"Lawyer's Ethics in An Adversary System"

PART I

Law in Practice

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The Adversary System and the Practice of Law

We begin this book with essays on the nature of the practice of law for two reasons. First, the selections are of great practical and moral interest: Many who study the philosophy of law will be thinking about becoming lawyers. The oft-heard criticisms of lawyers and of the practice of law will be all too familiar to them. We all know that lawyers often bear the brunt of jokes about the practice of law. They are also frequently accused of demonstrating a lack of integrity or a willingness to do what may seem to be immoral acts. Why, for instance, does society tolerate the confidentiality of the lawyer–client relationship when it means that useful information is being withheld from the police? Or why do the activities of lawyers make truthful people appear to be liars and liars appear to be truthful? Second, beyond these practical and moral issues, the essays in this section also begin our inquiry into some of the other important topics that arise throughout the text, which include the justification of the legal practices of excluding relevant evidence in certain cases, the connections between the law and politics, and the essential nature of the law.

Lawyers' Ethics in an Adversary System

Monroe H. Freedman

In this selection from his book *Lawyers' Ethics in an Adversary System,* Monroe H. Freedman, professor of law and dean of the Hofstra University School of Law, examines the obligations of criminal defense lawyers in three difficult, morally troubling cases: whether to keep knowledge of a client's crime confidential, whether to allow a client to present perjured testimony, and whether to destroy a truthful witness through tough cross-examination. Freedman notes the conflicting obligations facing the conscientious attorney, but he defends zealous and aggressive advocacy in these cases as a necessary part of our adversarial criminal justice system.

WHERE THE BODIES ARE BURIED: THE ADVERSARY SYSTEM AND THE OBLIGATION OF CONFIDENTIALITY

In a recent case in Lake Pleasant, New York, a defendant in a murder case told his lawyers about two other people he had killed and where their bodies had been hidden. The lawyers went there, observed the bodies, and took photographs of them. They did not, however, inform the authorities about the bodies until several months later, when their client had confessed to those crimes. In addition to withholding the information from police and prosecutors, one of the attorneys denied information to one of the victim's parents, who came to him in the course of seeking his missing daughter.

There were interesting reactions to that dramatic event. 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. That attitude was encouraged by public statements by the local prosecutor, who sought to indict the lawyers for failing to reveal knowledge of a crime and for failing to see that dead bodies were properly buried. In addition, the reactions of lawyers and law professors who were questioned by the press were ambivalent and confused, indicating that few members of the legal profession had given serious thought to the fundamental questions of administration of justice and of professional responsibility that were raised by the case.

One can certainly understand the sense of moral compulsion to assist the parents and to give the dignity of proper burial to the victims. What seems to be less readily understood—but which, to my mind, throws the moral balance in the other direction—is the obligation of the lawyers to their client and, in a larger sense, to a system of administering justice which is itself essential to maintaining human dignity. In short, not only did the two lawyers behave properly, but they would have committed a serious breach of professional responsibility if they had divulged the information contrary to their client's interest. The explanation of that answer takes us to the very nature of our system of criminal justice and, indeed, to the fundamentals of our system of government. . . .

A trial is, in part, a search for truth. Accordingly, those basic rights are most often characterized as procedural safeguards against error in the search for truth. Actually, however, a trial is far more than a search for truth, and the constitutional rights that are provided by our system of justice may well outweigh the truth-seeking value—a fact which is manifest when we consider that those rights and others guaranteed by the Constitution may well impede the search for truth rather than further it. What more effective way is there, for example, to expose a defendant's guilt than to require self-incrimination, at least to the extent of compelling the defendant to take the stand and respond to interrogation before the jury? The defendant, however, is presumed innocent; the burden is on the prosecution to prove guilt beyond a reasonable doubt, and even the guilty accused has an "absolute constitutional right" to remain silent and to put the government to its proof.

Thus, the defense lawyer's professional obligation may well be to advise the client to withhold the

truth. As Justice Jackson said: "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Similarly, the defense lawyer is obligated to prevent the introduction of evidence that may be wholly reliable, such as a murder weapon seized in violation of the Fourth Amendment, or a truthful but involuntary confession. Justice White has observed that although law enforcement officials must be dedicated to using only truthful evidence, "defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission.... [W]e... insist that he defend his client whether he is innocent or guilty." ...

Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes be duly followed which ensure regard for the dignity of the individual, irrespective of the impact of those processes upon the determination of truth.

By emphasizing that the adversary process has its foundations in respect for human dignity, even at the expense of the search for truth, I do not mean to deprecate the search for truth or to suggest that the adversary system is not concerned with it. On the contrary, truth is a basic value, and the adversary system is one of the most efficient and fair methods designed for determining it. That system proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence in as thorough and persuasive a way as possible. The truth-seeking techniques used by the advocates on each side include investigation, pretrial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence in summation. Thus, the judge or jury is given the strongest possible view of each side, and is put in the best possible position to make an accurate and fair judgment. Nevertheless, the point that I now emphasize is that in a society that honors the dignity of the individual, the high value that we assign to truth-seeking is not an absolute, but may on occasion be subordinated to even higher values.

The concept of a right to counsel is one of the most significant manifestations of our regard for the dignity of the individual. No person is required to stand alone against the awesome power of the People of New York or the Government of the United States of America. Rather, every criminal defendant is guaranteed an advocate—a "champion" against a "hostile world," the "single voice on which he must rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct." In addition, the attorney serves in significant part to assure equality before the law. Thus, the lawyer has been referred to as "the equalizer," who "places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried."

The lawyer can serve effectively as advocate, however, "only if he knows all that his client knows" concerning the facts of the case. Nor is the client ordinarily competent to evaluate the relevance or significance of particular facts. What may seem incriminating to the client, may actually be exculpatory. For example, one client was reluctant to tell her lawyer that her husband had attacked her with a knife, because it tended to confirm that she had in fact shot him (contrary to what she had at first maintained). Having been persuaded by her attorney's insistence upon complete and candid disclosure, she finally "confessed all"—which permitted the lawyer to defend her properly and successfully on grounds of self-defense.

Obviously, however, the client cannot be expected to reveal to the lawyer all information that is potentially relevant, including that which may well be incriminating, unless the client can be assured that the lawyer will maintain all such information in the strictest confidence. "The purposes and necessities of the relation between a client and his attorney" require "the fullest and freest disclosures" of the client's "objects, motives and acts." If the attorney were permitted to reveal such disclosures, it would be "not only a gross violation of a sacred trust upon his part," but it would "utterly destroy and prevent the usefulness and benefits to be derived from professional assistance." That "sacred trust" of confidentiality must "upon all occasions be inviolable," or else the client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance." Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case." The result would be impairment of the

"perfect freedom of consultation by client with attorney," which is "essential to the administration of justice." Accordingly, the new Code of Professional Responsibility provides that a lawyer shall not knowingly reveal a confidence or secret of the client, nor use a confidence or secret to the disadvantage of the client, or to the advantage of a third person, without the client's consent. . . .

That is not to say, of course, that the attorney is privileged to go beyond the needs of confidentiality imposed by the adversary system, and actively participate in concealment of evidence or obstruction of justice. For example, in the *Ryder* case, which arose in Virginia several years ago, the attorney removed from his client's safe deposit box a sawed-off shotgun and the money from a bank robbery and put them, for greater safety, into the lawyers's own safe deposit box. The attorney, quite properly, was suspended from practice for 18 months. (The penalty might well have been heavier, except for the fact that Ryder sought advice from senior members of the bench and bar, and apparently acted more in ignorance than in venality.) The important difference between the *Ryder* case and the one in Lake Pleasant lies in the active role played by the attorney in *Ryder* to conceal evidence. There is no indication, for example, that the attorneys in Lake Pleasant attempted to hide the bodies more effectively. If they had done so, they would have gone beyond maintaining confidentiality and into active participation in the concealment of evidence.

The distinction should also be noted between the attorney's knowledge of a past crime (which is what we have been discussing so far) and knowledge of a crime to be committed in the future. Thus, a major exception to the strict rule of confidentiality is the "intention of his client to commit a crime, and information necessary to prevent the crime." Significantly, however, even in that exceptional circumstance, disclosure of the confidence is only permissible, not mandatory. Moreover, a footnote in the Code suggests that the exception is applicable only when the attorney knows "beyond a reasonable doubt" that a crime will be committed. There is little guidance as to how the lawyer is to exercise the discretion to report future crimes. At one extreme, it seems clear that the lawyer should reveal information necessary to save a life. On the other hand, as will be discussed [below], the lawyer should not reveal the intention of a client in a criminal case to commit perjury in his or her own defense.

It has been suggested that the information regarding the two bodies in the Lake Pleasant case was not relevant to the crime for which the defendant was being prosecuted, and that, therefore, that knowledge was outside the scope of confidentiality. That point lacks merit for three reasons. First, an unsophisticated lay person should not be required to anticipate which disclosures might fall outside the scope of confidentiality because of insufficient legal relevance. Second, the information in question might well have been highly relevant to the defense of insanity. Third, a lawyer has an obligation to merge other, unrelated crimes into the bargained plea, if it is possible to do so. Accordingly, the information about the other murders was clearly within the production of confidentiality. . . .

In summary, the Constitution has committed us to an adversary system for the administration of criminal justice. The essentially humanitarian reason for such a system is that it preserves the dignity of the individual, even through that may occasionally require significant frustration of the search for truth and the will of the state. An essential element of that system is the right to counsel, a right that would be meaningless if the defendant were not able to communicate freely and fully with the attorney.

In order to protect the communication—and, ultimately, the adversary system itself—we impose upon attorneys what has been called the "sacred trust" of confidentiality. It was pursuant to that high trust that the lawyers acted in Lake Pleasant, New York, when they refrained from divulging their knowledge of where the bodies were buried. . . .

PERJURY: THE CRIMINAL DEFENSE LAWYER'S TRILEMMA

Is it ever proper for a criminal defense lawyer to present perjured testimony? . . . That question cannot be answered properly without an appreciation of the fact that the attorney functions in an adversary system of criminal justice which . . . imposes special responsibilities upon the advocate.

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sel cannot properly perform their duties without knowing the truth." The lawyer who is ignorant of any potentially relevant fact "incapacitates himself to serve his client effectively," because "an adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial."*

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

Third, the lawyer is an officer of the court, and his or her conduct before the court "should be characterized by candor."

As soon as one begins to think about those responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court. Moreover, the difficulties presented by those conflicting obligations are particularly acute in the criminal defense area because of the presumption of innocence, the burden upon the state to prove its case beyond a reasonable doubt, and the right to put the prosecution to its proof.

Before addressing the issue of the criminal defense lawyer's responsibilities when the client indicates to the lawyer the intention to commit perjury in the future, we might note the somewhat less difficult question of what the lawyer should do when knowledge of the perjury comes after its commission rather than before it. Although there is some ambiguity in the most recent authorities, the rules appear to require that the criminal defense lawyer should urge the client to correct the perjury, but beyond that, the obligation of confidentiality precludes the lawyer from revealing the truth. . . .

If we recognize that professional responsibility requires that an advocate have full knowledge of every pertinent fact, then the lawyer must seek the truth from the client, not shun it. That means that the attorney will have to dig and pry and cajole, and, even then, the lawyer will not be successful without convincing the client that full disclosure to the lawyer will never result in prejudice to the client by any word or action of the attorney. That is particularly true in the case of the indigent defendant, who meets the lawyer for the first time in the cell block or the rotunda of the jail. The client did not choose the lawyer, who comes as a stranger sent by the judge, and who therefore appears to be part of the system that is attempting to punish the defendant. It is no easy task to persuade that client to talk freely without fear of harm. . . .

Assume the following situation. Your client has been falsely accused of a robbery committed at 16th and P Streets at 11:00 P.M. He tells you at first that at no time on the evening of the crime was he within six blocks of that location. However, you are able to persuade him that he must tell you the truth and that doing so will in no way prejudice him. He then reveals to you that he was at 15th and P Streets at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 P.M., he was six blocks away. At the trial, there are two prosecution witnesses. The first mistakenly, but with some degree of persuasiveness, identifies your client as the criminal. At that point the prosecution's case depends upon that single witness, who might or might not be believed. The second prosecution witness is an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 P.M. She has corroborated the erroneous testimony of the first witness and made conviction extremely likely. However, on cross-examination her reliability is thrown into doubt through demonstration that she is easily confused and has poor eyesight. Thus, the corroboration has been eliminated, and doubt has been established in the minds of the jurors as to prosecution's entire case.

The client then insists upon taking the stand in his own defense, not only to deny the erroneous

*American Bar Association Canons of Professional Ethics, 15.

evidence identifying him as the criminal, but also to deny the truthful, but highly damaging, testimony of the corroborating witness who placed him one block away from the intersection five minutes prior to the crime. Of course, if he tells the truth and thus verifies the corroborating witness, the jury will be more inclined to accept the inaccurate testimony of the principal witness, who specifically identified him as the criminal.

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

For example, how would [one] resolve the following case? The prosecution witness testified that the robbery had taken place at 10:15, and identified the defendant as the criminal. However, the defendant had a convincing alibi for 10:00 to 10:30. The attorney presented the alibi, and the client was acquitted. The alibi was truthful, but the attorney knew that the prosecution witness had been confused about the time, and that his client had in fact committed the crime at 10:45. (Ironically, that same attorney considers it clearly unethical for a lawyer to present the false testimony on behalf of the innocent defendant in the case of the robbery at 16th and P Streets.) Should the lawyer have refused to present the honest alibi? How could he possibly have avoided doing so? Was he contributing to wise and informed judgment when he did present it?

The most obvious way to avoid the ethical difficulty is for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney. The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of guilt from the new attorney. In terms of professional ethics, the practice of withdrawing from a case under such circumstances is difficult to defend, since the identical perjured testimony will ultimately be presented. Moreover, the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but loses it in the very act of evading the ethical problem.

The difficulty is all the more severe when the client is indigent. In that event, the client cannot retain other counsel, and in many jurisdictions it is impossible for appointed counsel or a public defender to withdraw from a case except for extraordinary reasons. Thus, the attorney can successfully withdraw only by revealing to the judge that the attorney has received knowledge of the client's guilt, or by giving the judge a false or misleading reason for moving for leave to withdraw. However, for the attorney to reveal knowledge of the client's guilt would be a gross violation of the obligation of confidentiality, particularly since it is entirely possible in many jurisdictions that the same judge who permits the attorney to withdraw will subsequently hear the case and sentence the defendant. Not only will the judge then have personal knowledge of the defendant's guilt before the trial begins, but it will be knowledge of which the newly appointed counsel for the defendant will very likely be ignorant.

Even where counsel is retained, withdrawal may not be a practical solution either because trial has begun or it is so close to trial that withdrawal would leave the client without counsel, or because the court for other reasons denies leave to withdraw. Judges are most reluctant to grant leave to withdraw during the trial or even shortly before it because of the power that that would give to defendants to delay the trial date or even to cause a series of mistrials. . . .

Since there are actually three obligations that create the difficulty—the third being the attorney's duty to learn all the facts—there is, of course, another way to resolve the difficulty. That is, by "selective ignorance." The attorney can make it clear to the client from the outset that the attorney does not want to hear an admission of guilt or incriminating information from the client. That view, however, puts an unreasonable burden on the unsophisticated client to select what to tell and what to hold back, and it can seriously impair the attorney's effectiveness in counselling the client and in trying the case.

For example, one leading attorney, who favors selective ignorance to avoid the trilemma, told me about one of his own cases in which the defendant assumed that the attorney would prefer to be igno-

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rant of the fact that the defendant had been having sexual relations with the chief defense witness. As a result of the lawyer's ignorance of that fact, he was unable to minimize its impact by raising it with potential jurors during jury selection and by having the defendant and the defense witness admit it freely on direct examination. Instead, the first time the lawyer learned about the illicit sexual relationship was when the prosecutor dramatically obtained a reluctant admission from the defense witness on cross-examination. The defense attorney is convinced that the client was innocent of the robbery with which he had been charged, but the defendant was nevertheless found guilty by the jury—in the attorney's own opinion because the defendant was guilty of fornication, a far less serious offense for which he had not been charged.

The question remains: what should the lawyer do when faced with the client's insistence upon taking the stand and committing perjury? It is in response to that question that the Standards present a most extraordinary solution. If the lawyer knows that the client is going to commit perjury, Section 7.7 of the Standards requires that the lawyer "must confine his examination to identifying the witness as the defendant and permitting him to make his statement." That is, the lawyer "may not engage in direct examination of the defendant . . . in the conventional manner." Thus, the client's story will become part of the record, although without the attorney's assistance through direct examination. The general rule, of course, is that in closing argument to the jury "the lawyer may argue all reasonable inferences from the evidence in the record." Section 7.7 also provides, however, that the defense lawyer is forbidden to make any reference in closing argument to the client's testimony.

There are at least two critical flaws in that proposal. The first is purely practical: The prosecutor might well object to testimony from the defendant in narrative form rather than in the conventional manner, because it would give the prosecutor no opportunity to object to inadmissible evidence prior to the jury's hearing it. The Standards provide no guidance as to what the defense attorney should do if the objection is sustained.

More importantly, experienced trial attorneys have often noted that jurors assume that the defendant's lawyer knows the truth about the case, and that the jury will frequently judge the defendant by drawing inferences from the attorney's conduct in the case. There is, of course, only one inference that can be drawn if the defendant's own attorney turns his or her back on the defendant at the most critical point in the trial, and then, in closing argument, sums up the case with no reference to the fact that the defendant has given exculpatory testimony. . . .

It would appear that the ABA Standards have chosen to resolve the trilemma by maintaining the requirements of complete knowledge and of candor to the court, and sacrificing confidentiality. Interestingly, however, that may not in fact be the case. I say that because the Standards fail to answer a critically important question: Should the client be told about the obligation imposed by Section 7.7? That is, the Standards ignore the issue of whether the lawyer should say to the client at the outset of their relationship: "I think it's only fair that I warn you: If you should tell me anything incriminating and subsequently decide to deny the incriminating facts at trial, I would not be able to examine you in the ordinary manner or to argue your untrue testimony to the jury." The Canadian Bar Association, for example, takes an extremely hard line against the presentation of perjury by the client, but it also explicitly requires that the client be put on notice of that fact. Obviously, any other course would be a betrayal of the client's trust, since everything else said by the attorney in attempting to obtain complete information about the case would indicate to the client that no information thus obtained would be used to the client's disadvantage.

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

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

Taking into account, therefore, . . . the practical and constitutional difficulties encountered by any of the alternatives to strict maintenance of confiden-

tiality,... I continue to stand with those lawyers who hold that "the lawyer's obligation of confidentiality does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself." What that means—necessarily, it seems to me—is that the criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant....

CROSS-EXAMINATION: DESTROYING THE TRUTHFUL WITNESS

More difficult than the question of whether the criminal defense lawyer should present known perjury, is the question of whether the attorney should cross-examine a witness who is testifying accurately and truthfully, in order to make the witness appear to be mistaken or lying. The issue was raised effectively in a symposium on legal ethics through the following hypothetical case.

The accused is a drifter who sometimes works as a filling station attendant. He is charged with rape, a capital crime. You are his court-appointed defense counsel. The alleged victim is the twenty-two-year-old daughter of a local bank president. She is engaged to a promising young minister in town. [The drifter claims she consented.]...

You learn that the victim has had affairs with two local men from good families. Smith, one of these young men, admits that the victim and he went together for some time, but refuses to say whether he had sexual intercourse with her and indicates he has a low opinion of you for asking. The other, Jones, apparently a bitterly disappointed and jealous suitor, readily states that he frequently had intercourse with the victim, and describes her behavior toward strange men as scandalous. He once took her to a fraternity dance, he says, and, having noticed she had been gone for some time, discovered her upstairs with Smith, a fraternity brother, on a bed in a state of semiundress. He appears eager to testify and he states that the girl got what she'd always been asking for. You believe Jones, but are somewhat repelled by the disappointed suitor's apparent willingness to smear the young woman's reputation.

Suppose the accused, after you press him, admits that he forced himself on the victim and admits that his first story was a lie. He refuses to plead guilty to the charge or any lesser charge. He says that he can get away with his story, because he did once before in California.

Should the defense lawyer use the information supplied by Jones to impeach the young woman and, if necessary, call Jones as a witness?...

That case takes us to the heart of my disagreement with the traditional approach to dealing with difficult questions of professional responsibility. That approach has two characteristics. First, in a rhetorical flourish, the profession is committed in general terms to all that is good and true. Then, specific questions are answered by uncritical reliance upon legalistic norms, regardless of the context in which the lawyer may be acting, and regardless of the motive and the consequences of the act. Perjury is wrong, and therefore no lawyer, in any circumstance, should knowingly present perjury. Cross-examination, however, is good, and therefore any lawyer, under any circumstances and regardless of the consequences, can properly impeach a witness through cross-examination. The system of professional responsibility that I have been advancing, on the other hand, is one that attempts to deal with ethical problems in context—that is, as part of a functional sociopolitical system concerned with the administration of justice in a free society—and giving due regard both to motive and to consequences. In that respect, the debate returns us to some fundamental philosophical questions that have not been adequately developed in the literature of professional responsibility....

One of the major flaws in the traditional approach to legal ethics is that it seeks to an answer the difficult questions in a legalistic fashion at the personal level, but begs completely the critical questions raised at the systemic level. Thus, if you say to a lawyer: "Lawyers are under a moral duty not to participate in the presentation of perjury, and therefore you are required to act in a way contrary to your client's interest if the client insists upon committing perjury," the lawyer is entitled to respond: "Let us consider your maxim. If it is embodied into the system as a universal law to be applied to all lawyers in all circumstances, w
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all circumstances, would the maxim destroy itself and be destructive of the system?"

As we have seen [previously], the system requires the attorney to know everything that the client knows that is relevant to the case. In order to enable the lawyer to obtain that information, the system provides for an obligation of confidentiality, designed to protect the client from being prejudiced by disclosures to the attorney. In addition, the attorney is required to impress upon the client the obligation of confidentiality in order to induce the client to confide freely and fully.

Let us return, then, to the case involving the street robbery at 16th and P Streets, in which the defendant has been wrongly identified as the criminal, but correctly identified by the nervous, elderly woman who wears eyeglasses, as having been only a block away five minutes before the crime took place. If the woman is not cross-examined vigorously and her testimony shaken, it will serve to corroborate the erroneous evidence of guilt. On the other hand, the lawyer could take the position that since the woman is testifying truthfully and accurately, she should not be made to appear to be mistaken or lying. But if a similar course were to be adopted by every lawyer who learned the truth through confidential disclosures from the client, such disclosures would soon cease to be made. The result, for practical purposes, would be identical with the practice, disapproved in the ABA Standards, of "selective ignorance," in which the client is warned not to reveal to the lawyer anything that might prove embarrassing and prevent the lawyer from doing a vigorous job of presenting evidence and cross-examining. Of course, if that is the result we want, it would be far better that lawyers take a direct and honest approach with their clients, telling them to be less than candid, rather than lying to their clients by impressing upon them a bond of trust that the lawyers do not intend to maintain. Thus, when we examine the problem in a systemic context, we reach the conclusion . . . supporting cross-examination of the prosecutrix in the rape case.

Obviously, however, the rape case is a much harder one, because the injury done to the prosecutrix is far more severe than the more limited humiliation of the public-spirited and truthful witness in the case of the street robbery. In addition, in the rape case, the lawyer is acting pursuant to a manifestly irrational rule, that is, one that permits the defense to argue that the prosecutrix is the kind of person who would have sexual intercourse with a stranger because she has had sexual relations with two men whom she knew in wholly different social circumstances. Irrational or not, however, in those jurisdictions in which the defense of unchastity is still the law, the attorney is bound to provide it on the client's behalf. For the lawyer who finds the presentation of that defense, and perhaps others in rape cases, to go beyond what he or she can in good conscience do, there are two courses that should be followed. The first is to be active in efforts to reform the law in that regard; the second is to decline to accept the defense of rape cases, on the grounds of a conflict of interest (a strong personal view) that would interfere with providing the defendant with his constitutional rights to effective assistance of counsel.

REVIEW AND DISCUSSION QUESTIONS

1. What moral and professional conflict is raised by the Lake Pleasant, buried-bodies case? Explain how Freedman appeals to our adversarial system to defend confidentiality. What are the limits to what an attorney may do to assist a client? How does the *Ryder* case differ from the Lake Pleasant case?
2. What does Freedman mean by the "lawyer's trilemma"? Why does he criticize the treatment of the issue by the American Bar Association (ABA) Standards?
3. Should an attorney allow a client to present perjured testimony to the court? Is the Canadian Bar Association's rule an improvement over the system that Freedman defends?
4. How ought an attorney handle the cross-examination of the truthful witness?
5. Does Freedman's defense of the adversary system tip the balance too much in favor of criminal defendants?

6. Freedman discusses criminal cases, but our society also uses an adversary system for handling civil cases. To what extent can Freedman's arguments be used to defend zealous advocacy and aggressive legal tactics in civil cases?

An Alternative to the Adversary System

John H. Langbein

It is often assumed by practicing lawyers as well as the wider public that the adversary system is if not perfect, at least better than its alternatives. But why should that be assumed, especially in light of the fact that so many other nations use a different system? Indeed it has seemed to many that the adversary system makes demands on lawyers that cannot possibly be met, since it asks that they both represent their clients' interests and that they serve justice as "officers of the Court." In this essay John H. Langbein describes the differences between the Anglo-American and German systems of civil procedure. Civil procedure (as opposed to criminal procedure) is the process by which the legal system resolves disputes over "private" matters such as contracts, negligence that causes damage, property, marriage, corporations, and taxation—in other words, much of the law. As Langbein points out, the major differences between the adversary system and what is sometimes called an "inquisitorial" one are first that the Court plays the dominant role in gathering the evidence, rather than the lawyers, and second that the trial is not treated as a separate, brief period in which the lawyers and clients present their cases to the judge or jury but rather as an extended process during which evidence is gathered and assessed.

There are two fundamental differences between German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require. . . .

From the standpoint of comparative civil procedure, the most important consequence of having judges direct fact-gathering in this episodic fashion is that . . . in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case. Free of constraints that arise from party presentation of evidence, the court investigates the dispute in the fashion most likely to narrow the inquiry. A major job of counsel is to guide the search by directing the court's attention to particularly cogent lines of inquiry. . . .

The episodic character of German civil procedure—Benjamin Kaplan called it the "conference method" of adjudication—has other virtues: It lessens tension and theatrics, and it encourages settlement. Countless novels, movies, plays, and broadcast serials attest to the dramatic potential of the Anglo-American trial. . . . German civil proceedings have the tone not of the theatre, but of a routine business meeting—serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage. . . .

In this business-like system of civil procedure the tradition is strong that the court promotes compromise. The judge who gathers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved. As the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the

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