, as Justice White said, commissioned to block the truth. Given that context, it becomes evident why Professor Freedman's hardest question, concerning client perjury, though almost never encountered in real life, has for us a kind of agonizing fascination. The question is actually a surrogate, I think, for the perennial question of lay people that we prefer not to face in its full dimension: How can you bear to fight with all your might for a client you know to be guilty? Our stock answer is, of course, that we don't "know" the client to be guilty. Or, perhaps more candidly, that nobody is "guilty" in our system without either an admission or a jury's finding of proof beyond a reasonable doubt.

If that answer is acceptable, as we've thus far determined it to be, the special rule we've made about assisting the perjurious client may be little more than an anomaly after all. Recall Justice White's blessing of

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24. See note 3, *supra*.

Professor Freedman's first hardest answer: on the propriety of seeking to make a truthful witness look like a liar. There appears thus far to be no serious dispute about that answer. But what is the distance in principle between attacking an honest adverse witness and shielding the beleaguered client who has reposed trust in you? And what direction do you go in to bridge that distance?

The fact is that apart from our scholarly pastime about client perjury, everyone knows and expects that defense lawyers, in nearly all cases that go to trial, are engaged in blocking or distorting to prevent the jury's ascertainment of the truth. We have our private and public rationales for that:

- Prison and other criminal punishments are so horrendous that it is virtuous to help prevent their imposition by all permissible means — short of helping the threatened victim of these horrors by lying to avoid them.
- Better ten or more guilty people should go free than one innocent be convicted.

The first of these is simply a claimed license for members of the legal profession to help thwart laws we don't like. The second, freeing the guilty to protect the innocent, is among our many slogans that sound best when you avoid thinking about them. While it is true that we risk freeing guilty people by a variety of protections for the innocent — e.g., the requirement of proof beyond a reasonable doubt — the broad slogan is no justification for a practice of blocking the truth. If we acquitted at random, without a trial, every tenth defendant, that would probably serve to free some innocent people. The notion that we should pervert the truth to protect the innocent is not on a higher level of rationality.

So what must we do? The answer lies, I think, in our proceeding to countermand the prevailing defense principles noted by Justice White in *United States v. Wade*. It ought not to be acceptable, as it is, to attempt knowingly to plant false leads in a jury's mind as a means of generating supposedly reasonable doubts. It ought to be equally unacceptable to see if an honest witness can be made to look like a liar. It ought in sum to be unethical for a lawyer to pursue knowingly the goal of having a guilty defendant acquitted. The defense lawyer ought to owe a duty no lower than the prosecutor's to seek the truth. The truth, after all, is not less desired by the innocent defendant than by the prosecutor who honestly believes that (i) the defendant is guilty beyond a reasonable doubt or (ii) there is not evidence enough against an accused to warrant prosecution.

The preceding paragraph looked sacrilegious as it was being written. But not for very long. I've mentioned, and everyone knows, that

most defense lawyers most of the time are leading their clients through the process of acknowledging their guilt. This is presumably because there is no effective choice. Leaving aside extravaganzas like the O.J. Simpson trial, somewhat beyond the means of your everyday litigant, the average defendant cannot afford financially or otherwise to give up the hope of some sentence mitigation for the slim possibility of an acquittal. We're concerned, then, with the small percentage — five, ten, maybe fifteen — of cases that go to trial. Within that group, there is a modest fraction of innocents who certainly ought to be acquitted. And a much larger portion who should be convicted. But none of the outcomes, in my submission, should be accomplished by deliberate perversion or obstruction of the truth.

The changes I've proposed — broadly, a duty of counsel not to subvert the truth — would go far to eliminate the incongruity of the rule forbidding assistance to a perjurious client. As things stand now, that is a striking anomaly. Why, when the truth can be fought or smothered at every other turn, should there be an exception for the client who has above all others reposed trust and confidence in defense counsel? It is more acceptable and realistic, if still not perfectly comfortable, if the client-perjury rule is simply one aspect of the general prohibition against dishonesty.

The benefit of the proposed change for lawyers would seem to be obvious. The new obligation to the truth would enable us to approach more nearly the character of a learned *profession*. The low esteem in which we are held might not change altogether by applying to us the standards of truthfulness we now help to enforce against stockbrokers and advertising copywriters. It would surely help, however, if we ceased to stand out as the only putative profession practicing obscurantism and deception among its most visible implements.

There remain two hard questions about which I've thought to very limited avail:

- How to enforce the defense lawyer's duty to the truth.
- How to deal with the client who, the defense lawyer "knows" (i.e., strongly believes), is bent on perjury.

In the next two (brief) sections, I offer, respectively, some tentative answers and an invitation to imaginations more fertile to cope especially with the second question.

## VI. SANCTIONS FOR KNOWING DECEPTION

Certainly at the outset, and probably for the longer run, defense counsel's duty to the truth ought to be enforced in gingerly fashion, subject rarely to sanctions. No matter how careful we are, there is a palpable conflict here between the self-interests of lawyer and client. The lawyer too wary about second guesses is likely to fall short of the zealous advocacy our system will continue to require. The rarity of discipline for prosecutors who present perjury presumably reflects this concern. The solicitude for defendants should call for no less.

Proof as a basis for sanctions on this score should be beyond a reasonable doubt, most certainly in the rare case where counsel is charged with knowing presentation of client perjury. This measure of protection is owed to both client and lawyer. The high standard of proof will be a minimal protection for counsel as we shift from the position Justice White described as the standard to denouncing that position as punishably wrong. Perhaps, if and when the proposed reform is accomplished, there should be a substantial moratorium preceding any steps toward sanctions.

But then, in a longer future, times — and our profession — may change markedly. Offering helpful reactions to a draft of this paper, Monroe Freedman said in a letter to me:

If the rules really mean what they appear to say, then we could expect enforcement in every case in which the defendant testified to his innocence but was found guilty by the jury. Is it credible that twelve strangers could unanimously conclude, beyond a reasonable doubt, that the defendant is guilty, but that the lawyer couldn't figure it out? Indeed, the lawyer sometimes knows about additional incriminating evidence that has been suppressed. At least in those cases, the lawyer has to be guilty of knowingly presenting perjury (unless we are defining "knowing" in a way that makes a monkey of the rule).

Professor Freedman describes the prospect he finds both bizarre and dismaying to drive home his point that the client perjury rule is wrong and remains unenforced because everybody knows it is wrong. My different conclusion is that the rule should come ultimately to be enforced as part of the lawyer's general obligation not to lie or help others to lie or portray known truths as false. The regime thus envisioned is not near at hand. If it comes to be, one does not expect that lawyers will be called routinely to the disciplinary carpet whenever their clients are convicted after swearing to their innocence. But this is part of the larger subject to which my next section relates — the measures lawyers should or must take in avoiding the knowing presentation of perjury.



## VII. DEALING WITH THE SUPPOSEDLY PERJURIOUS CLIENT

This last question has been and is the hardest for me. I assume the lawyer who "knows" beyond a reasonable doubt that the client intends to commit perjury is entitled to take strong measures. Still, one is haunted by the realization that lawyers, like juries, are capable of being convinced beyond a reasonable doubt of propositions that are false. This blocks the possibility of a perfect answer. But that, as someone said, is life.

To retrace what have been thought generally to be the possible steps, the lawyer in most cases will talk the client out of proposed perjury, either by persuading the client not to testify at all or by deleting the questioned testimony as happened in Mr. Whiteside's case. There will remain the occasional tough case of the client who insists. For this, I think there may be no thoroughly happy solution.

Withdrawal, depending on when the problem arises, may be impossible. The so-called "narrative" solution, largely in disrepute not very long after its formulation,<sup>25</sup> is a blunt signal to the judge, and very possibly to the jury. Telling the judge is a nearly unbearable switch, perhaps most appalling when the trial is without a jury.

It has been suggested that when counsel and client are at an impasse — the client insisting on giving testimony that counsel "knows" will be false — the issue should be resolved by the court, either by the trial judge if the conflict ripens before trial or by another judge during a recess when the trial is already in progress.<sup>26</sup> Upon first encountering the suggestion, I reacted like a proper adversarial lawyer: I was against it. I've changed my mind and want now to vote for it. Opposing the proposal, there are the obvious objections that it is cumbersome and involves automatic betrayal of the client's confidences to the judge who will later impose sentence (and likely enhance it for perjury or even proposed perjury). But the objections are curable or surmountable. And the urge to surmount them is powerful.

As for the urge, given our undoubted fallibility, it is not readily bearable that the lawyer should have a final say in the deep discomfiture of the client who has been relying upon him or her. We are experienced, without the need for much beseeching, in thinking it possible that we may be mistaken. Far from being objectionable to defense counsel, the

25. See, e.g., Model Rules of Professional Conduct 3.3, Comment on "Perjury by a Criminal Defendant"; ABA Informal Opinion 1314 (1975).

26. Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121, 149 *et seq.* (1985).

availability of a detached judgment could be a welcome means for sharing a heavy burden.

As for possible cumbersomeness, I think it unlikely to be major problem. As noted earlier, the occasions when client and counsel will reach an impasse — when counsel will fail to persuade the client that the proposed testimony should not be given — will in any circumstances be rare. For the few cases that will arise, the procedural cost is modest. The ends to be served — maximum fairness to the client on one side and for the lawyer's ethical functioning on the other — are well worth the price.

I would depart in one respect from Professor Rieger's outline. Regardless of when the problem emerged, before or during trial, I would have it resolved by a magistrate or a judge other than the trial judge. Whatever the decision, the process creates a weighty prospect that it will leave undesirable impressions with the judge scheduled to preside, to charge the jury, and, very possibly, to sentence. That undesirable consequence is worth avoiding.

The independent magistrate might vote with the client, finding room for a reasonable doubt that the proposed testimony will be false. That outcome is easy. Defense counsel should be free at that point to proceed in normal fashion with the presentation of the evidence.<sup>27</sup>

The easy outcome — let's face it — is not the more probable one. More likely, one supposes, is agreement of the magistrate with defense counsel. For me, the road ends at that point. The lawyer should then be free to withdraw. If the client insists over two such weighty opinions, he or she should be left to proceed *pro se*. This sort of fiasco is not unknown to the law. It has been borne for less weighty reasons.

Let me confess again my uncertainty about this procedural solution. There may well be better ways. They will be found if and when the profession genuinely means (1) to oppose giving aid to perjury and (2) to end the techniques of obstructing the truth from which the single question of client perjury is not meaningfully separable. Those in the end should be the paramount objectives.

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27. Worth a footnote at most is the possibility that lawyer and client could conspire to arrange for the client's success, allowing both the probable perjury and a cover for the lawyer's participation. But if every procedure were to be rejected because of the possibility of skulduggery, we'd all be out of business. The possibility here seems slender in any case.

