1976

Review of Freedman's "Lawyers' Ethics in An Adversary System"

Ronald D. Rotunda
Chapman University, Fowler School of Law, rrotunda@chapman.edu

Review of Freedman's "Lawyers' Ethics in An Adversary System"

BOOK REVIEW

LAWYERS' ETHICS IN AN ADVERSARY SYSTEM. By Monroe H. Freedman.[1] Indianapolis: Bobbs-Merrill, 1975. Pp. xiii, 284. $12.50.

Reviewed by Ronald D. Rotunda [2]

In 1966, almost by accident, Monroe Freedman was asked to present a lecture outlining some of his thoughts about the ethical problems of a criminal defense lawyer. In that lecture he advanced the view for which he is now famous: that the lawyer must put a witness on the stand even though he knows that the witness will perjure himself. The subsequent efforts of a few Washington attorneys and judges to disbar him [3] launched Freedman's career in legal ethics. His recent book is the product of nearly a decade of his thoughts and a compilation of many of his earlier articles.[4] The essence of this book is the question of perjury. Must the criminal defense attorney put the perjurious client on the stand, examine him in the usual way, and argue the false statements to the jury, even though the lawyer is fully aware of the perjury? In spite of our post-Watergate morality, Freedman still vigorously answers yes to this question.[5]

---

[1] Dean, Hofstra University School of Law.

[2] Assistant Professor of Law, University of Illinois. Member of the Illinois, New York, and Washington, D.C. Bars. B.A., 1967, Harvard College; J.D., 1970, Harvard Law School.

[3] The judges included Chief Justice, then Judge, Burger. That Freedman has never forgotten nor forgiven Warren Burger's earlier unjustified attacks is evident throughout the book. Burger is cited quite often in this very short book in order to illustrate error. Even when Freedman concedes that Burger is right in his conclusions, he is "correct, although for the wrong reason . . ." (p. 48). In his characteristically biting style, Freedman explains that because of Burger's earlier efforts to prevent Freedman's discussions of a criminal defense lawyer's professional responsibility, Freedman "was therefore tempted for a time to dedicate this book 'To the Chief Justice of the United States, but for whose efforts this book would never have been written'" (p. viii, n.*).

[4] *E.g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967). Freedman, *Solicitation of Clients: For the Poor, not the Privileged*, JURIS DOCTOR, April, 1971, at 10; Freedman, *A Civil Libertarian Looks at Securities Regulation*, 35 OHIO ST. L.J. 280 (1974); Freedman, *Book Review*, 16 AM. U.L. REV. 177 (1966).

[5] In his original ethics lecture, Freedman formulated what he termed "the three hardest questions" for a criminal defense lawyer:

> (1) Should you put a witness on the stand when you know the witness is going to commit perjury? (2) Should you cross-examine a prosecution witness whom you know to be accurate and truthful, in order to make the

Freedman's efforts have caused people to think about some hard ethical questions, and in that sense he has performed a service. But while he raises hard questions, he provides only simplistic answers. He creates a supposed trilemma: The lawyer is to learn all the facts from the client and hold them in confidence, fight with zeal, and still display candor to the court (p. 27). But this trilemma only exists because of Freedman's overly broad view of the need for confidentiality and zeal. His book does not offer a careful balancing and consideration of the different sides of the argument. One cannot rely on it either as a statement of the law of professional responsibility or even a good argument for what the law should be. Instead, it is a brief, pure and simple. Like many briefs, it is more argumentative than illuminating; many competing facts, arguments, and other considerations are not even mentioned. Therefore, Freedman's conclusions are suspect. His failure is most unfortunate, for this short book[6] is highly readable and might have been a more valuable addition to the ethical controversy.

In his first chapter, Freedman lays much of the groundwork for the remainder of the book by emphasizing the need for complete confidentiality between attorney and client. He relies in part on Disciplinary Rule 4-101(B) of the Code of Professional Responsibility:[7]

> 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

witness appear to be mistaken or lying? (3) Should you give your client advice about the law when you know your advice may induce the client to commit perjury? I concluded, with admitted uncertainty, that the adversary system, with its corollary, the confidential relationship between lawyer and client, often requires an affirmative answer to those questions. (P. viii.)

Though he still answers yes to the first two questions, he has changed his mind on the third.

[6] The actual book is a mere 107 pages in length, when we exclude the ABA Code of Professional Responsibility. which is reprinted, the index, nontextual footnotes, appendix, and blank pages.

[7] The ABA CODE OF PROFESSIONAL RESPONSIBILITY (hereinafter the CODE) has been adopted as law in most states. It is divided into Canons — axiomatic norms; Disciplinary Rules [hereinafter cited as DR] — mandatory in character; and Ethical Considerations [hereinafter cited as EC] — aspirational in character. *See* CODE, *Preliminary Statement.*

> 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" . . . . 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. (P. 5, footnotes omitted.)

If Freedman is trying here to present a short statement of the attorney-client privilege, or to demonstrate broad recognition of its liberal application, he is wrong. Though this formulation differs little from Ethical Consideration 4–1, the Code of Professional Responsibility, unlike Freedman, immediately qualifies its statement with Ethical Consideration 4–2, which affirms that "obviously" the need to protect confidences does not preclude the lawyer from revealing information "when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law." Disciplinary Rule 4–101(C) in turn lists four exceptions to the obligation to preserve a client's confidences or secrets, and one of them is the power to reveal the "intention of his client to commit a crime and the information necessary to prevent the crime." This exception appears to allow a lawyer to reveal the client's planned perjury, the intention to commit a crime. The requirements of confidentiality [8] and candor, then, are not irreconcilable, because the Code explicitly recognizes that the latter modifies the former. Indeed, Professor Wigmore and others have noted that the privilege "ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle." [9] Courts have long followed this prescription,[10] and this "inviolable" trust of

[8] While Freedman only talks of the obligation of confidentiality, DR 4–101(A) refers to both "confidences," *i.e.*, information protected by the attorney-client privilege, and "secrets," *i.e.*, information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Neither "confidences" nor the broader category of "secrets" prevent an attorney from testifying when "permitted under Disciplinary Rules or required by law or court order." DR 4–101(C)(2); *accord*, EC 4–2. Note also that DR 4–101(C)(4) allows an attorney to reveal, *inter alia*, confidences or secrets "necessary to establish or collect his fee . . . ."

[9] 8 J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961); *accord*, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 87, at 176–77 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

[10] *See, e.g.*, Foster v. Hall, 29 Mass. (12 Pick.) 89, 97 (1831) ("The rule of

confidentiality is riddled with exceptions. For example, business advice is not within the privilege;[11] ordinarily, neither is information regarding the existence, execution, or place of custody of a document.[12] Also, a client's identity, address, and the object or scope of his employment are ordinarily not privileged.[13] Communications to the attorney in the presence of a third person who is not the agent of either the attorney or the client are similarly unprivileged.[14] Nor is an attorney's advice to a client privileged when the client expects the attorney to prepare a letter to a third person setting forth the client's position, because the client's intent that the lawyer reveal the conversation to third persons negates the privilege.[15]

There are many other ways that a client may lose the protection of confidentiality. This review of a few is not an attempt to present the law of confidentiality in a nutshell, but to emphasize that the obligation of confidentiality operates within very narrow boundaries that are often crossed. In a variety of technical ways, this " 'sacred trust' of confidentiality," without which the right to counsel is "meaningless" (p. 8) may be lost. Yet we learn none of this from Freedman's book. His view of confidentiality is a distorted mirror of reality. He even tells us — as if it were recognized law — that "an unsophisticated lay person should not be required to anticipate which disclosures might fall outside the scope of confidentiality because of insufficient legal relevance" (p. 7). But unsophisticated lay persons and *lawyers* [16] frequently lose the lawyer-client privilege because they do not recognize that the privilege is one that the law grudgingly grants and easily withdraws. Freedman does not protest this view of confidentiality as much as he ignores it.

Privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly.").

[11] *See, e.g.*, United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753–54 (D. Del. 1943). Where the client seeks legal advice, the existence of nonlegal, incidental communications between attorney and client does not destroy the privilege. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950) (Wyzanski, J.).

[12] 8 J. WIGMORE, *supra* note 9, § 2309.

[13] MCCORMICK, *supra* note 9, § 90, at 185–86.

[14] 8 J. WIGMORE, *supra* note 9, § 2311, at 601–02.

[15] *See, e.g.*, United States v. Tellier, 255 F.2d 441 (2d Cir. 1958). *See also* Wilcox v. United States, 231 F.2d 384 (10th Cir.), *cert. denied*, 351 U.S. 943 (1956) (client's private instructions to attorney that at preliminary hearing he should propound certain questions to witness not privileged).

[16] *See, e.g.*, Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J. OF L. & SOCIAL PROB. 179, 180–81 (1972) (survey of lawyers indicates a general lack of awareness as to when the attorney-client privilege will apply to inter-attorney exchanges of information in joint attorney conferences).

If Freedman really means to attack the state of the law, one would have expected him to describe the present ethical responsibility and explain why it furnishes inadequate protection of a client's confidences. Instead, he presents his view of confidentiality as a given. And because the remainder of the book is based on this undiluted view of confidentiality, the rest of his analysis suffers correspondingly.

Freedman does acknowledge that unlike the attorney's knowledge of a past crime, "a major exception [in the ABA Code of Professional Responsibility] to the strict rule of confidentiality is the 'intention of his client to commit a crime, and information necessary to prevent the crime'" (p. 6, *quoting* Disciplinary Rule 4-101(C)(3)). But, continues Freedman:

> 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. (P. 6, footnote omitted.)

Leaving aside the point that the "exceptional circumstance" is only one of several, Freedman's reading of the Code is a strained one. A more natural reading would be that under the Disciplinary Rule, information about the client's intention to commit a crime is not confidential. There is, as Freedman points out, little guidance [17] as to how the attorney should exercise his discretion to volunteer information about client intentions to commit future crimes. Footnote 16 to Disciplinary Rule 4-101(C)(3), however, gives us one instance when the attorney ***must*** exercise his discretion when to report: [18]

> *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if 'the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed.'

---

[17] In fact, given the strong wording of the aspirational ethical consideration, EC 4-1, one is left wondering when it is most appropriate for an attorney to exercise his discretion under DR 4-101(C)(3). Although the footnote to this section of the Code offers some assistance — as explained in the text — other situations are left unclear.

[18] Footnote 1 to the Preamble to the Code states:

> The footnotes are intended merely to enable the reader to relate the provisions of this Code to the [predecessor] ABA Canons of Professional Ethics adopted in 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources; they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards . . . .

Other footnotes suggest instances where the discretion ***may*** be exercised. *See, e.g.*, ABA CANONS OF PROFESSIONAL ETHICS No. 4, n.15.

Freedman has read the "must" language of the Code's footnote to mean "may." And his absolutist view of confidentiality in turn has required him to read the "may" language of Disciplinary Rule 4-101(C)(3) to be meaningless.

Under the Code and this footnote, one might think the attorney would be obliged to exercise his discretion and disclose confidences when the client has told the attorney that, if called to the stand, he will commit the crime of perjury.[19] Instead of offering his crabbed interpretation of Disciplinary Rule 4-101(C)(3), Freedman might have argued that a defendant's perjury in his own defense in a criminal case is a special type of crime that should not be included within the meaning of Disciplinary Rule 4-101(B)(3). Even so, the very existence of the special rights accorded a defendant whose liberties are at stake — appointed counsel, the fifth amendment privilege, jury trial, proof beyond a reasonable doubt, and others — militates against adding the right to compel counsel to allow the client to perjure himself and even ethically require the counsel to argue the client's false story to the jury.

Having laid in chapter one the first half of the foundation of his theory of ethics for a criminal defense lawyer, Dean Freedman turns to the other half in chapter two: "Zealous Advocacy and the Public Interest." Freedman's basic thesis is summed up by Lord Brougham, representing the Queen in *Queen Caroline's Case*:[20]

> . . . An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others . . . . [H]e must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion. (P. 9.)

Freedman feels "bound to provide" this type of advocacy, but

---

[19] *See* M. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS 270 (1975):

> This public [monopoly] status [of lawyers] entails a scale of obligations. In legal proceedings lawyers cannot lie, knowingly allow clients to commit perjury . . . . ABA Formal Opinion 155 [May 4, 1936] prohibits a lawyer from aiding or tolerating the "commission of an unlawful act, even if received in confidence . . . . He should, if unable to get the client to cease the conduct, make such disclosures as may be necessary to protect those against whom the conduct is threatening or working legal harm." Thus, a lawyer can restrain, refuse, or even disclose a client's activities if sufficiently harmful.

[20] Trial of Queen Caroline 8 (1821), *quoted in* FREEDMAN at 9.

says that the "rest of the picture, however, should not be ignored" (p. 9). To complete the picture, Freedman tells us, we need only "an advocate on the other side, and an impartial judge over both" (p. 9).

This picture, though, is far from complete. The Code of Professional Responsibility represents a complex balance of at least five competing interests. Freedman recognizes only one interest — the client's. But there are four others: the lawyer's responsibility to his fellow attorneys, to the public, to the court, and to himself.[21] Must the client's interest always be placed above all others? The Code, for example, recognizes that the duty of zealous advocacy must at times be tempered by the duty towards one's fellow lawyers. Thus Ethical Consideration 7–38 provides that a lawyer "should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so."[22] Yet following the local custom may harm the client. If the advocate must be so single-minded as to disregard "the torments . . . which he brings to others," how would Freedman react to the local custom consideration? Would he consider this ethical consideration unethical? Unexplained under Freedman's single-interest analysis, it appears quite reasonable under a multi-interest analysis of the Code. Obedience to Ethical Consideration 7–38 does not affect the merits of the client's cause and only requires lawyers to act in good faith with each other. Therefore, the lawyer's responsibility to his fellow attorneys should prevail.

Similarly, lawyers may investigate jurors on behalf of their clients, but they should not be "[v]exatious or harassing . . . ."[23] The dominant interest here is the public one of protecting jurors. Disciplinary Rules 2–109 and 7–102(A)(1) and Ethical Consideration 7–4 all forbid filing frivolous motions, even though a frivolous motion may cause delay in the client's case and delay is often beneficial.[24] Yet such delays are not in

[21] I am indebted to my colleague, Professor Thomas Morgan, for developing this five-part interest analysis of the Code, which is discussed in the introduction to our book, T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (1976).

[22] *Cf.* AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT § 13 (1972):

> *The lawyer, and not the client has the sole discretion* to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights such as extension of time, continuances, adjournments *and admissions of facts.* In such matters no client has a right to demand that his counsel shall be illiberal or that he do anything therein repugnant to his own sense of honor and propriety. (Emphasis added.)

[23] EC 7–30.

[24] *Accord,* ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 1.2(c)

the interest of efficient judicial administration and are not relevant to the merits of the case. Here the court's interest outweighs the client's. Even the lawyer's responsibility to himself (not at all a cynical interest) may modify the client's interest in unrestrained zeal. Professor Robert Keeton, an academic with considerable trial experience, recognizes the propriety of this interest. He offers a more complex and, I find, a more persuasive view of the Code when he concludes that the lawyer's duty to himself, his interest in protecting his reputation, also modifies the client's interests. He declares [25] that the

> duty of supporting the client's cause is sometimes so forcefully stated as to support the argument that as a trial lawyer you are obliged to assert every legal claim or defense available, except those you can reject on tactical grounds relating to the immediate case. But the aims of the trial system to achieve justice, the interests of future clients, and your legitimate interest in your own reputation and future effectiveness at the bar compel moderation of that extreme view.

The Code is full of similar restrictions on zealous representation.[26] Indeed, those sections that require zealous representation specifically cabin that zeal within "the law, which includes Disciplinary Rules and enforceable professional regulations." [27] But Freedman, by assuming away the evidence of the other interests reflected in the Code, misunderstands the adversary system, which cannot and does not operate on his terms. The

(Approved Draft, 1971). *See also* FED. R. CIV. P. 11, which provides that the signature of an attorney, required on every pleading, constitutes a certificate by him that to the best of his knowledge, information, and belief there is good ground to support it and that it is not interposed for delay. The rule further states that for its willful violation an attorney may be subject to "appropriate disciplinary action."

[25] R. KEETON, TRIAL TACTICS AND METHODS § 1-3 (2d ed. 1973) (footnote omitted). This view does not conflict with EC 2-28, which forbids a lawyer to reject employment because of a personal preference to avoid "adversary alignment against judges, other lawyers, public officials, or influential members of the community . . . ." To the same effect is § 1.6, ABA STANDARDS RELATING TO THE DEFENSE FUNCTION (Approved Draft, 1971). These sections condemn only a venal, bad faith view of reputation. Other sections of the Code recognize that a lawyer should seek to develop a reputation for integrity and competence. *Cf.* EC 2-6.

[26] *See, e.g.*, EC 7-7 to 7-10. DR 4-101(C)(4), quoted in note 8, *supra*, is an example of a Code provision that limits confidentiality in order to protect the personal interest of the lawyer. DR 4-101(C)(4) also provides that confidentiality may be violated so that a lawyer can "defend himself or his employees or associates against an accusation of wrongful conduct." The interests primarily protected here are the attorney's interest and his fellow attorneys' interests.

[27] EC 7-1. *See also* Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 410 (1953).

duties of the lawyer are not as simple and unsophisticated as Freedman suggests. Thus the lawyer must defend his client with full vigor in making his summation to the jury,[28] but this concession does not transform the lawyer into a hired gun.[29] There is a middle ground between an undiluted adversary system in which unrestrained lawyers are forced to use every trick of the trade and no adversary system at all. One would have thought that in a booklength work Freedman should at least have offered some discussion of the competing interests modifying a simple-minded view of the adversary system.

Nonetheless, armed with these two basic and overstated principles of strict confidentiality and strict zeal, Freedman turns to the issue of perjury. He concludes, in apparent conflict with Disciplinary Rule 7-102(A)(4),[30] 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" (pp. 40–41). Freedman rejects the position of the Canadian Bar Association, which:

> takes an extremely hard line against the presentation of perjury by a client, but it also explicitly requires that the client be put on notice of that fact . . . . [T]he 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, . . . [is] a solution which . . . is denounced by the [ABA Criminal Defense] standards as unscrupulous, 'most egregious', and 'professional impropriety'. (P. 38.)

Conceivably, the Canadian view may cause some clients to conceal certain facts that might have provided the basis for a winning, nonperjurious argument. Therefore, allowing the lawyer to present perjury may ultimately cause less harm and more truth than not allowing perjury. But Freedman makes no attempt to demonstrate that this long chain of speculation is

---

[28] Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959).

[29] As Justice Jackson has declared:

> We believe in an independent Bar, . . . intellectually independent of client control. In the client-and-attorney relation the client is not a master, the lawyer is not a mere hired hand — he is an officer of the court, with a duty of independent judgment in the performance of his professional service . . . .

Jackson, *The American Bar Center: A Testimony to Our Faith in the Rule of Law*, 40 A.B.A.J. 19, 21 (1954). *See also* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). *See generally* M. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS (1975).

[30] "In his representation of a client, a lawyer shall not: . . . [k]nowingly use perjured testimony or false evidence."

valid. The practice of the Canadian Bar Association [31] shows that it is possible to make some inroads into confidentiality in order to prevent the lawyer from becoming involved in the client's attempted perjury without making the right to counsel "meaningless" (p. 6) as Freedman contends. The lawyer's zeal need not be undiluted and unthinking.

In addition, Freedman's analysis here appears to conflict with his answer to the question whether a lawyer should give his client advice about the law which may induce the client to commit perjury. About a decade ago Freedman answered yes to this question.[32] "I argued," Freedman relates:

> that the client is entitled to have that information about the law and to make his own decision as to whether to act upon it. To withhold the advice, I said, would not only penalize the less well educated, but would also prejudice the client because of his initial truthfulness in telling his story in confidence to the attorney.
>
> The fallacy in that argument is that the lawyer is giving the client more than just 'information about the law', but is actively participating in — indeed, initiating — a factual defense that is obviously perjurious. [We must not carry] the 'equalizer' concept of the lawyer's role too far. Moreover, even though the client has initially been truthful in telling his story to the attorney in confidence, it does not follow that there is any breach of confidence if the lawyer simply declines to create a false story for the client. (P. 73.)

If we forbid lawyers to go along with their clients' decisions to commit perjury, Freedman tells us, we will encourage clients to be less than completely candid with their lawyers. But Freedman does not explain why a lawyer who refuses to advise his client about the law because it may induce him to commit perjury is not also penalizing the client because of his initial truthfulness, and thus encouraging him to be less than completely candid with the attorney. Nor does Freedman tell us why a lawyer who uses his direct examination techniques to elicit known perjury from his client on the witness stand and argues the false testimony to the jury is not "actively participating in" a perjurious defense. Freedman must have noticed the disquieting similarity in reason-

---

[31] Freedman relies in part on "the consensus and the practice of the bar" in using the known perjury of their clients. Such anecdotal analysis should not end the debate; he concedes (p. 72) that the probable consensus of the bar on an ethical matter, while relevant, is not conclusive. Moreover, my own experience with one large firm has been contrary to Freedman's alleged "consensus."

[32] Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478–82 (1966).

ing, for at this point in his essay he tells us in a footnote: "That [*i.e.*, advising the client about the law so that he may commit perjury] is a very different matter from accepting a client's decision to commit perjury, and presenting that perjury to the court, recognizing that to do otherwise would undermine the confidential relationship." (P. 73 n.*) Unfortunately he does not explain why the matter is "very different." The distinction must spring from Freedman's undiluted view of confidentiality, but it is not self-evident.

When Freedman attempts to explain why statutes forbidding subornation of perjury do not apply to lawyers who accept their clients' decisions to commit perjury (p. 31), he refers back to an earlier section (pp. 5–6) for support, but this earlier section only offers three reasons why it is not a crime for a lawyer to withhold information about a past crime. At least two of these reasons do not appear to apply at all to the case of future crimes.

The first reason Freedman offers is that an attorney withholding information about past crimes plays no active role (p. 6), and therefore there is no obstruction of justice. Yet in the case of the client's intent to commit perjury in the future, the lawyer, according to Freedman, must examine the client in the ordinary manner and "argue to the jury, as evidence in the case, the [knowingly false] testimony . . ." (p. 41). This role seems active, unless one has an unusual definition of "active." Freedman does not tell us what his is.

Freedman's second reason for the inapplicability of obstruction-of-justice statutes to the attorney's refusal to reveal information about his client's past crimes is that the "distinction should also be noted between the attorney's knowledge of a past crime . . . and knowledge of a crime to be committed in the future" (p. 6). This distinction is hardly a convincing reason for not applying a subornation statute to future perjury. At any rate, Freedman does not explain the significance of the distinction.

The only reason that may apply to the case of future perjury is the first one that Freedman gives: criminal statutes should be strictly construed in order to avoid constitutional issues. While this reason may be applicable to future crimes, the argument is hardly irrefutable. If an attorney is forced to reveal his client's *past* crimes, the constitutional right to effective assistance of counsel and privilege against self-incrimination are indeed severely weakened. But this conclusion need not apply, certainly not to the same degree, to the case of revealing an intent to commit future crimes.

In the remainder of the book, Dean Freedman touches on a variety of topics, often too briefly. He argues that the attorney

is bound to use his cross-examination techniques to try to destroy a truthful witness. He thus places insufficient emphasis on important questions of judgment [33] and ignores the apparently conflicting view of the American Bar Association in its *Standards Relating to the Defense Function*, which provide that the lawyer "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully." [34] While I do not purport to embrace the ABA view, it at least merits some discussion, rather than Freedman's nontreatment. He does present an excellent discussion of issues related to the certification of trial lawyers, an interesting but very short discussion of British customs — both inserted apparently as a rebuttal to some of Chief Justice Burger's remarks touting British superiority— and a very persuasive chapter on ambulance chasing, arguing for greater access to the legal system.

All in all, it is an interesting though incomplete book. Had Dean Freedman developed more issues in greater detail, it would have been better.

---

[33] For example, using trick questions to attempt to "destroy" the witness is a technique that often backfires. R. KEETON, *supra* note 27, at § 3-19.

[34] ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.6(b) (Approved Draft, 1971). Freedman apparently does not contend that the lawyer *may* attempt to destroy the truthful witness; according to Freedman he *must* destroy this witness. Good trial tactics, however, may require the lawyer to ignore or otherwise seek to downplay the witness. Freedman's ethically "required" and apparently unthinking vigorous attack on the witness may create jury sympathy for the opposition. *See* R. KEETON, *supra* note 27, at § 3-19.