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# Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility

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# PROFESSIONAL ETHICS IN CRIMINAL TRIALS: A VIEW OF DEFENSE COUNSEL'S RESPONSIBILITY

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MORE than thirty years ago, in *Berger v. United States*,[1] Mr. Justice Sutherland described the heavy and multiple responsibility assumed by a prosecutor. The United States Attorney, he asserted, not only must be an advocate for the prosecution, but also must ensure that justice prevails. The Justice stated: "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[2]

In the face of this admonition and the standard of conduct required of the prosecutor, one is prone to inquire about the responsibilities of the defense counsel. Is he merely an advocate for his client under all circumstances, or is he also governed by a standard of conduct which imposes both a duty to the courts and restrictions upon his conduct in dealings with his client? It would appear that the views expressed by Professor Freedman imply the former—that the duty of defense counsel to secure an acquittal for his client is paramount to his obligation to the court and to the legal profession. It is submitted that Professor Freedman's views are contrary to the Canons of Professional Ethics,[3] notwithstanding his suggestion that his position must be adopted if the confidentiality of lawyer-client communications is to be preserved.

There can be no question that the recent procedural and substantive developments in criminal law have defined and extended the rights of persons accused of crime. Some of the decisions effecting these developments were long overdue and reflect changing concepts of due process. It is the duty of the advocate to be thoroughly familiar with these innovations and with the advantages afforded by the Federal Rules of Criminal Procedure, including the new discovery techniques introduced in the recent amendments to the Rules.[4] These developments, coupled with the recent growth of public or quasi-public defender offices, whose investigative staffs have been made readily available to counsel appointed to represent

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1. 295 U.S. 78 (1935).
2. *Id.* at 88.
3. AMERICAN BAR ASSOCIATION. CANONS OF PROFESSIONAL ETHICS (1908).
4. See FED. R. CRIM. P. 16(b), as amended Feb. 28, 1966, to take effect July 1, 1966.

indigents, have presented defense counsel both with new methods of defense and with increased responsibilities to his client. Counsel's duties to the court and to the profession, however, have not changed.

A defense attorney does not promote the attainment of justice when he secures his client's freedom through illegal or improper means. Rather, by the use of such methods, he breaches the public trust reposed in him by virtue of his oath of office. Canon 5, entitled "The Defense or Prosecution of Those Accused of Crime," provides:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused . . . . Having undertaken such defense, the lawyer is bound, *by all fair and honorable means,* to present every defense *that the law of the land permits,* to the end that no person may be deprived of life or liberty, but by due process of law.[5]

Canon 5 thus sets a standard of conduct for defense counsel which restricts him to the use of "fair and honorable means." Like the prosecutor, counsel for the defense must remain within the bounds of propriety. When the prosecutor is regarded as "the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer,"[6] is it appropriate that the defense attorney be allowed to use unfair methods in protecting his client? Do the dictates of justice or of our system of jurisprudence require that he be permitted to do so? It would appear that neither the presumption of the defendant's innocence nor the government's burden of proof demands that the defense attorney act with anything other than honor and fairness.

With specific reference to the problems posed by Professor Freedman in his article, it is agreed that, absent some unusual circumstances, every witness presented by one's adversary should be subjected to searching cross-examination.[7] Once a defendant has exercised his constitutional right to put the government to its proof, the question of his guilt or innocence is to be determined by the trier of fact. Accordingly, the advocate should not rely on his own opinion of the witness' veracity, but rather must present to the jury all of the factors relevant to the witness' perceptual ability, his bias, and the consistency of his testimony.[8]

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5. Emphasis added.

6. Berger v. United States, 295 U.S. 78, 88 (1935).

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

8. See Alford v. United States, 282 U.S. 687 (1931).

With respect to Professor Freedman's second proposition,[9] it is interesting to note that the broadly-phrased question whether a lawyer should present a witness who he knows will commit perjury remains unanswered. He advocates only the less startling, but nevertheless perplexing, proposition that an attorney should permit his client to perjure himself. It is inconceivable that ethical counsel would call to the witness stand a person, other than his own client, who he knows will commit perjury. Professor Freedman does not undertake to defend such a tactic. Clearly, the prosecutor may not call such a witness;[10] counsel for the defense ought not be allowed to do so either. Judge Warren E. Burger of the Court of Appeals for the District of Columbia Circuit has stated:

> It must be remembered that there is not a dual standard of conduct, one for the prosecutor and one for the defense counsel. Nor is there a different standard of professional duty as between paid or unpaid counsel. The fact that improper conduct of a prosecutor is more readily dealt with by reversal of convictions should not lead defense counsel to believe that such conduct goes unnoticed by this court.[11]

As previously noted, the Canons of Professional Ethics emphasize that a lawyer may use only "fair and honorable" means in defense of a client.[12] They also provide that counsel must not take part in any fraud,[13] and that, should perjury occur in a trial, he owes a duty "to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."[14] Under no reasonable interpretation can the attorney-client privilege justify using perjured testimony of a non-client.[15]

Admittedly, a more difficult question is presented when one's client insists upon testifying falsely in his own behalf. Surely, counsel must vigorously attempt to dissuade the client from this course of action. If his efforts fail, counsel should move to withdraw from the case.[16] Under such circumstances, counsel need not divulge his

9. See Freedman, *supra* note 7, at 1469.
10. *E.g.*, Mooney v. Holohan, 294 U.S. 103 (1935).
11. Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961) (concurring opinion).
12. Canon 5.
13. Canon 15.
14. Canon 29.
15. See notes 18-20 *infra*.
16. See Canons 15 ("The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his conscience and not that of his client."); 16 ("If a client persists in such wrongdoing, the lawyer should terminate their relation."); 44 ("If the client insists upon an . . . immoral course in the conduct of his case, . . . the lawyer may be warranted in withdrawing on due notice to the client . . . .").

client's confidences, for the court might well accept his assertion that he could no longer conscientiously represent the defendant. While a majority of lawyers appear to agree that an attorney should attempt to withdraw in such a situation,[17] Professor Freedman finds fault with this procedure because he fears that the defendant, anticipating an attorney's probable reaction to the truth, will merely lie initially to his next attorney. This, however, would not be as great a misfortune as Professor Freedman implies. The defendant would have been advised by his first lawyer of the strong possibility that the prosecutor will expose his perjured defense, thus seriously jeopardizing his chance for acquittal by calling his credibility into question before the jury.

Moreover, conscientious counsel would have reminded his client that perjury is illegal and might result in his being cited for contempt of court,[18] that counsel could be prosecuted for criminal complicity,[19] and that an intention to commit perjury destroys the attorney-client privilege.[20] In the face of such advice, the unscrupulous defendant would have been afforded the opportunity to make an intelligent and considered judgment before committing perjury. While the second lawyer's defense efforts would be handicapped by his ignorance of the truth, the defendant himself would have elected this course deliberately. Thus, the onus for the perjury would not rest upon a member of the bar, but rather upon the defendant alone.

Of course, should the motion for leave to withdraw be denied, counsel must continue in the case. If the defendant persists in his decision to perjure himself, then the lawyer must, unfortunately, permit him to testify. In this event, however, counsel will have fulfilled his moral obligations to the court and will have maintained his client's confidences, as well as his client's respect.[21]

Logic and reason alone are sufficient to compel disagreement with Professor Freedman's third proposition—that a defendant should be given the opportunity to fabricate a defense by being informed of the legal consequences before being asked his version of the facts. In addition, however, Canon 15 specifically states that only

17. See, *e.g.*, Steinberg, *The Defense of the White Collar Accused: An Attorney's View*, 3 AM. CRIM. L.Q. 129, 132 (1965).

18. See United States v. Arbuckle, 48 F. Supp. 537 (D.D.C. 1943). See also *Ex parte* Hudgings, 249 U.S. 378, 384 (1919); *In re* Gottman, 118 F.2d 425 (2d Cir. 1941).

19. 18 U.S.C. § 2 (1964) proscribes no less.

20. Alexander v. United States, 138 U.S. 353 (1891); *In re* Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956). See also Mr. Justice Cardozo's statement respecting destruction of the privilege, even in the absence of *pari delicto*. Clark v. United States, 289 U.S. 1, 15 (1933).

21. *Cf.* Canon 31.

the "unscrupulous" contend that "it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause." Although Professor Freedman purports to shift to the defendant the moral responsibility for what may become perjured testimony,[22] counsel cannot so easily escape culpability in a clear case of subornation of perjury.

Significantly, Canon 22 states that "it is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses . . . ." Furthermore, Professor Freedman's proposition is contrary to another principle which he accepts as fundamental to the attorney-client relationship—that of full and free disclosure. An attorney who adopts the Professor's viewpoint will never be certain what actually happened.[23] He may thereafter build his entire defense upon a foundation which might be readily undermined by the prosecution. Surely this will not benefit his client, nor will it increase the esteem in which the legal profession is held by the defendant or the public.

There is no sound basis for the proposition that different standards of conduct may be applied to the prosecutor and the defense counsel and that the latter must make no concessions in the attempt to free his client. Counsel for the defense must certainly fight vigorously, but he must do so within the framework of the prescribed rules. He owes loyalty to his client, but he cannot be disloyal "to the law whose ministers we are,"[24] because "the place of justice is a hallowed place."[25] Furthermore, a lawyer who condones perjury does not advance the cause of justice. Whether he is acquitted or convicted, an accused who sees his lawyer employ unethical tactics will emerge from his trial filled with justifiable contempt for the law, for his own unscrupulous counsel, and perhaps for the entire legal profession.[26]

Advocates, whether prosecutors or defense attorneys, are constrained to remember, as the Supreme Court recently stated, that "the basic purpose of a trial is the determination of truth."[27] The

22. See Canon 15.
23. See Canon 8.
24. Canon 32.
25. BACON, *Of Judicature*, in ESSAYS (1955).
26. A lawyer "advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law . . . . [A]bove all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." Canon 32.
27. Tehan v. Shott, 382 U.S. 406, 416 (1966).

Court has also proclaimed that perjury "tends to defeat the sole ultimate objective of trial."[28] It should now be axiomatic that justice must be achieved for society as well as for defendants, that a criminal trial is not a sporting contest, and that the fair determination of an individual's guilt and the protection of society are both important objectives of the criminal law. Consequently, one must reject the position of those who believe that morality for the defense counsel is different from morality for the prosecutor. It is wrong to acquit the guilty through illegal and improper means,[29] just as it is improper to convict a defendant by the use of such tactics. Thus, a lawyer's conduct should be guided by the following words of a former Solicitor General of the United States:

> In such a profession [as the law] there is no room for fellowship with the dishonest, the unfaithful, the untrustworthy, or the unpatriotic, and no useful place for those who are ignorant or inadequately prepared. It is our duty to the public, to the government, and to our profession to guard jealously professional standards and ideals, and to see that they are kept high and clean.[30]

28. *In re* Michael, 326 U.S. 224, 227 (1945).

29. See Mitchell v. United States, 259 F.2d 787, 792 (D.C. Cir. 1958).

30. Address by William M. Frierson, 5th Session, Conference on Legal Education, 1922. See 8 A.B.A.J. 156 (1922).