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THE PURPOSES OF ADVOCACY AND THE LIMITS OF CONFIDENTIALITY

*John T. Noonan, Jr.**

THE privilege of confidentiality between lawyer and client is a significant barrier to the search for truth and the attainment of justice. Since bankers, accountants, psychiatrists, and confessors are not entitled at common law to confidentiality in their relationships with those with whom they deal, one may well inquire why lawyers possess such an extraordinary privilege. In the early English case which established the lawyer-client privilege, counsel offered several justifications: (1) A "gentleman of character" does not disclose his client's secrets. (2) An attorney identifies himself with his client, and it would be "contrary to the rules of natural justice and equity" for an individual to betray himself. (3) Attorneys are necessary for the conduct of business, and business would be destroyed if attorneys were to disclose their communications with their clients.¹

None of the above justifications seems very persuasive today. Gentlemen of character have no legally recognized immunity from testifying about their friends' secrets. The identification of lawyer and client is, at best, only a metaphor, indicating an underlying policy justification for the privilege. Finally, attorneys are no more essential to the conduct of general business than are accountants, bankers, and secretaries, who do not enjoy the privilege. The suspicion arises that the legal profession has carved out for itself a privilege which it is reluctant to grant to other equally necessary and honorable men merely because the privilege is good for the legal business.

However, the secrecy of information communicated by a client to a lawyer may have a more rational justification than those discussed above when the information is divulged in preparation for a trial. The purpose of employing a trial lawyer is to assert one's rights in a lawsuit; this purpose might be defeated if a relevant secret were available to one side merely by calling the opposing counsel to testify. Therefore, if the essential function of lawyers is to conduct trials, they must be able to receive relevant information and keep it confidential.

To say that a lawyer's function is to conduct a trial, however, does not suffice, for one must inquire into the purposes of a trial

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I am indebted to the suggestions of my colleague, Professor G. Robert Blakey, *l. Annesley v. Anglesey*, 17 How. St. Tr. 1140, 1223-26, 1241 (Ex. 1743).

and of trial advocacy. If one agrees with Charles Curtis that a trial is an irrational process—a substitute for trial by battle which gives the litigant the satisfaction of having “his day in court”²—one may conclude that the function of the advocate is to be a friendly champion who, by his wholehearted devotion to the cause, is able to satisfy his client’s desire for a day in court. It is hard to deny that many trials of the past, and some of the present, suggest the appropriateness of such an analysis. If this theory of the purposes of a trial and of advocacy is accepted, there is no reason why the solutions proposed by Professor Monroe Freedman to his three hypothetical cases should be rejected. Since many trial lawyers believe, perhaps subconsciously, that the Curtis view is an accurate reflection of what actually happens in a trial, it is easy to understand why Professor Freedman’s solutions seem plausible, if not mandatory; he has merely expressed as a norm what is, in fact, current practice for some practitioners. Indeed, the merit of Professor Freedman’s exposition is that he candidly exposes the working principles of many lawyers at the same time that he makes those principles vital by showing how they would govern particular cases. This scholarly explication of what is often taken for granted serves a very useful function.

Professor Freedman’s analysis, however, presupposes that the Curtis theory, or something approximating it, is a correct description of the trial process. Yet, Curtis’ description of the system obscures three important points. First, although a trial may be a battle, not only is physical violence excluded, but some purely peaceful tactics such as the subornation of perjury and the introduction of faked documents are discouraged; the system gives each litigant his day in court, but it also excludes obviously false information. Second, the satisfaction the client receives depends not on his sense of the friendly atmosphere of the court, but rather on his feeling that justice is being done, insofar as he is being heard, for the client will usually believe that once he is heard, truth will prevail. Third, the truth-discovering techniques of Anglo-American law have developed from such crude devices as trial by battle to more refined and more ample procedures such as detailed interrogatories and discovery procedures under the Federal Rules; this evolution must be taken into consideration in any analysis of purposes of the system.

A second, perhaps more appropriate view of a trial and of the adversary system is the view endorsed in 1958 by the Joint Confer-

2. CURTIS, *IT’S YOUR LAW* 17-21 (1954).

ence on Professional Responsibility of the Association of American Law Schools and the American Bar Association. It is a modern view in that it looks less at the way in which trials have been conducted in the past than at the way in which they may be conducted in the future. A trial is seen as a process "within which man's capacity for impartial judgment can attain its fullest realization,"³ and the function of the advocate is to assist the trier of fact in making this impartial judgment. In a non-adversary system, the tribunal would do its own investigating, have its own theory of the case, and possibly decide the issues too quickly. On the other hand, the adversary system permits the tribunal to remain uncommitted while a case is explored from opposing viewpoints, thus requiring the liability or guilt to be demonstrated publicly to a neutral tribunal. In this view of the system, "the advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case."⁴

Evidently, if the Joint Conference's approach is taken, distinctions must be made in answering Professor Freedman's three hypotheticals. As to the first problem,⁵ it could be argued that the sole function of an advocate is to produce a wise and informed *ultimate* judgment. In the process of assisting the trier in attaining this final result, counsel therefore may properly obscure or impugn testimony which, while true, would not be relevant to the determination of guilt but rather would merely create an erroneous impression.⁶ For example, a defense lawyer could attempt to impair the credibility of a witness who testified truthfully before a jury of Negroes that the defendant was a member of the Ku Klux Klan. By destroying the true but irrelevant testimony, it is argued, the advocate would, in fact, contribute to a wise ultimate result. This reasoning, however, does not seem persuasive. Rather, it resembles the paternalism which is so often invoked as an excuse for not trusting others with the truth. Instead of attempting to destroy the testimony it would be better to refrain from impeaching the truthful witness and to trust the trier of fact to draw the right conclusions. The law itself provides mechanisms for excluding irrelevant and prejudicial evidence; where evidence is not clearly irrelevant, a lawyer should not attempt to exclude it at the cost of attacking a truthful witness. Repeated

3. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1160-61 (1958).

4. *Ibid.*

5. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

6. Professor Freedman uses a slightly different rationale to reach the same conclusion. See *id.* at 1474-75.

acts of confidence in the rationality of the trial system are necessary if the decision-making process is to approach rationality.

The second hypothetical⁷ is easier than the first to solve in terms of the Joint Conference's theory. To permit a client who will commit perjury to take the stand does not contribute to a wise and informed decision. It is difficult to differentiate among forging documents, suborning another witness, and calling one's own client with the knowledge that he will lie. An impartial, informed, and wise decision presupposes that the person deciding a case has been given the truth. To furnish him with a lie is to mock impartiality, to mislead rather than to inform, and to stultify the decisional process rather than to make it an exploration leading to mature judgment.

The third hypothetical⁸ would seem to be answerable, in part, the same way under both Professor Freedman's analysis and that of the Joint Conference. A lawyer should not be paternalistic toward his client, and cannot assume that his client will perjure himself. Furthermore, a lawyer has an obligation to furnish his client with all the legal information relevant to his case; in fulfilling this duty to inform his client, a lawyer would normally not violate ethical standards. Motives may properly be given their weight after the legal consequences of an act are known by the client, for a human being rarely acts with a completely undivided heart. Although the courts have made a generous allowance for this multiplicity of human motivations, there is a point, however, at which it becomes brute rationalization to claim that the legal advice tendered to a client is meant to contribute to wise and informed decision-making. For example, a lawyer may, in substance, be suggesting perjury rather than giving legal advice when the lawyer knows that the facts are completely contrary to the defense which he outlines to his client. In *Anatomy of a Murder*, Paul Biegler won his case, but lost his fee.⁹ Possibly this result reflects the author's own conception of a just reward for Biegler's manipulative use of the system. Professor Freedman seems to feel that to refuse to tell a client of a defense which is not supported by the facts would penalize truth-telling clients; the answer is that truth sometimes has unfortunate consequences.

Thus, if one considers that the function of the advocate is to assist in the formulation of wise and informed decisions, there is a limit to the confidentiality of communication between client and trial

7. *Id.* at 1469.

8. *Ibid.*

9. TRAVER, *ANATOMY OF A MURDER* (1956).

counsel. The partisanship involved in keeping a communication confidential must be restricted when it leads to conduct which destroys the truth or presents perjury to the fact-finder. Indeed, in some instances, courts may even compel a lawyer to testify about confidential information revealed to him by a client. The communication of an intention to commit a crime is not privileged;¹⁰ neither does the privilege exist if a lawyer has a pre-existing duty which precludes him from acting for a client.¹¹ Some courts have held that only relevant information is privileged¹² and that information may not remain confidential after the client's death.¹³ All of these qualifications present difficult questions which a naïve client, believing his communications were truly free from disclosure by his lawyer, would not anticipate.¹⁴ Thus, it appears that neither confidentiality nor the adversary system is an absolute; each is justified pragmatically by its ability to serve certain social needs. Professor Freedman repeatedly treats a privileged communication as an absolute which takes precedence over all other values. He justifies this by asserting that complete lawyer-client confidentiality is necessary to the adversary system. Yet such confidentiality is necessary to the adversary system only if the system exists as Professor Freedman views it. Asserted as a standard by which to measure the lawyer's conduct in all situations, absolute confidentiality is inimical to a system which has as its end rational decision-making.

It might, however, be objected that I have not sufficiently considered the requirements of a criminal trial. In criminal trials, the privilege against self-incrimination has a far more significant impact on the procedure than it does in civil trials. Dominant among the multiple purposes of this constitutional privilege are the creation of some balance between the government and the individual and the

10. *E.g.*, *United States v. Bob*, 106 F.2d 37, 39-40 (2d Cir. 1939).

11. *E.g.*, *Prichard v. United States*, 181 F.2d 326 (6th Cir. 1950).

12. *E.g.*, *Snow v. Gould*, 74 Me. 540, 543 (1883).

13. *In re Graf's Estate*, 119 N.W.2d 478 (N.D. 1963).

14. In the ancient civil case first recognizing the privilege, the issue was whether an earl's solicitor could disclose his client's intent to arrange the judicial hanging of a rival for his estate. The court, while recognizing the privilege, ordered disclosure of the information. One ground of the decision was that the communication was not relevant to the earl's legal business, although in fact it bore very heavily on the earl's willingness to settle certain lawsuits in which the solicitor was involved. *Annesley v. Anglesey*, 17 How. St. Tr. 1140, 1223-26, 1241 (Ex. 1743). Randolph Paul says that "in some instances taxpayers are unaware of the safety inherent in the confidential relationship which exists between tax clients and their attorneys." Paul, *Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377, 383 (1950). He apparently does not point out to them that this privilege is limited; if the client reveals an intent to continue a plan of tax evasion, there is no judicially recognizable confidentiality attending the communication.

assurance of respect for the person of the defendant.¹⁵ It may be asserted that the objective of displaying respect for the humanity of a defendant cuts across and limits the truth-discovering purpose of a trial, and that, therefore, the privilege of confidentiality in a criminal trial should be absolute. This approach can be persuasive, especially if the tendency to expand the meaning and scope of the constitutional privilege against self-incrimination is interpreted as a series of advances in the protection of the person.¹⁶ Nevertheless, truth-discovering may still be a dominant purpose of a criminal trial.

The criminal process operates in such a way that a large number of convictions are obtained by admissions; in this decade, roughly five sixths of those convicted in the federal courts have pleaded *nolo contendere* or guilty.¹⁷ Recent decisions have resulted in a marked lessening of the adversary role of the prosecutor, who is now compelled to respond to the broad discovery rights of the defendant,¹⁸ is prohibited from suppressing evidence helpful to the defendant,¹⁹ and is required to make the names of the material witnesses available to the defendant.²⁰ While this trend could be considered another series of advances in the protection of the individual, it could also be interpreted as an effort to eliminate those characteristics of a trial which have made trials appear to be somewhat of a game.²¹ The adversary system is not eliminated by such changes, but its irrational aspects are diminished, and if the trend is truly one of eliminating the irrational, it may be expected that the irrational elements favoring the defendant will also be reduced. In the new Federal Rules of Criminal Procedure, the courts are given the power to condition discovery by a defendant on the defendant's giving the government a limited right to discovery.²² It may be expected that if the government prosecutor cannot present a doubtful witness without calling the defendant's attention to his lack of credibility,²³

15. See WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961); Note, 78 HARV. L. REV. 426 (1964).

16. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964).

17. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANN. REP. 132 (1963).

18. *Campbell v. United States*, 373 U.S. 487 (1963); *Bowman Dairy v. United States*, 341 U.S. 214 (1951).

19. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); Note, 34 GEO. WASH. L. REV. 92, 103 (1965).

20. *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964).

21. *Curran v. Delaware*, 259 F.2d 707, 711 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959).

22. FED. R. CRIM. P. 16b, 16c, as amended Feb. 28, 1966, to take effect July 1, 1966.

23. *Curran v. Delaware*, 259 F.2d 707, 711 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959).

the defendant's lawyer may be asked to observe the same standard as to his witnesses. Should there be any difference if the witness is the defendant himself? Is it really an enhancement of the rights of the person or a protection of the defendant's dignity to permit him to commit perjury with his lawyer's acquiescence? These questions are raised because it is difficult to believe that the defense of human rights depends upon a deliberate avoidance of the rational.

Extensive subordination of the lawyer's interests to those of his client also has an effect on the lawyer himself. Professor Freedman is concerned about the rights of the client; but what of the rights of the lawyer? Professor Freedman's chief authorities are the Canons of Professional Ethics of the American Bar Association, Opinion 287 interpreting Canons 29 and 37,²⁴ and the case of *Johns v. Smyth*.²⁵ While the Canons, which were adopted at the beginning of this century, do not offer as clear or as rational a view of the advocate's function as is found in the report of the 1958 Joint Conference, they are significant in so far as they are the work of a professional group which refused to let professional requirements be the ultimate norm. The Canons do not say that the man is to be subordinated to the advocate or that a lawyer, *qua* lawyer, is to be less than human. On this cardinal point, the Canons are squarely in disagreement with the extraordinary dictum in *Johns v. Smyth*.²⁶ Under the heading, "How far may a lawyer go in supporting a client's cause," the Canons recognize the need for "warm zeal" in the maintenance of a client's rights, but they conclude flatly that the lawyer "must obey his own conscience and not that of his client."²⁷

It is inconceivable that Professor Freedman would endorse a system in which a lawyer is merely the willing tool, mouthpiece, or technician for his client. Only a moral idealist would so uncompromisingly proclaim his position as Professor Freedman has done. Only a moral absolutist would say that a criminal's plea of not guilty is a lie.²⁸ Professor Freedman is so strongly in favor of candor and

24. Opinion 287, Committee on Professional Ethics and Grievances of the American Bar Association (1953).

25. 176 F. Supp. 949 (E.D. Va. 1959).

26. *Id.* at 953: "[T]he defendant was entitled to the faithful and devoted services of his attorney uninhibited by the dictating conscience." The lawyer, when he could not conscientiously proceed with the defense, should have offered his client the option of seeking other counsel. In failing to do so, he deprived his client of the basic right to choose a lawyer who was willing to act for him. *But see* Orkin, *Defense of One Known To Be Guilty*, 1 CRIM. L.Q. 170, 174 (1958).

27. AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908).

28. Professor Freedman posits a "moralist" who will tell lawyers that they lie in

idealism that he in effect exposes the working principles of some lawyers by spelling out explicitly their assumptions and the consequences of those assumptions. Like many idealists, however, he is so candid that he may be mistaken for a cynic by the unenlightened. His position is not cynical, but it does seem to ignore the dangers inherent in defining the lawyer's role without broader consideration of the demands of human personality and of society. I would hope that reflection on the nature of the moral automatons which lawyers would logically become under Professor Freedman's view might cause him to reconsider his premises.

A lawyer should not impose his conscience on his client; neither can he accept his client's decision and remain entirely free from all moral responsibility, subject only to the restraints of the criminal law. The framework of the adversary system provides only the first set of guidelines for a lawyer's conduct. He is also a human being and cannot submerge his humanity by playing a technician's role. Although the obligation to be candid is not so absolute that it cannot be affected by context, both the seeking and stating of truth are so necessary to the human personality and so demanded by broad social values that the systematic presentation of falsehood is both personally demeaning and socially frustrating. Moreover, the adversary system itself does not demand active suppression of truth. As a free person, cooperating with another free person—his client—to prove the client's innocence in a way which will also lead to the revelation of truth, the lawyer must act with regard for the requirements of the adversary system and with concern for his own standards as a human person, as well as with regard for the requirements of the society which the system serves.

entering such a plea. However, the obligation to tell the truth is seen today as dependent on the duty to respond. Moreover, words have no absolute significance. The plea "not guilty," as used in the context of a court proceeding, is understood by everyone to mean, "I cannot be proved guilty of the charge by the ordinary process of law."