

# Criminal Law Defense, Ethics, and the Client Who Plans to Lie

## INTRODUCTION

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*Although published over forty years ago, Monroe Freedman's Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions<sup>1</sup> continues to reverberate through American jurisprudence. In an effort to raise some of Freedman's questions in the context of contemporary plea bargaining, eight lawyers were asked to respond to the hypothetical below,<sup>2</sup> restricting their answers to five-to-ten "lightly footnoted" pages each.<sup>3</sup> Professor Freedman kindly consented to comment on these submissions, and to accept a similar limit on his comments. The product of all their efforts is a pithy and provocative commentary on a situation that arises all too frequently in today's criminal courts.*

You are a lawyer representing a defendant in a federal drug prosecution. The allegation against your client is that she transported heroin into the United States by concealing it on her person; the principal evidence against your client is the heroin seized from her during lawful police procedures upon her arrival by air into Tampa International Airport. Your candid assessment of the evidence against your client is that she will very likely be convicted and sentenced to a long prison term.

In your discussions with your client, she has mentioned that she is well acquainted with a man who is reputed to be a "drug kingpin" in the Tampa Bay area. You know from conversations with your friends in the local federal prosecutor's office that there is substantial interest in making a case against this man, who has thus far eluded prosecution.

You have already generally informed your client that she might be able to reduce her sentence if she provides "substantial assistance" to the prosecution in

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<sup>1</sup> Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

<sup>2</sup> For several years I have included this hypothetical in a reading assignment in my first-year Criminal Law course that includes Freedman's article and the relevant Florida versions of the Model Rules of Professional Conduct.

<sup>3</sup> The editors of this journal wisely decided to suspend this limit in order to publish the new ABA Criminal Justice Standards on Prosecutorial Investigations as an appendix to Rory K. Little's symposium contribution.

their pursuit of other lawbreakers. Should you also specifically draw your client's attention to the government's interest in her friend, the reputed drug kingpin, even though you know this might tempt your client to commit perjury in testifying against him?

Assume that you have had this specific conversation with your client, and that she subsequently agreed with the prosecution to provide detailed testimony regarding the drug kingpin's illegal operations, in exchange for which she will plead guilty to a reduced charge and receive a short sentence after she testifies against the kingpin. As her attorney, you have assisted her in reaching this agreement.

Sometime before the kingpin's trial (and thus before your client has entered her guilty plea and been sentenced), she confesses to you that her testimony against the kingpin will be "all lies—I figured out what those prosecutors wanted me to say, and I'm gonna say it." You advise the client against this procedure, but she is adamant, saying that this is the only way she can avoid a long sentence—"and besides, I'm convinced that guy is dirty, I just can't prove it. He was too careful around me." Assuming that you believe your client is now telling you the truth, what are your ethical obligations?

Are you required to withdraw from representing your client? If not, are you permitted to do so? Are you required to inform the court of her perjury? If so, which court—the one trying the kingpin, the one to which she plans to plead guilty, or both? If you are not required to disclose, are you permitted to do so? And once again, to whom?