

# ETHICS ADVISORY OPINION

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## The Ethics Advisory Committee of NACDL Formal Opinion 92-2

### **Ethics Opinion Will Reduce Perjury and Uphold Defendants' Rights**

A new ethics opinion relating to the issue of client perjury was adopted by a near-unanimous NACDL Board of Directors at its meeting on November 7, 1992, in Newport, Rhode Island. The opinion had been debated before the NACDL Board at two previous meetings, leading to refinements in an earlier draft.

The unusually long and closely reasoned opinion concludes that the constitutional privilege against self-incrimination and the constitutional right to the effective assistance of counsel prohibit a lawyer from revealing a client's perjury to the court, regardless of ethical rules that appear to require disclosure.

The opinion expressly rejects the "narrative solution," in which the lawyer forces the client to testify without the assistance of counsel, and in which the lawyer then omits reference to the client's testimony in closing argument. As is generally recognized, this kind of conduct by the lawyer effectively reveals client confidences and secrets to the judge and jury.

Also rejected was the suggestion that a lawyer intentionally maintain ignorance of client perjury by giving the client a lawyer-client *Miranda* warning. One disadvantage of this approach is that the lawyer frequently fails to obtain important information about the case. Another is that the lawyer who purposefully remains ignorant of the client's perjury is not in a position to dissuade the client. In addition, the lawyer may unwittingly help the client to improve upon the perjury in the normal course of preparing the client to testify.

By contrast, the NACDL ethics opinion expressly forbids the lawyer to assist the client in improving the perjury, and it requires the lawyer to make good faith efforts to dissuade the client from testifying falsely. Even those who argue against this position generally concede that it will result in less perjury rather than more.

In the rare case in which the lawyer is unable to dissuade the client from testifying falsely, the opinion requires the lawyer to examine the client in the usual way and, to the extent tactically desirable, to argue the client's testimony to the jury.

The opinion also adopts the dominant view that the lawyer should not act on the belief that a client intends to commit perjury unless the lawyer has "actual knowledge" that the testimony will be false or, at least, knows this to be so beyond a reasonable doubt. Under *Strickland v. Washington*, 466 U.S. 668 (1984), the lawyer's judgment that there is a reasonable doubt should be accepted as falling within the "wide range of reasonable professional assistance." See, e.g., *State v. Skjonsby* 417 N.W.2d 818 (No. Dak. 1987).

The NACDL ethics opinion notes, however, that no ethics opinion can guarantee a safe harbor in difficult cases. In close cases, lawyers should proceed carefully, with full knowledge of the applicable ethical rules of the jurisdiction and, ideally, with the advice of counsel.

#### **QUESTION PRESENTED**

What is the proper course for a criminal defense attorney to follow if the defendant proposes to commit perjury?

#### **DIGEST**

(1) The constitutional privilege against self-incrimination and the constitutional right to the effective assistance of counsel prohibit a lawyer from disclosing a client's perjury to the court, even though such conduct is in conflict with ethical rules, such as Rule 3.3(a)(2) and (4) of the American Bar Association's (ABA's) Model Rules of Professional Conduct, that call for disclosure.

(2) A lawyer should not betray a client's confidences and

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secrets by conveying to the judge and/or jury that the lawyer believes that the client intends to commit perjury or that the client is doing so. This means that the lawyer should not inform the judge obliquely of "ethical problems," force the client to testify in narrative fashion, or fail to argue the client's testimony to the jury for other than tactical reasons.

(3) A lawyer may act on the belief that a client intends to commit perjury only if the lawyer knows this beyond a reasonable doubt.

(4) If a lawyer believes beyond a reasonable doubt that the client intends to commit perjury, the lawyer must make a strong, continuing, good faith effort to dissuade the client from that course. The lawyer may withdraw, but only if this can be accomplished without either directly or indirectly revealing the client's confidences or secrets, or otherwise prejudicing the client's rights.

(5) If the lawyer is unable to dissuade the client or to withdraw, the lawyer may not assist the client to improve upon the perjury, but must maintain the client's confidences and secrets, examine the client in the ordinary way, and, to the extent tactically desirable, argue the client's testimony to the jury as evidence in the case.

(6) In pursuing the course outlined in paragraph (5) above, attorneys should proceed carefully, with full knowledge of the applicable ethical rules of the jurisdiction, and with the advice, if possible, of counsel.

### Opinion<sup>1</sup>

The Board of Directors has been presented with the question of whether a criminal defense lawyer may put a client on the stand to testify when the lawyer believes that the client will give materially false testimony in whole or part, and, if so, how the client's testimony should be presented. The issue has arisen recently because Rule 3.3(a)(2) and (4) of the Model Rules of Professional Conduct, requiring the lawyer to prevent or disclose client perjury to the court, are inconsistent with the client's Fifth and Sixth Amendment rights.

Our opinion is based upon an analysis of the constitutional rights to counsel and the privilege against self-incrimination, the attorney-client privilege, and ethical protection of clients' confidences and secrets. When, as in this case, ethical rules conflict with constitutional rights, the ethical rules must give way.

## I. Ethical Rules Involved

The ethical rules take differing approaches to the question of client perjury. The Model Code of Professional Responsibility (1969) continues to govern in a minority of states. Under the Model Code, the lawyer is either forbidden to reveal foreknowledge of client perjury,<sup>2</sup> or has discretion whether to reveal foreknowledge of client perjury.<sup>3</sup> In no event is the lawyer permitted to reveal knowledge of client perjury that is learned after the fact.<sup>4</sup>

In a "major policy change,"<sup>5</sup> however, the Model Rules of Professional Conduct (1983) make it mandatory for the lawyer to reveal a client's fraud on the court if the lawyer cannot persuade the client to rectify the fraud.

### A. Model Code of Professional Responsibility

#### EC 4-1

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system....

#### DR 4-101

*Preservation of Confidences and Secrets of a Client.*

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(C) A lawyer may reveal:

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(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

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#### EC 7-6

...In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

#### DR 7-101

*Representing a Client Zealously*

(A) A lawyer shall not intentionally:

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

#### DR 7-102

*Representing a Client Within the Bounds of the Law.*

(A) In his representation of a client, a lawyer shall not:

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(4) Knowingly use perjured testimony or false evidence.

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(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.  
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

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(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

### B. Model Rules of Professional Conduct

#### Rule 1.6

*Confidentiality of Information*

(a) A lawyer shall not reveal information relating to representation of a client....

Rule 3.3

Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

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(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

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(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

C. ABA Standards for Criminal Justice: The Defense Function (3d ed. 1991)

Standard 4-3.1

Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused...

Standard 4-3.2

Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused...

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

D. ABA Standards for Criminal Justice: The Defense Function (1st ed. 1971).

7.7 Testimony by the Defendant.

(a) If the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial, the lawyer must advise his client against taking the witness stand to testify falsely.

(b) If, before trial, the defendant insists that he will take the stand to testify false-

ly, the lawyer must withdraw from the case, if that is feasible, seeking leave of the court if necessary.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, it is unprofessional conduct for the lawyer to lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

II. DISCUSSION

A. The Privilege Against Self-Incrimination and the Right to Counsel

In *Nix v. Whiteside*,<sup>7</sup> the Supreme Court decided that the Sixth Amendment right to counsel was not violated when the defense lawyer prevented his client from committing perjury by threatening to reveal the truth to the court. As the Court noted, the lawyer "divulged no client communications" until he was compelled to do so in post-conviction proceedings.<sup>8</sup> It is still an open question, therefore, whether the constitutional right to counsel would be violated if the lawyer were actually to divulge client communications to the court, particularly if this were to be done after the perjury had already been committed.<sup>9</sup>

Even more clearly, the defendant's Fifth Amendment privilege against self-incrimination has not been foreclosed by *Nix* because the issue was neither argued to the Court nor discussed in the opinions. As pointed out by Professors Hazard and Hodes:<sup>10</sup>

The defendant or suspect in a criminal case usually will reveal to his lawyer information that would be protected by the Fifth Amendment if sought by the government. Because of the attorney-client privilege, the government plainly cannot obtain this information

from the lawyer... Indeed, the government conceded this preliminary point in *Fisber v. United States*, 425 U.S. 391 (1976), and the Supreme Court considered it to be obvious.

The lawyer, of course, has no Fifth Amendment privilege with regard to information that would incriminate only the client. Nevertheless:<sup>11</sup>

[T]he attorney-client privilege *must* apply to communications by an accused to his lawyer, for otherwise, a criminal defendant would *de facto* lose his Fifth Amendment protection merely by speaking candidly to his lawyer. In this sense, the attorney-client privilege stands in for the constitutional protection.

Thus, in *Fisber v. United States*, "the Supreme Court...extended Fifth Amendment protection to the attorney-client privilege for the express purpose of encouraging the uninhibited exchange of information between citizens and their attorneys."<sup>12</sup>

The continuing importance of the privilege against self-incrimination to the client perjury issue is therefore obvious. Because the lawyer-client privilege "must apply to communications by an accused to his lawyer" in order to maintain the client's Fifth Amendment protection,<sup>13</sup> and because the government "plainly cannot obtain this information from the lawyer,"<sup>14</sup> it follows that the government cannot enforce a rule requiring a lawyer to reveal his/her client's confidences regarding the client's perjury.

As noted, the case in which Fifth Amendment protection was extended to the lawyer-client privilege was *Fisber v. United States*. The Court reasoned in *Fisber* that "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."<sup>15</sup> Because the Fifth Amendment was not raised in *Nix*, however, *Fisber* was neither cited to the Court nor mentioned in the *Nix* opinions.

Another relevant Fifth Amendment case that was not raised in *Nix* is *Estelle v. Smith*,<sup>16</sup> which involved a psychiatrist's examination of a defendant's competency to stand trial. The defendant was not advised of his privilege against self-incrimination, nor was his lawyer informed of the examination. The psychiatrist did not testify at trial

regarding the crime at issue. At the post-trial sentencing hearing, however, the psychiatrist gave his opinion that the defendant was likely to commit future crimes.

Writing for the Court, Chief Justice Burger noted that, during the psychiatric evaluation, the defendant "assuredly... was 'not in the presence of [a person] acting solely in his interest.'" "Rather, the psychiatrist's apparent neutrality changed, and he became at the sentencing trial essentially "an agent of the State recounting unwarned statements made in a post-arrest custodial setting."<sup>18</sup> Accordingly, the defendant's Fifth and Sixth Amendment rights had been violated, and the sentence was vacated.

Another case not cited in *Nix v. United States v. Henry*.<sup>19</sup> In that case, a government informant who had been placed in the same cell with Henry established a relationship of trust and confidence with him. As a result, Henry revealed incriminating information to the informer. Again, Chief Justice Burger wrote the opinion for the Court, vacating Henry's conviction because it had been based in part on the admissions elicited through a false relationship of trust and confidence.<sup>20</sup>

It is difficult to understand how a defendant's own lawyer can properly do what the psychiatrist in *Estelle* or the cellmate in *Henry* could not do—that is, establish a relationship of trust and confidence and then "become an agent of the State" by disclosing to the court the incriminating information gained in the relationship.<sup>21</sup> In fact, the case of the lawyer is a more serious one than that of the cellmate.<sup>22</sup> The Supreme Court has never described trust and confidence between cellmates as "imperative," but it has used that word in describing the relationship of trust and confidence between lawyer and client.<sup>23</sup> That relationship has also been lauded as the "cornerstone of the adversary system and effective assistance of counsel,"<sup>24</sup> and fidelity to that trust has been called "the glory of our profession."<sup>25</sup>

Accordingly, the Fifth Amendment privilege against self-incrimination incorporates the lawyer-client privilege, giving constitutional protection to information that a lawyer has received from his/her client. Conversely, however, if the lawyer's information is outside the lawyer-client privilege, it is not protected by the Fifth Amendment. It is important to consider, therefore, whether a lawyer's knowledge of a client's intention to commit perjury is within the future crime exception to the

lawyer-client privilege.

In fact, perjury has been construed as falling outside of the future crime exception. One reason is that it is "intrinsicly and inextricably" related to the crime for which the defendant is being tried.<sup>26</sup> In this respect, it is like the future crime of concealing the proceeds of a theft—that is, to reveal the future crime (ongoing concealment) is to implicate the client in the past crime (theft).<sup>27</sup> This is not true, of course, of the future crime of bribing a juror. To reveal the client's intent to commit the bribery does not require revealing any confidences regarding his guilt of the past crime that is being tried.

The majority in *Nix* does equate perjury with bribing a witness or juror.<sup>28</sup> However, this was part of what the four concurring justices criticized as the majority's inappropriate *dictum* on professional ethics.<sup>29</sup> As Justice Brennan said, that part of the majority opinion was "pure discourse without force of law."<sup>30</sup> Moreover, as is characteristic of the most unreliable *dictum*, counsel failed adequately to argue the point,<sup>31</sup> and the majority opinion does not consider any of the significant differences between perjury and bribing a witness or juror.

Also, bribery of a juror is "structural," sabotaging the adversary system at its foundation.<sup>32</sup> By contrast, the adversary system takes perjury into account and is designed to deal with it. As Dean Wigmore has written, cross-examination is "the greatest legal engine ever invented for the discovery of truth."<sup>33</sup> A panel on lawyers' ethics was once asked what the defense lawyer should do when a client proposes to commit perjury. "Do me a favor," a United States Attorney on the panel replied, "Let him try it."<sup>34</sup> If the question had related to bribing a juror, however, the United States Attorney would not have responded, "Do me a favor. Let him try it."

In the same paragraph in which it concludes that perjury is "essentially the same" as bribing a juror, the *Nix* majority says that a defendant would have no "right" to insist upon his lawyer's silence regarding bribery of a juror or witness. The analogy cuts the other way, however, because the Court has permitted a defendant to insist upon silence regarding his perjury, and, significantly, the context involved the defendant's Fifth Amendment privilege.

In *New Jersey v. Portash*,<sup>35</sup> Portash had been granted use immunity<sup>36</sup> for grand jury testimony. When he was subsequently prosecuted, the trial court ruled that if he presented an alibi that was inconsistent

with his grand jury testimony, the prosecution would be able to use the grand jury testimony to impeach him. The Supreme Court reversed, holding that Portash had a constitutional right to present his alibi (which was assumed to be perjured)<sup>37</sup> without being impeached with his inconsistent grand jury testimony.

Obviously, Portash did not acquire a "right" to commit perjury. The Supreme Court did hold, however, that forfeiture of his Fifth Amendment privilege was not one of the consequences of his perjury.<sup>38</sup> Moreover, although the lawyer is "an officer of the court and a key component" of a system that is "dedicated to a search for truth,"<sup>39</sup> there was no suggestion that Portash's lawyer had acted improperly in offering the perjurious alibi.<sup>40</sup>

Also bearing upon the future crime exception in the context of the Fifth Amendment privilege is *Estelle v. Smith*,<sup>41</sup> where the psychiatrist interviewed the defendant without warning him that his statements could be used against him in court. The psychiatrist was therefore barred from using the defendant's communications as the basis for testifying in the sentencing phase about the likelihood that the defendant would commit future crimes. If the future crime exception did in fact nullify the defendant's privilege with respect to communications to his lawyer, surely the Court would have allowed the psychiatrist to testify about the defendant's future criminality. Put otherwise, if the psychiatrist cannot reveal in court the defendant's unwarned communications bearing upon future crimes without violating the defendant's Fifth Amendment privilege, the defendant's lawyer cannot do so either.

### **B. Proposed Solutions That Violate the Privilege Against Self-Incrimination and the Right to Counsel**

The foregoing discussion makes clear that no solution to the client perjury problem is constitutional that requires the lawyer to reveal a client communication to the court that incriminates the client.

One proposal that cannot survive this test is that the lawyer seek leave to withdraw in circumstances in which the lawyer will be required to give the court an explanation for doing so. There is general agreement that even an equivocal answer inevitably incriminates the client. For example, in *Lowery v. Cardwell*,<sup>42</sup> the lawyer said only, "I cannot state the reason." This was recognized by the court as being an "unequivocal announcement"

of the defendant's perjury.<sup>45</sup> Similarly, in *United States v. Henkel*,<sup>46</sup> the court inferred the client's perjury when the defense lawyer simply said that he could not "professionally... proceed."<sup>46</sup>

Another proposal appeared in Section 7.7 of the 1971 version of the ABA Defense Function Standards. Under Section 7.7 of the 1971 Standards, the lawyer was required to "confine his examination to identifying the witness as the defendant and permitting him to make his statement." That is, the lawyer has the client present his testimony in narrative form, rather than in the normal question-and-answer manner. The result is that the client's perjury will become part of the record, although without the attorney's assistance through questioning.

The Supreme Court has held, however, that denying a defendant the right to be questioned by counsel is tantamount to a deprivation of the Sixth Amendment right to the effective assistance of counsel.<sup>46</sup>

One might rejoin that, by lying, the defendant waives this right. But the Supreme Court... "has always set high standards of proof for the waiver of constitutional rights,"<sup>47</sup> and to presume such waiver from the mere fact of his lying is imposing upon the defendant [the deprivation of a constitutional right as] an added perjury punishment.<sup>48</sup>

As the Ninth Circuit has held, "If in truth the defendant has committed perjury... she does not by that falsehood forfeit her right to fair trial."<sup>49</sup>

Assuming, however, that the client's perjury has been put in evidence in narrative form, what should the lawyer do about his/her closing argument to the jury? The general rule, of course, is that "the lawyer may argue all reasonable inferences from the evidence in the record,"<sup>50</sup> and the client's story is now part of the record.<sup>51</sup> Indeed, it is a deprivation of the right to counsel to prevent the defense lawyer from marshalling the evidence in closing argument.<sup>52</sup> Nevertheless, Section 7.7 provides that the defense lawyer is forbidden to make any reference in closing argument to the defendant's testimony.

Beyond any question, the procedure envisioned by Section 7.7 divulges the client's confidences. The judge is certain to understand what is going on, and it is generally agreed that the jury usually will as well.<sup>53</sup> Even if the jury does not realize the significance of the unusual manner in which the defendant is testifying, the jury is sure to catch on when the defense lawyer

in closing argument makes no reference to the defendant's exculpatory testimony.

Section 7.7 was deleted from the Standards by the ABA in 1979, with reference to the emerging Model Rules. In 1983, the Model Rules explicitly rejected Section 7.7, in part because it is "an implicit disclosure of information imparted to counsel." Also, Chief Justice Burger, who was the first to promote the idea, repudiated Section 7.7 in *Nix v. Whiteside*.<sup>54</sup>

Obviously, Model Rule 3.3, which requires that the lawyer reveal client perjury by using information derived from client confidences or secrets, is subject to similar objections as is Section 7.7. In particular, under MR 3.3 the lawyer is placed in the position of "waiving" the defendant's privilege against self-incrimination. As Dean Norman Lefstein has pointed out, the decision to waive a client's constitutional right "should not be permitted to be made unilaterally by defense counsel."<sup>55</sup> "We permit no other constitutional right of a defendant... to be stripped away in this fashion."<sup>56</sup> The defendant is entitled, at the least, to an "on-the-record judicial hearing."<sup>57</sup>

That procedure, however, only serves to create further difficulties. If such a hearing is held, "it is virtually unthinkable that a defendant would acknowledge that he or she planned to lie."<sup>58</sup> In addition to involving the trial court in lawyer-client confidences, therefore, the hearing "will... almost certainly be unsatisfactory."<sup>59</sup> In the process, moreover, the attorney-client relationship will have been "tom asunder."<sup>60</sup> As Dean Lefstein demonstrates, therefore, the solution proposed by MR 3.3 (as interpreted by Opinion 87-353) is a shambles.

An additional problem with MR 3.3 is that it would require a lawyer-client *Miranda* warning.<sup>61</sup> In fact, in the 1980 Discussion Draft of the Model Rules, which contained a rule virtually identical to 3.3,<sup>62</sup> the Comment explained the need for giving the warning at the outset of the lawyer-client relationship:

A new client should be given a general explanation of the client-lawyer relationship. A client should understand the lawyer's ethical obligations, such as the prohibitions against assisting a client in committing a fraud or presenting perjured evidence.

The Comment candidly acknowledged that "[t]he warning may lead the client to withhold or falsify relevant facts, thereby making the lawyer's representation... less

effective...." When it was pointed out that this amounts to instructing the client to be less than candid with the lawyer<sup>63</sup>—which is forbidden by the Defense Function Standards<sup>64</sup>—the Kutak Commission simply deleted the comment, thereby eliminating the candor but not the problem.

Finally, the prejudice to the client is clear when the lawyer puts on the record that the client is going to try to lie his way out of a conviction. Even the proponents of Section 7.7 acknowledged that "if the trial judge is informed of the situation, the defendant may be unduly prejudiced."<sup>65</sup> Today, with the extraordinary expansion of the harmless error doctrine,<sup>66</sup> the lawyer's divulgence of the client's confidences could well negate what would otherwise be reversible error.<sup>67</sup>

### C. The Recommended Solution

We recommend the following means of resolving the problem of client perjury, maintaining the traditional model of lawyer-client trust and confidence, protecting the constitutional rights to which that relationship gives expression, and putting lawyers in a position to dissuade the client from committing perjury.

As provided in the Defense Function Standards, defense counsel should "seek to establish a relationship of trust and confidence with the accused."<sup>68</sup> Counsel should also "probe for all legally relevant information,"<sup>69</sup> explaining to the client "the necessity of full disclosure of all facts known to the client for an effective defense," and the extent to which ethical rules protect the client's confidences and secrets.<sup>70</sup>

If the lawyer believes that the client intends to commit perjury, the lawyer should not act on that belief unless it is beyond a reasonable doubt.<sup>71</sup> Surely the lawyer should not convict his/her client on a lesser standard than the jury would have to use. Also, as noted in EC 7-6 of the Model Code, whenever the lawyer is not "certain" as to the client's state of mind, the lawyer should "resolve reasonable doubts in favor of his client."

If, on that standard, the lawyer determines that the client is contemplating perjury, he/she should make continuing, good faith efforts to dissuade the client from that course.<sup>72</sup> The lawyer is permitted to withdraw, as long as withdrawal would not prejudice the client; it is preferable, however, that the lawyer not withdraw, but that he/she continue to use his/her relationship of trust and confidence with the client, "up to the very hour of the client's... testimony,"<sup>73</sup> to dissuade the client from committing the perjury.

The client, faced with the threat of prison, may or may not be impressed with the fact that perjury is immoral and illegal, but may well be persuaded by the fact that the judge has the power to increase the sentence if he/she concludes that the defendant has given false testimony.<sup>74</sup> In any event, there is a professional consensus that lawyers are frequently successful in dissuading client perjury.<sup>75</sup> Note again, however, that lawyers can serve this function—to the benefit of society as well as their clients—only if their clients are willing to entrust them with their confidences and to accept their advice. That is not likely to happen if a lawyer-client *Miranda* warning is given.<sup>76</sup>

In the relatively small number of cases in which the client who has contemplated perjury rejects the lawyer's advice and decides to proceed to trial, to take the stand, and to give false testimony, the lawyer should go forward at trial in the ordinary way.<sup>77</sup> That is, the lawyer should examine the client in the normal professional manner and should argue the client's testimony to the jury in summation to the extent that sound tactics justify doing so.

#### **D. When Does a Lawyer "Know" That a Client Is Going to Commit Perjury?**

Within weeks of the decision in *Nix v. Whiteside*, the American Bar Association (ABA), in conjunction with the American Law Institute (ALI), produced a videotape on which several experts on the ethics of criminal defense lawyers commented on the case and on MR 3.3. The ABA/ALI commentators make it clear that the trial lawyer's conduct approved by the majority in *Nix* represented a radical departure from traditional, standard practice.

Defense counsel in *Nix* is described as having gone "bonkers" in inferring that his client was going to commit perjury and in his "brutal" reaction. Further, the notion that a criminal defense lawyer might be required to divulge his client's perjury is characterized as "startling," "unworkable," and out-of-touch with the dynamics of the lawyer-client relationship.

Thus, one commentator on the ABA/ALI videotape says that a lawyer has an obligation to reveal client perjury only if the lawyer has "absolutely no doubt whatsoever" that the client will commit a "serious" fraud on the court. (The perjury in *Nix* is defined as falling short of "serious" fraud.) Also, soon after *Nix*, the

Deputy Attorney General who won the case was quoted in the *ABA Journal* as saying that if the lawyer does not "know for sure" that a witness' evidence is false, the lawyer should put the evidence on.<sup>78</sup> In the same article a former prosecutor said that a client may stick to a story that "you know in your heart of hearts is false." As long as the client "never admits that it is false," however, most lawyers "suspend judgment and do the best they can." He added that any different standard of "knowing" would be "at war with the duty to represent the client zealously."<sup>79</sup> Similarly, ABA Formal Opinion 87-353 makes sure that it will be "the unusual case where the lawyer does know." The opinion requires that knowing be established only by the client's "clearly stated intention" that he will commit perjury at trial.

The insistence upon a direct client admission of perjury to establish "knowing" or "actual knowledge" has also been adopted by the Eighth Circuit.<sup>80</sup> The court held that an attorney must use "extreme caution" in deciding that a client intends to commit perjury, and that nothing but "a clear expression of intent" will justify the attorney's disclosure to the judge.<sup>81</sup>

The Second Circuit has similarly insisted upon a "clearly established" or "actual knowledge" standard.<sup>82</sup> In doing so, the court approved a definition providing that information is "clearly established" only when the client "acknowledges" the perjury to the attorney.<sup>83</sup> The court observed that under any standard less than actual knowledge, courts would be "inundated" with lawyers' reports of perjury.<sup>84</sup>

At another point in its opinion, the Second Circuit went further, indicating that an admission alone will not be sufficient to justify disclosure by a lawyer. After explaining that knowledge by the lawyer means "actual knowledge," the court went on to say that the lawyer should disclose "only that information which [1] the attorney reasonably knows to be a fact and which, [2] when combined with other facts in his knowledge, would [3] clearly establish the existence of a fraud on the tribunal."<sup>85</sup> Thus, the client's admission does not suffice unless corroborated by "other facts" that "clearly establish" the perjury.

This development was forecast in *Nix* itself. The majority opinion characterizes the case as one in which the defendant's "intent to commit perjury [was] communicated to counsel."<sup>86</sup> The concurring justices add that "[e]xcept in the rarest of cases" attorneys who "adopt the role of the judge or jury to determine the facts" . . . pose a danger of depriving their clients of the zeal-

ous and loyal advocacy required by the Sixth Amendment.<sup>87</sup> Also, Justice Stevens appropriately observes that:<sup>88</sup>

A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked.

Finally, when the defense lawyer makes the decision that the client's inconsistent stories do not mean that he intends to commit perjury, the standard of review is likely to be that established by *Strickland v. Washington*.<sup>89</sup> That is, the court must "indulge a strong presumption" that counsel's conduct falls within the "wide range of reasonable professional assistance."<sup>90</sup>

For example, in *Strickland* itself, the defense lawyer employed tactics deliberately designed to cover up the client's false statements to the court that he had no significant criminal record and that he had committed the crime under emotional stress. The lawyer then argued to the court what he knew to be false statements made by the client. Nevertheless, the Supreme Court held that the lawyer's conduct fell within the "wide range of reasonable professional assistance," and no member of the Court suggested that the lawyer had acted improperly in any way in using these tactics.<sup>91</sup>

In almost all of the cases discussing client perjury, the issue has been raised by a defense lawyer who has concluded that the client is committing perjury and has revealed that conclusion to the court.<sup>92</sup> In *State v. Skionsby*,<sup>93</sup> however, the client raised the issue, complaining that the lawyer rendered ineffective assistance of counsel by failing to recognize that the client's self-defense testimony was perjurious and ineffectual.<sup>94</sup>

In rejecting that claim, the court followed a line of analysis paralleling that suggested here. "[O]ur scrutiny of counsel's performance must be highly deferential," the court said, "and must be evaluated from counsel's perspective at the time."<sup>95</sup> Continuing to quote from *Strickland*, the court added that "every effort [must] be made to eliminate the distorting effects of hindsight" and to recognize "the difficulties inherent in making the evaluation."<sup>96</sup> The court concluded that it "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable profes-

sional assistance."<sup>97</sup>

The court in *Skjonsby* also noted that "[l]awyers are not to perform the functions of judges or jurors,"<sup>98</sup> adding:<sup>99</sup>

To compel attorneys to monitor their clients' behavior, to pursue vigorously any suspicions that might occur to them about possible wrongdoing by the clients, and to develop evidence against the people they represent, would undermine the fundamental character of the attorney-client relationship and bastardize the role of defense counsel. Imposing such obligations on attorneys also would create pressure on clients to conceal information from their lawyers and to try to make the tactical judgments about the use of evidence that only attorneys are fully equipped to make.

In view of these authorities, including the ABA, the ALI, and the Supreme Court, a very high standard must be met—"actual knowledge" or "proof beyond a reasonable doubt"—before a lawyer "knows" a client intends to commit perjury. A lawyer who relies upon such a high standard should not be charged with violating Model Rule 3.3 or a similar rule. ■

## Notes

1. CAVEAT: The Committee cautions that, regardless of which model code of ethical rules has been adopted in a given state, the language, interpretation, and enforcement of the rules may vary from one jurisdiction to another. In each instance, therefore, local law must be consulted.

This opinion is based upon the language of the ABA's Model Code (1969) and Model Rules (1983), as they have been amended by the ABA and interpreted in opinions of the ABA Standing Committee on Ethics and Professional Responsibility.

2. DR 7-101(A) (3) forbids the lawyer to "[p]rejudice or damage his client...except as required under DR 7102 (B)." DR 7-102 (B) deals with perjury, but only when the lawyer learns about it after the fact. In the case of foreknowledge of perjury, therefore, there is no exception to DR 7-101(A) (3) that would permit the lawyer to reveal perjury.

3. ABA Informal Opinion 1314 (1975) stated that a lawyer who knows in advance of client perjury has an obligation either to withdraw or to report the false testimony to the court. Inf. Opin. 1314 has been expressly disapproved on this point in ABA Formal Opin. 87-353, which recognizes that no provision of the Model Code requires disclosure of the client's intention to commit perjury but, rather, that the Model Code makes disclosure discretionary on the part of the lawyer.

4. When the lawyer learns of the client's perjury only after the fact (which is not the principal focus of this opinion), the Model Code forbids the lawyer to reveal the truth. ABA Inf. Opin. 1314 (1975), Formal Opin. 341 (1975), Formal Opin. 87-353.

5. ABA Formal Opin. 87-353.

6. Section 7.7 was adopted as part of the Defense Function Standards in 1971. However, it was withdrawn in 1979, was not adopted as part of the Standards in 1980, was expressly repudiated by the ABA in the Model Rules in 1983, and has been omitted in the current, 1991 edition.

7. 475 U.S. 157, 106 S.Ct. 988 (1986).

8. 106 S.Ct. at 997.

9. See, e.g., Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1954-1955 (1988).

10. G.C. Hazard and W.W. Hodes, *THE LAW OF LAWYERING* vol. 1, p. 90.1 (1987 Supp.).

11. *Ibid.* (emphasis in the original).

12. C. Whitebread, *Criminal Procedure* 257 (1976). See also Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOPSTRA L. REV. 693 (1978).

13. G.C. Hazard and W.W. Hodes, *THE LAW OF LAWYERING* 90.1 (1987 Supp.).

14. *Ibid.*

15. 425 U.S. at 403.

16. 451 U.S. 454, 101 S.Ct. 1866 (1981). An additional ground of the decision in *Estelle v. Smith* was the right to counsel under the Sixth Amendment. In a similar case, *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792 (1988), the Court applied the harmless error doctrine to the Sixth Amendment right, but found that the psychiatrist's testimony had not been harmless.

17. *Id.* at 467 (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)).

18. *Ibid.*

19. 447 U.S. 264 (1980).

20. *Henry* was decided under the Sixth Amendment, but its relevance to the Fifth Amendment aspect of client perjury is plain.

21. A private attorney becomes a government agent if she serves as a "conduit for information elicited from defendant and used by the authorities in the prosecution of defendant." *People v. Baugh*, 19 Ill. App.3d 448, 311 N.E.2d 607, 609 (1974).

22. The lawyer who elicits a client's confidences and then reveals them to the court has been analogized to Jeff in the "Mutt and Jeff" interrogation technique. See *Legal Ethics, Client Perjury and the Privilege Against Self-Incrimination*, 13 HASTINGS CONST. L.Q. 545, 571 (1986).

23. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

24. *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981), quoted with approval, *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 1621, n. 4 (1983) (Brennan, J., concurring).

25. *United States v. Costen*, 38 Fed. 24 (1889) (upholding the disbarment of a lawyer for violating his client's confidences). The author of the opinion was Justice David J. Brewer, who was appointed to the Supreme Court shortly thereafter, and who later served on the committee that drafted the ABA Canons of Professional Ethics (1908).

26. Exam, *the Perjurious Criminal Defendant: A Solution to His Lawyer's Dilemma*, VI SOCIAL RESPONSIBILITY 16, 22 (1980).

27. See, e.g., N.Y.S. Bar Opin. 405 (1975).

28. 106 S.Ct. at 998.

29. 106 S.Ct. at 1000.

30. *Ibid.*

31. See Freedman, *Client Confidence and Client Perjury: Some Unanswered Questions*, 136 PA. L. REV. 1939, 1949-1951 (1988).

32. *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) (coerced confessions are subject to harmless error rule, but distinguishing "structural" flaws which are never subject to harmless error).

33. 5 J. Wigmore, WIGMORE ON EVIDENCE sec. 1367 (Chadbourn rev. ed., 1974).

34. Remarks by S. Martoche at the Seminar on "Ethics in an Adversary System" (Buffalo, N.Y., Feb 11, 1984).

35. 440 U.S. 450 (1979).

36. Use immunity is given so that testimony can be compelled from a witness who has invoked her Fifth Amendment privilege. The testimony cannot be used against the witness, but can be used against others.

37. See 440 U.S. at 452-453.

38. Compare the earlier case of *Harris v. New York*, 401 U.S. 222 (1971). *Harris* held that if the defendant takes the stand, he must testify truthfully or "suffer the consequences." The consequences include "the risk of confrontation with prior inconsistent utterances," which is "the traditional truth-testing [device] of the adversary system." 401 U.S. at 225-226. (The impeaching matter in *Harris* was evidence obtained in violation of *Miranda*, which is not of constitutional status.) The Court did not suggest, however, that one of the consequences of the defendant's perjury would be disclosure of lawyer-client confidences.

39. *Nix v. Whiteside*, 106 S.Ct. at 998.

40. See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), discussed in the text at n. 91 *infra*.

41. 451 U.S. 454 (1981).

42. 575 F.2d 727 (9th Cir. 1978).

43. *Id.* at 729.

44. 799 F. 2d 369 (7th Cir. 1986).

45. *Id.* at 370.

46. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

47. Citing *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

48. Silving, *The Morality of Advocacy*, in S. Shoham (ed.), *OF LAW AND MAN* 209, 212 (1971).

49. *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir., 1978). The Ninth Circuit then endorsed the 7.7 solution, but did so on the assumption that the Standards represent "an authoritative consensus" of the organized bar. 575 F.2d at 730 n.1. A year later, however, the ABA rejected Section 7.7, and then did so again in the *Model Rules* in 1983.

50. ABA Defense Function Standards 4-7.7(a) (3d ed.)

51. "[H]ighly respected counsel have told this writer that they would feel obligated to argue the defendant's case fully, including his perjured testimony." Judd, *Conflicts of Interest—A Trial Judge's Notes*, 41 FORDHAM L. REV. 1097, 1106 (1976). (The author was a United States District Court Judge for the Eastern District of New York.)

52. *Herring v. New York*, 422 U.S. 853 (1975). See also *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va., 1959) (emphasis added):

The failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney's conscience. *It is as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement.* The right to an attorney embraces effective representation throughout all stages of the trial, and where

## ETHICS ADVISORY OPINION

the representation is of such low caliber as to amount to no representation, *the guarantee of due process has been violated.*

53. See, e.g., *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976). Juries would become increasingly aware of the significance of narrative testimony if Section 7.7 were to become institutionalized. Among other things, it would provide some dramatic material for television and movie treatment, and the public would not long remain ignorant of the reason for the lawyer's conduct.

54. 106 S.Ct. 988, 996 n.6 (1986). The Chief Justice chaired the committee that originally drafted Section 7.7.

55. Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 537 (1988).

56. *Id.* at 539.

57. *Ibid.*

58. *Id.* at 540.

59. *Ibid.*

60. *Id.* at 541.

61. See MR 1.2(c).

62. It was then MR 1.4(b), and was the same except that the clauses were in reverse order and there were minor variations in phrasing.

63. Freedman, *The Kutak Model Rules v. The American Lawyer's Code of Conduct*, 26 VILL. L. REV. 1165, 1174-1175 (1980-1981).

64. Defense Function Standard 4-3.2:

Defense counsel should not instruct the client

or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

65. Defense Function Standards, 7.7, Comment (1971).

66. E.g., *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991).

67. See, e.g., *Holmes v. United States*, 370 F.2d 209, 212 (D.C. Cir. 1966), where the dissenting judge argued that there was no prejudice because the defense lawyer had stated on the trial record that the defendant's testimony was inconsistent with numerous interviews and was therefore a surprise to counsel.

68. Standard 4-3.1(a) (1991).

69. Standard 4-3.2(a) (1991).

70. Standard 4-3.1(a) (1991).

71. Kimbell, *When Does a Lawyer 'Know' Her Client Will Commit Perjury?* 2 GEO. J. LEGAL ETHICS 579, 581 (1988); Reiger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 149 (1985); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 608-609 (1979); Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 528 (1988) ("absolutely no doubt about the matter").

72. The lawyer who makes good faith efforts to dissuade the client, but who unwillingly goes forward if she is unsuccessful, is not guilty of subornation of perjury. Subornation is the corrupt induce-

ment of perjury, or "procuring another to commit perjury by inciting, instigating, or persuading the guilty party to do so." Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 548 (1988), citing 68 Am. Jur. 2d, *Perjury* sec. 67 (1972). Clearly that is not what happens when the idea of perjury originates with the client, the lawyer uses her knowledge of the perjury to make ongoing, good faith efforts to dissuade the client, and the lawyer then proceeds only under the compulsion of her systemic role.

73. See Exum at n.26, *supra*.

74. *United States v. Grayson*, 438 U.S. 41 (1978). Prosecution for perjury is also possible.

75. See, e.g., Model Rule 1.6, Comment: "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."

76. Because the lawyer will be ignorant of the incriminating facts, there will be no occasion for the lawyer to attempt to dissuade the client from committing perjury, the client will give the perjurious testimony, the lawyer will elicit it in the ordinary way, and the lawyer will argue it to the jury. In systemic terms, therefore, there will be more perjury than under the traditional model.

77. However, in preparing the client for trial, the lawyer should not help the client to improve upon the perjury. See, e.g., DR 7-102(A)(6), forbidding the lawyer to participate in the creation of evidence known to be false.

78. ABA JOUR. 84, 88 (May 1, 1986).

79. *Ibid.*

80. *United States v. Long*, 857 F. 2d 436 (8th Cir., 1988).

81. *Id.* at 445, 447.

82. *Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir., 1988).

83. *Id.* at 62.

84. *Id.* at 63.

85. *Id.* at 63.

86. 106 S.Ct. at 993

87. 106 S.Ct. at 1006, quoting in part from *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir., 1977).

88. *Id.* at 1007.

89. 466 U.S. 668, 104 S.Ct. 2052, 2066 (1984).

90. *Nix v. Whiteside* 106 S.Ct. at 994, quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2066 (1984).

91. See also *New Jersey v. Portash*, *supra*, n.35.

92. Apparently, fee-paying clients never commit perjury. Virtually all cases of this sort involve public defenders and court-appointed lawyers. An exception is *State v. Fleck*, 744 P.2d 628 (Cl. App., Wash. 1987). Retained counsel in that case learned that his client was boasting at the jail that he was guilty but that he was successfully convincing his "Christian attorney." The lawyer then had the client take a lie detector test; the client failed the test and tacitly admitted its accuracy.

93. 417 N.W.2d 818 (No. Dak. 1987).

94. A similar case is *Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985).

95. 417 N.W.2d at 828.

96. *Id.*

97. *Id.*

98. 417 N.W.2d at 827, quoting Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 614 (1979).

99. *Id.*

# Polygraph

## PRIOR TO TRIAL

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**ETHICS ADVISORY COMMITTEE  
OF THE  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**  
FORMAL OPINION 90-2

## QUESTION PRESENTED

Must an attorney disclose to a state court that his or her client is charged under a false name where the prosecutor thinks that the client is an illegal alien but the client is actually a resident alien with a visa where the client has specifically requested that the attorney not disclose his or her true identity?

## DIGEST

The attorney must not disclose the client's true identity to the court because it is a confidential communication and it is protected by the client's privilege against self-incrimination. The lawyer should seek to get the client to either disclose his or her true identity or permit the lawyer to do so. If the client refuses, the lawyer may continue to represent the client without withdrawing as long as the client does not affirmatively misrepresent his identity.

## OPINION

A member of NACDL has requested a written opinion concerning the issue of confidentiality and attorney-client privilege in the identity of the client when the client has falsely represented his or her identity to a criminal court to prevent possible deportation and permanent ineligibility to return to the United States, which the client fears might result if the client gave his name.

The facts are as follows: The client is charged in state court with a drug offense under the name of "John Doe," and he has an apparently valid identification in that name. He told the arresting authorities that he entered the country illegally under that name. He has instructed the lawyer, however, that his name is really "Richard Roe,"

and he holds a valid visa under that name. He has instructed the lawyer that he does not want the lawyer to disclose his true identity so immigration authorities will not take action against his visa. The member further advises that it is a felony in the jurisdiction for one to knowingly assume a false identity and do some act with the intent of benefiting himself or another.

## I. ETHICAL RULES INVOLVED

Rule 3.3 (a) of the Rules of Professional Conduct (RPC) provides as follows:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

...

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The Comment to Rule 3.3, ¶ 6, states as follows:

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is

clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

RPC Rule 1.2(d) provides that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ...." RPC Rule 1.6 provides that "A lawyer shall not reveal information relating to a representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation...."

DR 4-101 of the Code of Professional Responsibility (CPR) provides as follows:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(C) A lawyer may reveal:

...

(3) the intention of his client to commit a crime and the information necessary to prevent the crime.

DR 7-102(A) (4,5) provides that a lawyer shall not knowingly use false evidence or make a false statement of fact in his or her representation of a client.<sup>1</sup>

## II. CRIMINAL LAW IMPLICATIONS

It is a crime in most jurisdictions for a person to knowingly assume a false identity and do some act with the intent to unlawfully benefit oneself or another. Based on the facts presented to the Committee, it would appear that the client may be committing a continuing crime; *i.e.*, every time he appears in court he falsely represents his identity. Underlying resolution of the ethical issue, however, is the fact that his false identity is not material to the drug charge.

If the false identity is put forth in state court, the federal government is still arguably a potential victim of that false statement since the client is trying to defeat the federal immigration laws. Whether the false identity is assumed in state or federal court, the client is arguably attempting to defraud the federal government. The client could also be accused of obstruction of justice or even perjury for falsely swearing to his name (as in, perhaps, the plea allocution). The lawyer must also be aware that any conduct that furthers the client's false identity could conceivably be considered as part of a conspiracy to defraud the government in the enforcement of the immigration laws in violation of 18 U.S.C. § 371.

## III. CONSTITUTIONAL IMPLICATIONS

Because the client's past false statement as to his identity is a potential criminal offense, there is a self-incrimination problem in the attorney's disclosing the client's true identity because the client could be charged with a crime, whether it be criminal impersonation, attempted criminal impersonation, obstruction of justice, perjury, or even contempt of court. The ethical rule<sup>2</sup> and cases<sup>3</sup> are woefully inadequate in considering the problem.

This situation is close to the client perjury issue.<sup>4</sup> In that situation, the Comment to RPC Rule 3.3 recognizes that constitutional requirements may qualify the lawyer's supposed duty to prevent it.<sup>5</sup>

## IV. ATTORNEY-CLIENT PRIVILEGE

As a general rule, the client's true identity is not considered to be protected by the attorney-client privilege. *See generally* Annot., 16, A.L.R.3d 1047; Annot., 84 A.L.R. Fed. 852; *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1519-21 (1985). There are four exceptions to this rule. The first is

where revealing the client's identity would implicate the client in the very matter for which he sought the attorney's advice ("legal advice exception").<sup>6</sup> The second is where the client's identity would provide the "last link" in a chain of incriminating evidence that could lead to an indictment of the client.<sup>7</sup> The third and most widely accepted is the "communication rationale" which holds as privileged client identification information if disclosure would connect the client to an already disclosed or independently privileged exchange.<sup>8</sup> The fourth is where unusual circumstances are present.<sup>9</sup>

The attorney-client privilege, of course, does not apply to future or ongoing crimes or frauds.<sup>10</sup> It clearly holds, however, that the lawyer may not reveal past crimes.<sup>11</sup>

## V. DISCUSSION

It is axiomatic that, according to the ethical rules, it is the lawyer's duty to attempt to persuade the client to inform the court of his or her true identity. But, how does the lawyer ethically handle this problem and what if the client refuses to disclose his or her true identity?

It is the Committee's belief, on the facts before it, that the client's potential "fraud" on the court, if it is one, is not material or relevant to the drug case before the state court. In this instance, the client's identity is of no relevance to the issues involved in the case. Thus, in this situation, the Committee feels that attorney-client confidentiality still protects the client's communication from disclosure since it will not foster a fraud on the court. While ethical rules are not co-extensive with the evidentiary privilege, RPC Rule 3.3 (a) (2) requires the lawyer to disclose the fraud if the client refuses to do so. CPR DR 7-102(B)(1) requires the lawyer to disclose client frauds where not protected by the attorney-client privilege. The Committee believes that RPC Rule 1.6 and CPR DR 4-101(B), concerning the preservation of confidences and secrets of a client, control in this limited situation and require the lawyer to maintain the confidence.

A further troublesome problem is the that disclosure will perhaps lead to the client being charged with a crime. Thus, the question arises: Does the privilege against self-incrimination, invoked by the client, prohibit the lawyer from disclosing what the ethical rules might otherwise require the lawyer to disclose? It is the Committee's opinion, as an alternative ground for this opinion, that ethical rules must, at least in this instance, give way to constitutional guarantees.<sup>12</sup> In this

situation, the privilege against self-incrimination overrides any claimed ethical duty and the lawyer shall not disclose the client's true identity.

If, however, the client is called as a witness, the problem of client perjury, fraud on the court, and the lawyer's complicity therein will be implicated.<sup>13</sup> The Committee believes that the lawyer may seek to withdraw if the client will not rectify the situation once a fraud on the court occurs. RPC 1.16 (a) (1); CPR DR 2-110(B)(2), (C)(2).<sup>14</sup> If the client refuses and the lawyer decides to seek withdrawal, the lawyer cannot disclose to the court the information which caused the withdrawal.<sup>15</sup>

The Committee also makes the following suggestion: The lawyer should consider methods to protect himself or herself from also being accused of a crime or other other misconduct. The lawyer may consider documenting<sup>16</sup> for posterity: (1) the fact the client made a privileged communication revealing an arguably ongoing crime; (2) that the lawyer clearly asked the client to reveal and discontinue the crime (with full advice of the risks of doing so); 3) that the lawyer clearly and unmistakably has advised the client that he or she will not participate in any acts which further the client's crime or fraud;<sup>17</sup> (4) that the client prohibits the lawyer from disclosing the true facts; (5) that the lawyer believes that the privilege against self-incrimination prohibits him or her from disclosing the ongoing crime; and (6) that the lawyer told the client that he or she may have to withdraw (without disclosing the facts to the court) to avoid furthering a fraud on the court.<sup>18</sup>

## Notes

1 Since there are often variations in ethical rules from state to state, members are advised to consult their state rules and law to determine what their duty is.

2 This is likely a result of the fact that few criminal lawyers were on the committees drafting the ethical rules.

3 *See, e.g., State v. Casby*, 348 N.W. 2d 736 (Minn. 1984) (attorney convicted of "attorney misconduct" for aiding client's use of false name; privilege against self-incrimination does not apply to disclosure of client identity, but possibility of client being exposed separate crime not mentioned), *disciplinary proceeding*, *Matter of Casby*, 355 N.W. 2d 704 (Minn. 1984) (attorney reprimanded and given two years probation.)

4 As to contemplated client perjury, *see* NACDL Formal Opinion 90-3 (December 1990) (trial) & 90-4 (December 1984) (grand jury).

5 RPC Rule 3.3, Comment ¶ 12. "The obligation of an advocate under these Rules is subordinate to such a constitutional requirement." *Id.* *See* text accompanying note 3, *supra*.

6 *See* cases cited in Annot., 84 A.L.R.Fed. 852, §§ 4-6.

7 *See* cases cited in *id.* § 8. The "last link" exception has fallen into disfavor. *See e.g., Re Grand Jury Investigation No. 83-2-25 (Durant)*, 723 F. 2d 447 (6th Cir. 1983), *cert. den. sub nom. Durant v. United States*, 467 U.S. 1246 (1984).

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8 *Developments, supra*, at 1521; Annot., 84 A.L.R.Fed. 852, § 7.

9 *See, e.g., Re Shargel*, 742 F.2d 61 (2d Cir. 1984); *Re Semel*, 411 F.2d 195 (3d Cir. 1969), *cert. den.* 396 U.S. 905; *Re Michelson*, 511 F.2d 882 (9th Cir. 1975), *cert. den.* 421 U.S. 978; *Tomlinson v. United States*, 68 U.S. App. D.C. 106, 93 F.2d 652 (1937), *cert. den.* 303 U.S. 642.

10 U.R. Ev. 502(d) (1); 8 Wigmore, Evidence § 2298 (McNaughton rev. 1961); McCormick on Evidence § 95 (2d ed. 1984).

11 *See, e.g., Alexander v. United States*, 138 U.S. 353 (1891); Annot., 16 A.L.R.3d 1029.

12 *See* note 4, *supra*. *But see State v. Casby, supra*, note 3.

13 *See, e.g., State v. Casby, supra*, at 739 (attorney aided client's deception of using false name in court); *In re Young*, 49 Cal.3d 257, 261 Cal.Rptr. 59, 776, P.2d 1121 (1989) (attorney who arranged bail knowing the client's use of a false identity and who provided financial support to client to avoid arrest was disciplined); *Office of Disciplinary Counsel v. Hazelkom*, 18 Ohio St.3d 297, 480, N.E.2d 1116 (1985) (attorney knowingly bailed out client under a false name and affirmatively misled the court as to the client's identity; indefinite suspension because of prior reprimand).

Query: Can the lawyer alleviate the problem at any hearings or trial which the client testifies by simply asking: "Are you the person charged in this case?" If so, what happens if the false statement occurs on cross-examination? The only way to avoid the problem may be to not call the client at all.

14 The Committee has taken the view in NACDL Formal Opinions 90-3 (December 1990) & 90-4 (December 1990) that withdrawal is not always a viable remedy for client perjury and that the lawyer must sometimes stay with the case without promoting the perjury while seeking to mitigate its effect on the case. *See, e.g., State v. Casby, supra* at 739 (attorney could have withdrawn to have avoided the fraud on the court).

15 The Committee recognizes that withdrawal is often not an effective remedy in promoting the truth-seeking function of the court because the client may be educated as to how to perpetuate the fraud and simply not tell the new lawyer about his or her true identity. *See* our opinions cited in note 14, *supra*.

16 The Committee recognizes that requesting the client to sign a writing may frighten or alienate the client and cause him or her to lose confidence in the lawyer or to seek another lawyer. Therefore, the Committee has decided that the decision whether to withdraw should be a discretionary one for the lawyer. If a writing is used, the Committee recommends that the document specifically state that it is protected by the attorney-client privilege and that the lawyer advises the client that the document is only for the file and not for disclosure to others unless the lawyer is accused of misconduct later.

17 *See, e.g.* cases cited in note 12, *supra*.

18 The biggest threat to the lawyer might be the potential of prosecution for conspiracy to defraud the government under 18 U.S.C. § 371. While, as a practical matter the risk of prosecution requires that the government find out the client's true identity and immigration status, one never knows when the client might make a deal with the prosecution and then turn on the lawyer. The lawyer should protect him or herself from that risk by dealing candidly and at arm's length with the client and pressing the client to disclose his or her true identity to the court.

**NACDL ETHICS ADVISORY COMMITTEE**

Formal Opinion No. 04-03 (May 10, 2004)

***Introduction***

The Ethics Advisory Committee of the National Association of Criminal Defense Lawyers has been asked by an Alabama member whether it violates Alabama Rule of Professional Conduct 3.7(a) for a sole practitioner to tape record a statement from a witness without having a third person present. The prosecutor seeks a hearing to disqualify counsel because the prosecutor intends to call defense counsel as a witness about the statement, apparently no matter what the statement says or whether there is a bona fide issue of voluntariness of the statement.

We conclude that tape recording witness statements does not per se require disqualification of defense counsel under Alabama Rule of Professional Conduct 3.7(a), which is the same as Model Rule of Professional Conduct 3.7(a). The prosecution seeks to disqualify defense counsel merely because defense counsel took a witness statement on tape. Moreover, a rule that works to bar sole practitioners and lawyers with limited budgets from tape recording witnesses because they do not have a third party present would work to disqualify those lawyers in violation of the client's right to counsel of choice under the Sixth Amendment and Art. I, § 6 of the Alabama Constitution. The prosecution's motion presumes defense counsel will be a witness, but this cannot be presumed at this stage of the case. More must be known, and a hearing will be required, with the burden on the prosecution, to show defense counsel is "a necessary witness" before defense counsel can be disqualified.

***Prosecutor's contentions***

The prosecutor has filed a "Motion to Remove Defense Attorney for Becoming a Necessary Witness in the Case" and contends, *inter alia*, that the defense lawyer interviewed the minor alleged victim without her mother being present and recorded the statement, after the mother much earlier said that she did not want the lawyer to talk to the witness<sup>1</sup>; that if the statement is consis

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<sup>1</sup> We are informed that defense counsel was looking for the alleged victim's aunt, and the alleged victim was at the aunt's house, answered the door, and agreed to talk to defense counsel on

tent, the state can bolster the alleged victim's testimony with it<sup>2</sup>; that if the statement is inconsistent, the prosecution can call the lawyer as a witness as to the circumstances of the taking of the inconsistent statement in an effort to impeach the inconsistent statement; and defense counsel should be removed from the case because it is likely she will be a necessary witness, and the state intends to call defense counsel as a witness. For relief, the prosecution asks that defense counsel be disqualified, or, in the alternative, that the court should order the taped interview be turned over to the state and the information obtained from the interview not be used to cross-examine the victim.

The defense at trial is denial; the wrong person is accused; and this issue arose because defense counsel wanted to interview the alleged victim concerning her identification of the accused.

### *Advocates as witnesses*

Is defense counsel a necessary witness for the prosecution or defense? It is too early to tell. The mere existence of this tape does not make defense counsel a necessary witness.

### *Alabama Rules of Professional Conduct Rule 3.7(a)*

Rule 3.7(a) of the Alabama Rules of Professional Conduct provides as follows:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hard-

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tape.

<sup>2</sup> The prosecution cites *Murphy v. State*, 355 So. 2d 1153 (Ala. Crim. App. 1978) (holding that witness could be asked about a prior consistent statement after tape recorded inconsistent statement was admitted); and *Cady v. State*, 455 So. 2d 101 (Ala. Crim. App. 1984), neither of which seem particularly pertinent to this situation.

ship on the client.<sup>3</sup>

***ABA Standards, The Defense Function***

ABA STANDARDS, *The Defense Function* § 4-4.3(e) (2d ed. 1991) provides:

Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

***Restatement (Third) of the Law Governing Lawyers***

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 (2000) provides:

(1) Except as provided in Subsection (2), a lawyer may not represent a client in a contested hearing or trial of a matter in which:

- (a) the lawyer is expected to testify for the lawyer's client; or
- (b) the lawyer does not intend to testify but (i) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented as stated in § 122 to the lawyer's intention not to testify.

(2) A lawyer may represent a client when the lawyer will testify as stated in Subsection (1)(a) if:

- (a) the lawyer's testimony relates to an issue that the lawyer reasonably believes will not be contested or to the nature and value of legal services rendered in the proceeding;
- (b) deprivation of the lawyer's services as advocate would work a substantial hardship on the client; or
- (c) consent has been given by (i) opposing parties who would be adversely affected by the lawyer's testimony and, (ii) if relevant, the lawyer's client, as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the lawyer's testimony would create.

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<sup>3</sup> This rule is the same as the 1983 version of the ABA Model Rule of Professional Conduct, so this opinion applies beyond Alabama. The 2003 version of the Model Rules uses "unless" instead of "except when."

(4) A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony.

***Constitutional right to counsel of choice***

The Sixth Amendment to the U.S. Constitution and Art. I, § 6 of the Alabama Constitution guarantee to an accused person the right to counsel of choice, and denial of counsel of choice is constitutional error not overcome by the weight of the evidence. *Davis v. State*, 292 Ala. 210, 215, 291 So.2d 346, 350 (1974) (counsel had a conflicting setting and trial court refused continuance; the fact that evidence was overwhelming and substitute counsel performed adequately did not obviate error). In addition, federal courts have held that a denial of counsel of choice is not even subject to the requirement of a showing of prejudice. *See, e.g., United States v. Panzardi-Alvarez*, 816 F.2d 813, 817-18 (1st Cir. 1987) (quoting *Flanagan v. United States*, 465 U.S. 259, 267-68 (1984) (prejudice need not be shown for violation of right to counsel of choice)); *United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002); *United States v. Childress*, 58 F.3d 693, 733-36 (D.C. Cir.1995) (remanding for hearing; denial of counsel of choice issue was not even mooted by the death of the lawyer during the pendency of the appeal).

***Must defense counsel be per se disqualified?***

In the situation presented for our review, defense counsel has a tape recorded statement of the alleged victim to a sexual assault. The prosecution has not heard the tape, so the prosecution does not know whether the statement aids or harms the defense, and neither do we. Likewise, whether the witness was coerced in giving her statement is not mentioned, but the prosecution apparently hopes to show that. Nevertheless, that is a fact for the trial judge to decide, and that will determine whether defense counsel is "a necessary witness" under Rule 3.7(a).

One of the reasons given by prosecutors for disqualification is that they can bolster their witness with defense counsel's testimony. Testimony which merely bolsters credibility universally is not admissible. *See, e.g., Wilsher v. State*, 611 So.2d 1175 (Ala. Crim. App. 1992). Therefore, that ground cannot be used by prosecutors to show defense counsel is "a necessary

witness.” And, even if they could, that does not even suggest that defense counsel is “a necessary witness” if the tape is otherwise admissible.

### ***Defense counsel’s duty to investigate***

Defense counsel had a constitutional duty to investigate on behalf of her client. “Counsel’s obligation is to conduct a ‘substantial investigation into each of the *plausible* lines of defense.’ *Strickland*, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added).” *Jones v. State*, 753 So.2d 1174, 1191 (Ala. Crim. App. 1999). *Accord: Bui v. State*, 717 So.2d 6, 18 (Ala. Crim. App. 1997); *Dill v. State*, 484 So.2d 491, 497-98 (Ala. Crim. App. 1985) (insanity defense). Defense counsel might well have been derelict in her duty to her client had she failed to seek to interview the witness, depending upon the circumstances of the case. Whether to interview a sexual abuse victim is strictly a judgment call for defense counsel. In this case, defense counsel did not seek to interview the witness early in the case, and she happened upon the witness months later and then elected to seek to talk to her and the witness agreed to be taped. This was her constitutional duty as defense counsel if she believed it was necessary for her client. A criminal defense lawyer needs to evaluate the credibility of witnesses before the trial. The mother’s wishes concerning interviewing the minor are entitled to weight, but, depending on the age and maturity of the alleged victim, defense counsel has the right to seek to interview the minor without the influence of the mother.<sup>4</sup>

Not all defense lawyers have the luxury of having investigators to either investigate for them or be witnesses to statements they take. As a matter of economics, defense counsel often must do the work herself, as happened here. When a lawyer takes a statement that the witness denies, then the lawyer *may* become an impeaching witness. But, if the statement is tape recorded, the lawyer seeks to obviate that problem because the witness herself can lay the foundation for admissibility of the tape under Ala. R. Evid. 901(b)(5). *Johnson v. State*, 826 So.2d 1, 30-31 (Ala. Crim. App. 2001). Disqualifying a lawyer merely for taking a tape recorded statement would deny due process by interfering with his ability to defend<sup>5</sup> and equal protection based on the

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<sup>4</sup> See Alabama Rule of Professional Conduct 4.4 (respect for rights of third persons).

<sup>5</sup> “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). “Few rights are more fundamental than that of an accused to present witnesses in his

client's economic means.

*Is defense counsel a necessary witness?*

Under Rule 3.7(a), it must be "likely" that defense counsel will be "a necessary witness." As a general rule, "there must be a showing that the proposed testimony is relevant, material, and unobtainable elsewhere." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.7 at 384-85 (5th ed. 2003) (citing cases). *Accord*: RESTATEMENT § 108(4), *supra*.

To disqualify defense counsel, the prosecution bears the burden of showing that defense counsel is a necessary witness, the information is not obtainable elsewhere, and, under RESTATEMENT § 108(4), that this is not merely an effort to disqualify counsel. The nature of the Motion, essentially assuming that the admission of the tape recording will force defense counsel out of the case because it will make defense counsel a witness, almost sounds like the latter here,<sup>6</sup> but we do agree that a motion to disqualify is a permissible method of resolving the issue before trial. RESTATEMENT § 108, *Comments k-l*. That does not, however, presume that the motion should be

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own defense." *Id.*, 410 U.S. at 302.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19 (1967). Accordingly, it is held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

<sup>6</sup> See *Harter v. University of Indianapolis*, 5 F.Supp.2d 657, 663 (S.D.Ind. 1998):

Where one party argues that an opponent's attorney is a necessary witness and moves to disqualify that attorney, however, courts view the opponent's asserted need to call the attorney more skeptically and must be concerned about the possibility that the motion to disqualify is an abusive tactic to hurt the opponent's ability to pursue his case. See, e.g., *McElroy v. Gaffney*, 129 N.H. 382, 529 A.2d 889, 894 (1987); *Spence v. Flynt*, 816 P.2d 771, 779 (Wyo.1991).

granted without some proof from the prosecutor.

The prosecution still bears the burden of proving as a preliminary fact under Ala. R. Evid. 104(a-b): that the witness denies that her voice is on the tape (an issue that almost certainly can be resolved without calling defense counsel), or that (if the statement favors the defense) she was coerced into giving it. If the witness does not dispute that her voice is on the tape and her statement was voluntary and that she just misunderstood what was asked of her, defense counsel would not be “a necessary witness” at all because the tape would speak for itself.

If the issue of coercion of the statement is raised by the witness, not just the prosecution in the abstract, then the choice would be up to defendant and defense counsel. If the statement is so important to the accused that it must be played and the circumstances of its being taken are seriously controverted,<sup>7</sup> then, and only then, would defense counsel face the question of disqualification. If the defense (*i.e.*, the defendant after consultation with defense counsel) elects not to use the tape, then defense counsel would not be disqualified. ABA STANDARDS, *The Defense Function* § 4-4.3(e), *supra*.<sup>8</sup>

The state cannot elect to play the tape recorded statement solely to exclude defense counsel from the case if the state cannot otherwise prove that defense counsel is “a necessary witness” to the taking of the statement.

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<sup>7</sup> Not just contested by the state, just for the purpose of disqualifying defense counsel without knowing more.

It has been held that a bona fide question of authenticity of tape recordings disqualified the lawyer in possession of them. *State ex rel. Karr v. McCarthy*, 417 S.E.2d 120 (W.Va. 1992). Authenticity has not been questioned here.

<sup>8</sup> How this issue is handled could implicate a future ineffective assistance claim, if the client gets convicted. Counsel must fully and clearly explain the implications to the client, and another lawyer might be called upon to assist. Disqualification during trial itself is possible, and having additional counsel on hand to conclude the trial would obviate this problem. That, however, is a hypothetical issue at this point.

## **SYMPOSIUM ON PROFESSIONAL ETHICS**

### **PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL DEFENSE LAWYER: THE THREE HARDEST QUESTIONS**

*Monroe H. Freedman\**

**I**N almost any area of legal counseling and advocacy, the lawyer may be faced with the dilemma of either betraying the confidential communications of his client or participating to some extent in the purposeful deception of the court. This problem is nowhere more acute than in the practice of criminal law, particularly in the representation of the indigent accused. The purpose of this article is to analyze and attempt to resolve three of the most difficult issues in this general area:

1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?

2. Is it proper to put a witness on the stand when you know he will commit perjury?

3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

These questions present serious difficulties with respect to a lawyer's ethical responsibilities. Moreover, if one admits the possibility of an affirmative answer, it is difficult even to discuss them without appearing to some to be unethical.<sup>1</sup> It is not surprising, therefore, that reasonable, rational discussion of these issues has been uncommon and that the problems have for so long remained unresolved. In this regard it should be recognized that the Canons of Ethics, which were promulgated in 1908 "as a general guide,"<sup>2</sup> are both inadequate and self-contradictory.

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1. The substance of this paper was recently presented to a Criminal Trial Institute attended by forty-five members of the District of Columbia Bar. As a consequence, several judges (none of whom had either heard the lecture or read it) complained to the Committee on Admissions and Grievances of the District Court for the District of Columbia, urging the author's disbarment or suspension. Only after four months of proceedings, including a hearing, two meetings, and a *de novo* review by eleven federal district court judges, did the Committee announce its decision to "proceed no further in the matter."

2. AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Preamble (1908).

## I. THE ADVERSARY SYSTEM AND THE NECESSITY FOR CONFIDENTIALITY

At the outset, we should dispose of some common question-begging responses. The attorney is indeed an officer of the court, and he does participate in a search for truth. These two propositions, however, merely serve to state the problem in different words: As an officer of the court, participating in a search for truth, what is the attorney's special responsibility, and how does that responsibility affect his resolution of the questions posed above?

The attorney functions in an adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views. It is essential to the effective functioning of this system that each adversary have, in the words of Canon 15, "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability." It is also essential to maintain the fullest uninhibited communication between the client and his attorney, so that the attorney can most effectively counsel his client and advocate the latter's cause. This policy is safeguarded by the requirement that the lawyer must, in the words of Canon 37, "preserve his client's confidences." Canon 15 does, of course, qualify these obligations by stating that "the office of attorney does not permit, much less does it demand of him for any client, violations of law or any manner of fraud or chicane." In addition, Canon 22 requires candor toward the court.

The problem presented by these salutary generalities of the Canons in the context of particular litigation is illustrated by the personal experience of Samuel Williston, which was related in his autobiography.<sup>3</sup> Because of his examination of a client's correspondence file, Williston learned of a fact extremely damaging to his client's case. When the judge announced his decision, it was apparent that a critical factor in the favorable judgment for Williston's client was the judge's ignorance of this fact. Williston remained silent and did not thereafter inform the judge of what he knew. He was convinced, and Charles Curtis<sup>4</sup> agrees with him, that it was his duty to remain silent.

In an opinion by the American Bar Association Committee on

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3. WILLISTON, *LIFE AND LAW* 271 (1940).

4. CURTIS, *IT'S YOUR LAW* 17-21 (1954). See also Curtis, *The Ethics of Advocacy*, 4 *STAN. L. REV.* 3, 9-10 (1951); Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 *STAN. L. REV.* 349, 350-51 (1952).

Professional Ethics and Grievances, an eminent panel headed by Henry Drinker held that a lawyer should remain silent when his client lies to the judge by saying that he has no prior record, despite the attorney's knowledge to the contrary.<sup>5</sup> The majority of the panel distinguished the situation in which the attorney has learned of the client's prior record from a source other than the client himself. William B. Jones, a distinguished trial lawyer and now a judge in the United States District Court for the District of Columbia, wrote a separate opinion in which he asserted that in neither event should the lawyer expose his client's lie. If these two cases do not constitute "fraud or chicanery" or lack of candor within the meaning of the Canons (and I agree with the authorities cited that they do not), it is clear that the meaning of the Canons is ambiguous.

The adversary system has further ramifications in a criminal case. The defendant is presumed to be innocent. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant is guilty. The plea of not guilty does not necessarily mean "not guilty in fact," for the defendant may mean "not legally guilty." Even the accused who knows that he committed the crime is entitled to put the government to its proof. Indeed, the accused who knows that he is guilty has an absolute constitutional right to remain silent.<sup>6</sup> The moralist might quite reasonably understand this to mean that, under these circumstances, the defendant and his lawyer are privileged to "lie" to the court in pleading not guilty. In my judgment, the moralist is right. However, our adversary system and related notions of the proper administration of criminal justice sanction the lie.

Some derive solace from the sophistry of calling the lie a "legal fiction," but this is hardly an adequate answer to the moralist. Moreover, this answer has no particular appeal for the practicing attorney, who knows that the plea of not guilty commits him to the most effective advocacy of which he is capable. Criminal defense lawyers do not win their cases by arguing reasonable doubt. Effective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent. As every trial lawyer knows, the jury is certain that the defense attorney knows whether his client is guilty. The jury is therefore alert to, and will be enormously affected by, any indication by the attorney

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

6. *Escobedo v. Illinois*, 378 U.S. 478, 485, 491 (1964).

that he believes the defendant to be guilty. Thus, the plea of not guilty commits the advocate to a trial, including a closing argument, in which he must argue that "not guilty" means "not guilty in fact."<sup>7</sup>

There is, of course, a simple way to evade the dilemma raised by the not guilty plea. Some attorneys rationalize the problem by insisting that a lawyer never knows for sure whether his client is guilty. The client who insists upon his guilt may in fact be protecting his wife, or may know that he pulled the trigger and that the victim was killed, but not that his gun was loaded with blanks and that the fatal shot was fired from across the street. For anyone who finds this reasoning satisfactory, there is, of course, no need to think further about the issue.

It is also argued that a defense attorney can remain selectively ignorant. He can insist in his first interview with his client that, if his client is guilty, he simply does not want to know. It is inconceivable, however, that an attorney could give adequate counsel under such circumstances. How is the client to know, for example, precisely which relevant circumstances his lawyer does not want to be told? The lawyer might ask whether his client has a prior record. The client, assuming that this is the kind of knowledge that might present ethical problems for his lawyer, might respond that he has no record. The lawyer would then put the defendant on the stand and, on cross-examination, be appalled to learn that his client has two prior convictions for offenses identical to that for which he is being tried.

Of course, an attorney can guard against this specific problem by telling his client that he must know about the client's past record. However, a lawyer can never anticipate all of the innumerable and potentially critical factors that his client, once cautioned, may decide not to reveal. In one instance, for example, the defendant assumed that his lawyer would prefer to be ignorant of the fact that the client had been having sexual relations with the chief defense witness. The client was innocent of the robbery with which he was charged, but was found guilty by the jury—probably because he was guilty of fornication, a far less serious offense for which he had not even been charged.

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7. "The failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney's conscience. It is as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement. The right to an attorney embraces effective representation throughout all stages of the trial, and where the representation is of such low caliber as to amount to no representation, the guarantee of due process has been violated." *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959); SCHWARTZ, *CASES ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE* 79 (1962).

The problem is compounded by the practice of plea bargaining. It is considered improper for a defendant to plead guilty to a lesser offense unless he is in fact guilty. Nevertheless, it is common knowledge that plea bargaining frequently results in improper guilty pleas by innocent people. For example, a defendant falsely accused of robbery may plead guilty to simple assault, rather than risk a robbery conviction and a substantial prison term. If an attorney is to be scrupulous in bargaining pleas, however, he must know in advance that his client is guilty, since the guilty plea is improper if the defendant is innocent. Of course, if the attempt to bargain for a lesser offense should fail, the lawyer would know the truth and thereafter be unable to rationalize that he was uncertain of his client's guilt.

If one recognizes that professional responsibility requires that an advocate have full knowledge of every pertinent fact, it follows that he must seek the truth from his client, not shun it.<sup>8</sup> This means that he will have to dig and pry and cajole, and, even then, he will not be successful unless he can convince the client that full and confidential disclosure to his lawyer will never result in prejudice to the client by any word or action of the lawyer. This is, perhaps, particularly true in the case of the indigent defendant, who meets his lawyer for the first time in the cell block or the rotunda. He did not choose the lawyer, nor does he know him. The lawyer has been sent by the judge and is part of the system that is attempting to punish the defendant. It is no easy task to persuade this client that he can talk freely without fear of prejudice. However, the inclination to mislead one's lawyer is not restricted to the indigent or even to the criminal defendant. Randolph Paul has observed a similar phenomenon among a wealthier class in a far more congenial atmosphere:

The tax adviser will sometimes have to dynamite the facts of his case out of the unwilling witnesses on his own side—witnesses who are nervous, witnesses who are confused about their own interest, witnesses who try to be too smart for their own good, and witnesses who subconsciously do not want to understand what has happened despite the fact that they must if they are to testify coherently.<sup>9</sup>

Paul goes on to explain that the truth can be obtained only by persuading the client that it would be a violation of a sacred obli-

8. "[C]ounsel cannot properly perform their duties without knowing the truth." Opinion 23, Committee on Professional Ethics and Grievances of the American Bar Association (1930).

9. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377, 383 (1950).

gation for the lawyer ever to reveal a client's confidence. Beyond any question, once a lawyer has persuaded his client of the obligation of confidentiality, he must respect that obligation scrupulously.

## II. THE SPECIFIC QUESTIONS

The first of the difficult problems posed above will now be considered: Is it proper to cross-examine for the purpose of discrediting the reliability or the credibility of a witness whom you know to be telling the truth? 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 persuasion, identifies your client as the criminal. At that point, the prosecution's case depends on this single witness, who might or might not be believed. Since your client has a prior record, you do not want to put him on the stand, but you feel that there is at least a chance for acquittal. 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 virtually certain. However, if you destroy her reliability through cross-examination designed to show that she is easily confused and has poor eyesight, you may not only eliminate the corroboration, but also cast doubt in the jury's mind on the prosecution's entire case. On the other hand, if you should refuse to cross-examine her because she is telling the truth, your client may well feel betrayed, since you knew of the witness's veracity only because your client confided in you, under your assurance that his truthfulness would not prejudice him.

The client would be right. Viewed strictly, the attorney's failure to cross-examine would not be violative of the client's confidence because it would not constitute a disclosure. However, the same policy that supports the obligation of confidentiality precludes the attorney from prejudicing his client's interest in any other way because of knowledge gained in his professional capacity. When a lawyer fails

to cross-examine only because his client, placing confidence in the lawyer, has been candid with him, the basis for such confidence and candor collapses. Our legal system cannot tolerate such a result.

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts . . . . To permit the attorney to reveal to others what is so disclosed, 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.<sup>10</sup>

The client's confidences must "upon all occasions be inviolable," to avoid the "greater mischiefs" that would probably result if a client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance."<sup>11</sup> Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."<sup>12</sup>

Therefore, one must conclude that the attorney is obligated to attack, if he can, the reliability or credibility of an opposing witness whom he knows to be truthful. The contrary result would inevitably impair the "perfect freedom of consultation by client with attorney," which is "essential to the administration of justice."<sup>13</sup>

The second question is generally considered to be the hardest of all: Is it proper to put a witness on the stand when you know he will commit perjury? Assume, for example, that the witness in question is the accused himself, and that he has admitted to you, in response to your assurances of confidentiality, that he is guilty. However, he insists upon taking the stand to protest his innocence. There is a clear consensus among prosecutors and defense attorneys that the likelihood of conviction is increased enormously when the defendant does not take the stand. Consequently, the attorney who prevents his client from testifying only because the client has confided his guilt to him is violating that confidence by acting upon the information in a way that will seriously prejudice his client's interests.

Perhaps the most common method for avoiding the ethical prob-

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10. 2 MECHEM, AGENCY § 2297 (2d ed. 1914).

11. Opinion 150, Committee on Professional Ethics and Grievances of the American Bar Association (1936), quoting THORNTON, ATTORNEYS AT LAW § 94 (1914). See also Opinion 23, *supra* note 8.

12. *Greenough v. Gaskell*, 1 Myl. & K. 98, 103, 39 Eng. Rep. 618, 621 (Ch. 1833) (Lord Chancellor Brougham).

13. Opinion 91, Committee on Professional Ethics and Grievances of the American Bar Association (1933).

lem just posed 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.<sup>14</sup> 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 his guilt from his new attorney. On ethical grounds, the practice of withdrawing from a case under such circumstances is indefensible, since the identical perjured testimony will ultimately be presented. More important, perhaps, is the practical consideration that 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 he loses it in the very act of evading the ethical problem.

The problem is all the more difficult when the client is indigent. He cannot retain other counsel, and in many jurisdictions, including the District of Columbia, it is impossible for appointed counsel to withdraw from a case except for extraordinary reasons. Thus, appointed counsel, unless he lies to the judge, can successfully withdraw only by revealing to the judge that the attorney has received knowledge of his client's guilt. Such a revelation in itself would seem to be a sufficiently serious violation of the obligation of confidentiality to merit severe condemnation. In fact, however, the situation is far worse, since it is entirely possible that the same judge who permits the attorney to withdraw will subsequently hear the case and sentence the defendant. When he does so, of course, he will have had personal knowledge of the defendant's guilt before the trial began.<sup>15</sup> Moreover, this will be knowledge of which the newly appointed counsel for the defendant will probably be ignorant.

The difficulty is further aggravated when the client informs the lawyer for the first time during trial that he intends to take the stand and commit perjury. The perjury in question may not necessarily be a protestation of innocence by a guilty man. Referring to

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14. See Orkin, *Defense of One Known To Be Guilty*, 1 CRIM. L.Q. 170, 174 (1958). Unless the lawyer has told the client at the outset that he will withdraw if he learns that the client is guilty, "it is plain enough as a matter of good morals and professional ethics" that the lawyer should not withdraw on this ground. Opinion 90, Committee on Professional Ethics and Grievances of the American Bar Association (1932). As to the difficulties inherent in the lawyer's telling the client that he wants to remain ignorant of crucial facts, see note 8 *supra* and accompanying text.

15. The judge may infer that the situation is worse than it is in fact. In the case related in note 23 *infra*, the attorney's actual difficulty was that he did not want to permit a plea of guilty by a client who was maintaining his innocence. However, as is commonly done, he told the judge only that he had to withdraw because of "an ethical problem." The judge reasonably inferred that the defendant had admitted his guilt and wanted to offer a perjured alibi.

the earlier hypothetical of the defendant wrongly accused of a robbery at 16th and P, the only perjury may be his denial of 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 far more inclined to accept the inaccurate testimony of the principal witness, who specifically identified him as the criminal.<sup>16</sup>

If a lawyer has discovered his client's intent to perjure himself, one possible solution to this problem is for the lawyer to approach the bench, explain his ethical difficulty to the judge, and ask to be relieved, thereby causing a mistrial. This request is certain to be denied, if only because it would empower the defendant to cause a series of mistrials in the same fashion. At this point, some feel that the lawyer has avoided the ethical problem and can put the defendant on the stand. However, one objection to this solution, apart from the violation of confidentiality, is that the lawyer's ethical problem has not been solved, but has only been transferred to the judge. Moreover, the client in such a case might well have grounds for appeal on the basis of deprivation of due process and denial of the right to counsel, since he will have been tried before, and sentenced by, a judge who has been informed of the client's guilt by his own attorney.

A solution even less satisfactory than informing the judge of the defendant's guilt would be to let the client take the stand without the attorney's participation and to omit reference to the client's testimony in closing argument. The latter solution, of course, would be as damaging as to fail entirely to argue the case to the jury, and failing to argue the case is "as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement."<sup>17</sup>

Therefore, the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the

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16. One lawyer, who considers it clearly unethical for the attorney to present the alibi in this hypothetical case, found no ethical difficulty himself in the following case. His client was prosecuted for robbery. 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.

17. See note 7 *supra*.

jury. Canon 37 does not proscribe this conclusion; the canon recognizes only two exceptions to the obligation of confidentiality. The first relates to the lawyer who is accused by his client and may disclose the truth to defend himself. The other exception relates to the "announced intention of a client to commit a crime." On the basis of the ethical and practical considerations discussed above, the Canon's exception to the obligation of confidentiality cannot logically be understood to include the crime of perjury committed during the specific case in which the lawyer is serving. Moreover, even when the intention is to commit a crime in the future, Canon 37 does not require disclosure, but only permits it. Furthermore, Canon 15, which does proscribe "violation of law" by the attorney for his client, does not apply to the lawyer who unwillingly puts a perjurious client on the stand after having made every effort to dissuade him from committing perjury. Such an act by the attorney cannot properly be found to be subornation—corrupt inducement—of perjury. Canon 29 requires counsel to inform the prosecuting authorities of perjury committed in a case in which he has been involved, but this can only refer to perjury by opposing witnesses. For an attorney to disclose his client's perjury "would involve a direct violation of Canon 37."<sup>18</sup> Despite Canon 29, therefore, the attorney should not reveal his client's perjury "to the court or to the authorities."<sup>19</sup>

Of course, before the client testifies perjuriously, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality. In addition, the client should be impressed with the fact that his untruthful alibi is tactically dangerous. There is always a strong possibility that the prosecutor will expose the perjury on cross-examination. However, for the reasons already given, the final decision must necessarily be the client's. The lawyer's best course thereafter would be to avoid any further professional relationship with a client whom he knew to have perjured himself.

The third question is whether it is proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury. This may indeed be the most difficult problem of all, because giving such advice creates the appearance that the attorney is encouraging and condoning perjury.

If the lawyer is not certain what the facts are when he gives the

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

19. *Ibid.*

advice, the problem is substantially minimized, if not eliminated. It is not the lawyer's function to prejudge his client as a perjurer. He cannot presume that the client will make unlawful use of his advice. Apart from this, there is a natural predisposition in most people to recollect facts, entirely honestly, in a way most favorable to their own interest. As Randolph Paul has observed, some witnesses are nervous, some are confused about their own interests, some try to be too smart for their own good, and some subconsciously do not want to understand what has happened to them.<sup>20</sup> Before he begins to remember essential facts, the client is entitled to know what his own interests are.

The above argument does not apply merely to factual questions such as whether a particular event occurred at 10:15 or at 10:45.<sup>21</sup> One of the most critical problems in a criminal case, as in many others, is intention. A German writer, considering the question of intention as a test of legal consequences, suggests the following situation.<sup>22</sup> A young man and a young woman decide to get married. Each has a thousand dollars. They decide to begin a business with these funds, and the young lady gives her money to the young man for this purpose. Was the intention to form a joint venture or a partnership? Did they intend that the young man be an agent or a trustee? Was the transaction a gift or a loan? If the couple should subsequently visit a tax attorney and discover that it is in their interest that the transaction be viewed as a gift, it is submitted that they could, with complete honesty, so remember it. On the other hand, should their engagement be broken and the young woman consult an attorney for the purpose of recovering her money, she could with equal honesty remember that her intention was to make a loan.

Assume that your client, on trial for his life in a first-degree murder case, has killed another man with a penknife but insists that the killing was in self-defense. You ask him, "Do you customarily carry the penknife in your pocket, do you carry it frequently or infrequently, or did you take it with you only on this occasion?" He replies, "Why do you ask me a question like that?" It is entirely appropriate to inform him that his carrying the knife only on this occasion, or infrequently, supports an inference of premeditation, while if he carried the knife constantly, or frequently, the inference

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20. See Paul, *supra* note 9.

21. Even this kind of "objective fact" is subject to honest error. See note 16 *supra*.

22. WURZEL, *DAS JURISTISCHE DENKEN* 82 (1904), translated in FULLER, *BASIC CONTRACT LAW* 67 (1964).

of premeditation would be negated. Thus, your client's life may depend upon his recollection as to whether he carried the knife frequently or infrequently. Despite the possibility that the client or a third party might infer that the lawyer was prompting the client to lie, the lawyer must apprise the defendant of the significance of his answer. There is no conceivable ethical requirement that the lawyer trap his client into a hasty and ill-considered answer before telling him the significance of the question.

A similar problem is created if the client has given the lawyer incriminating information before being fully aware of its significance. For example, assume that a man consults a tax lawyer and says, "I am fifty years old. Nobody in my immediate family has lived past fifty. Therefore, I would like to put my affairs in order. Specifically, I understand that I can avoid substantial estate taxes by setting up a trust. Can I do it?" The lawyer informs the client that he can successfully avoid the estate taxes only if he lives at least three years after establishing the trust or, should he die within three years, if the trust is found not to have been created in contemplation of death. The client then might ask who decides whether the trust is in contemplation of death. After learning that the determination is made by the court, the client might inquire about the factors on which such a decision would be based.

At this point, the lawyer can do one of two things. He can refuse to answer the question, or he can inform the client that the court will consider the wording of the trust instrument and will hear evidence about any conversations which he may have or any letters he may write expressing motives other than avoidance of estate taxes. It is likely that virtually every tax attorney in the country would answer the client's question, and that no one would consider the answer unethical. However, the lawyer might well appear to have prompted his client to deceive the Internal Revenue Service and the courts, and this appearance would remain regardless of the lawyer's explicit disclaimer to the client of any intent so to prompt him. Nevertheless, it should not be unethical for the lawyer to give the advice.

In a criminal case, a lawyer may be representing a client who protests his innocence, and whom the lawyer believes to be innocent. Assume, for example, that the charge is assault with intent to kill, that the prosecution has erroneous but credible eyewitness testimony against the defendant, and that the defendant's truthful alibi witness is impeachable on the basis of several felony convictions. The prosecutor, perhaps having doubts about the case, offers to permit

the defendant to plead guilty to simple assault. If the defendant should go to trial and be convicted, he might well be sent to jail for fifteen years; on a plea of simple assault, the maximum penalty would be one year, and sentence might well be suspended.

The common practice of conveying the prosecutor's offer to the defendant should not be considered unethical, even if the defense lawyer is convinced of his client's innocence. Yet the lawyer is clearly in the position of prompting his client to lie, since the defendant cannot make the plea without saying to the judge that he is pleading guilty because he is guilty. Furthermore, if the client does decide to plead guilty, it would be improper for the lawyer to inform the court that his client is innocent, thereby compelling the defendant to stand trial and take the substantial risk of fifteen years' imprisonment.<sup>23</sup>

Essentially no different from the problem discussed above, but apparently more difficult, is the so-called *Anatomy of a Murder* situation.<sup>24</sup> The lawyer, who has received from his client an incriminating story of murder in the first degree, says, "If the facts are as you have stated them so far, you have no defense, and you will probably be electrocuted. On the other hand, if you acted in a blind rage, there is a possibility of saving your life. Think it over, and we will talk about it tomorrow." As in the tax case, and as in the case of the plea of guilty to a lesser offense, the lawyer has given his client a legal opinion that might induce the client to lie. This is information which the lawyer himself would have, without advice, were he in the client's position. It is submitted that the client is entitled to have this information about the law and to make his own decision as to whether to act upon it. To decide otherwise would not only penalize the less well-educated defendant, but would also prejudice

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23. In a recent case, the defendant was accused of unauthorized use of an automobile, for which the maximum penalty is five years. He told his court-appointed attorney that he had borrowed the car from a man known to him only as "Junior," that he had not known the car was stolen, and that he had an alibi for the time of the theft. The defendant had three prior convictions for larceny, and the alibi was weak. The prosecutor offered to accept a guilty plea to two misdemeanors (taking property without right and petty larceny) carrying a combined maximum sentence of eighteen months. The defendant was willing to plead guilty to the lesser offenses, but the attorney felt that, because of his client's alibi, he could not permit him to do so. The lawyer therefore informed the judge that he had an ethical problem and asked to be relieved. The attorney who was appointed in his place permitted the client to plead guilty to the two lesser offenses, and the defendant was sentenced to nine months. The alternative would have been five or six months in jail while the defendant waited for his jury trial, and a very substantial risk of conviction and a much heavier sentence. Neither the client nor justice would have been well served by compelling the defendant to go to trial against his will under these circumstances.

24. See TRAVER, *ANATOMY OF A MURDER* (1958).

the client because of his initial truthfulness in telling his story in confidence to the attorney.

### III. CONCLUSION

The lawyer is an officer of the court, participating in a search for truth. Yet no lawyer would consider that he had acted unethically in pleading the statute of frauds or the statute of limitations as a bar to a just claim. Similarly, no lawyer would consider it unethical to prevent the introduction of evidence such as a murder weapon seized in violation of the fourth amendment or a truthful but involuntary confession, or to defend a guilty man on grounds of denial of a speedy trial.<sup>25</sup> Such actions are permissible because there are policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim. Similarly, there are policies that justify an affirmative answer to the three questions that have been posed in this article. These policies include the maintenance of an adversary system, the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt, the right to counsel, and the obligation of confidentiality between lawyer and client.

### POSTSCRIPT†

At the beginning of this article, some common question-begging responses were suggested. Professor John Noonan has added yet another: the role of the advocate is to promote a wise and informed judgment by the finder of fact.<sup>26</sup> This is the position of the 1958

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25. Cf. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *CRIMINAL JUSTICE IN OUR TIME* 77-78 (Howard ed. 1965):

Yes, the presence of counsel in the police station may result in the suppression of truth, just as the presence of counsel at the trial may, when a client is advised not to take the stand, or when an objection is made to the admissibility of trustworthy, but illegally seized, "real" evidence.

If the subject of police interrogation not only cannot be "coerced" into making a statement, but need not volunteer one, why shouldn't he be so advised? And why shouldn't court-appointed counsel, as well as retained counsel, so advise him?

26. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 *MICH. L. REV.* 1485 (1966). Professor Noonan adds a further *petitio principii* when he argues, in the language of Canon 15, that the lawyer "must obey his own conscience." It may be that the wisest course is to make each lawyer's conscience his ultimate guide. It should be recognized, however, that this view is wholly inconsistent with the notion of professional ethics which, by definition, supersedes personal ethics. In addition, it should be noted that personal ethics, in the context of acting in a professional capacity for another, can require a conclusion different from that which one might reach when acting for himself. For example, the fact that a lawyer would not commit perjury on his own behalf does not in any way preclude a decision to put on the witness stand a client who intends to perjure himself in his behalf.

† Because Mr. Bress' article was not received in time for Professor Freedman to prepare a reply, his comments in this brief postscript are restricted to Professor Noonan's article.—Ed.

Joint Conference on Professional Responsibility of the Association of American Law Schools and of the American Bar Association, and it is, of course, the primary basis of Professor Noonan's argument.

Professor Noonan graciously compliments me on "[making the] principles vital by showing how they would govern particular cases."<sup>27</sup> He adds, "this scholarly explication of what is often taken for granted serves a very useful function."<sup>28</sup> At the risk of appearing ungrateful, I am compelled to observe that Professor Noonan's own position fails in precisely that respect. His general proposition simply does not decide specific cases, nor does he make the effort to demonstrate how it might do so. Indeed, Professor Noonan occasionally appears to be struggling against confronting the particular cases.

For example, how would the Joint Conference principle resolve the situation where the prosecution witness testifies that the crime was committed at 10:15, and where the lawyer knows that his client has an honest alibi for 10:15, but that he actually committed the crime in question at 10:45?<sup>29</sup> Can the lawyer refuse to present the honest alibi? Is he contributing to wise and informed judgment when he does so? If he should decide that he cannot present the alibi, how should he proceed in withdrawing from the case? Does it matter whether he has forewarned his client that he would withdraw if he discovers that his client is in fact guilty? Will it contribute to wise and informed judgment if the client obtains another lawyer and withholds from him the fact of his guilt?<sup>30</sup> Similar questions might be asked regarding the problem of the guilty plea by the innocent defendant.<sup>31</sup> One might ask, in addition, whether such a plea is really a lie to the court, in the moral sense, or whether it is just a convention, which is Professor Noonan's view of the not-guilty plea by the guilty defendant.

In the situation involving avoidance of estate taxes,<sup>32</sup> the Joint Conference principle would probably require that the lawyer refuse to answer his client's question. Such a result would be required because, in the assumed circumstances, an answer could be justified as contributing to wise and informed judgment only by what Professor

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27. Noonan, *supra* note 26, at 1486.

28. *Ibid.*

29. See note 16 *supra*.

30. As has been noted earlier, the most significant practical difference between the lawyer who knows the truth and the one who does not is that only the former will have reason to attempt to dissuade the client from perjuring himself.

31. See note 23 *supra*.

32. See text accompanying note 23 *supra*.

Noonan characterizes as “brute rationalization.”<sup>33</sup> However, is it realistic to disregard as irrelevant the undoubted fact that virtually every tax lawyer in the country would answer the client?

Finally, Professor Noonan argues that it would be better to let the truthful (but misleading) witness remain unimpeached and to trust the trier of fact to draw the right conclusions. This is necessary, he contends, because “repeated acts of confidence in the rationality of the trial system are necessary if the decision-making process is to approach rationality.”<sup>34</sup> This means that the fortunes, liberty, and lives of today’s clients can properly be jeopardized for the sake of creating a more rational system for tomorrow’s litigants. It is hard to believe that Professor Noonan either wants or expects members of the bar to act on this advice.

Thus, Professor Noonan does not realistically face up to the lawyer’s practical problems in attempting to act ethically. Unfortunately, it is precisely when one tries to act on abstract ethical advice that the practicalities intrude, often rendering unethical the well-intended act.<sup>35</sup>

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33. Noonan, *supra* note 26, at 1488.

34. *Id.* at 1487-88.

35. See, *e.g.*, note 15 *supra*.

# COMMENTARY

## DEFENDING THE GUILTY

BARBARA ALLEN BABCOCK\*

### I. INTRODUCTION

How can you defend a person you know is guilty? I have answered that question hundreds of times, never to my inquirer's satisfaction, and therefore never to my own. In recent years, I have more or less given up, abandoning the high-flown explanations of my youth, and resorting to a rather peevish: "Well, it's not for everybody. Criminal defense work takes a peculiar mind-set, heart-set, soul-set." While I still believe this, the mind-set might at least be more accessible through a better effort at explanation.

My model is an article by Charles Curtis entitled *The Ethics of Advocacy*.<sup>1</sup> No piece in the field of professional responsibility has been so often cited, sometimes with a combination of outrage and disparagement.<sup>2</sup> I do not agree with all that Curtis says, but I admire the article for

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From 1964 to 1972, I was a criminal defense lawyer. I worked for two years with the firm of Edward Bennett Williams in Washington, D.C., and then as a Public Defender. I now teach courses in criminal procedure. Thus, I have had considerable opportunity to observe the pathology of the system. This piece is based, however, not only on my own reflections but on my reading of many dozens of books by and about criminal defense lawyers in the United States. Although my references to this literature are allusive rather than detailed, I find that these sources largely have mirrored my own experiences.

<sup>1</sup> Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

<sup>2</sup> The controversial reactions to the Curtis article are inevitable, particularly in light of some of its propositions. A fundamental premise of the article is that a lawyer's proper standard of conduct toward others is decidedly lower than his standard of conduct toward his clients. This standard adjusts proportionately: the more stringent the duty owed by a lawyer to his client, the less responsibly the lawyer may act toward the rest of the world. Hence, Curtis concludes, the situation may arise, albeit rarely, where a lawyer is duty-bound to lie on his client's behalf. *Id.* at 9. Reasoning that the lawyer-client relationship is "one of the intimate relations," and that occasions exist when one would lie for one's spouse or child, Curtis maintains that the real ethical dilemma for the lawyer is determining the point at which the lying must stop. *Id.* at 8. Curtis further indicates that this should not so shock the ethical sensibilities of the lawyer, since: 1) the lawyer is routinely required to make statements and arguments which he may hardly believe as a personal matter; and 2) the deliberate, tactical withholding of information from the court, while not technically a "lie," is often no more an advancement of truth than if an actual lie had been told. Thus, the

its rare candor: he wrote baldly and boldly about the conflict between a lawyer's work and common morality.

In discussing the dilemma of a lawyer faced with defending the guilty or handling a bad case, Curtis counseled the stoical approach of Montaigne:

There's no reason why a lawyer or a banker should not recognize the knavery that is part of his vocation. An honest man is not responsible for the vices or the stupidity of his calling and need not refuse to practice them. They are customs in his country and there is profit in them. A man must live in the world and avail himself of what he finds there.<sup>3</sup>

Curtis offered two devices to the advocate seeking to reconcile role with self: the first was to treat the enterprise as a game, and the second was to treat it as a craft.<sup>4</sup> Both, in his view, involved the necessity of laying aside some of the normal rules of human interaction and devoting one's entire energies to the cause of another.

One reason that Charles Curtis could speak so directly was that he was safe—an unassailable member of the establishment, Choate '91, Harvard undergraduate and law school, a partner in a distinguished firm. Even without such Brahmin credentials, I too feel quite safe in discussing, without the usual handwringing or -washing, what it is like to defend the guilty. I have a good and secure job. I am no longer a criminal defense lawyer in actuality but regard the years I spent in the work as a source of immense satisfaction.

First we will examine the nature of the question, then the possible answers. We must know, too, of whom the question is asked and what characterizes the attitudes held by the criminal defender. Moreover, the lawyer's discipline requires that we consider whether the right question is being asked. Finally, we look to the answer provided by the life of the most famous criminal defense lawyer of all: Clarence Darrow.

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lawyer's peculiar sphere of duty is defined not only by the intimacy of the lawyer-client relationship, but also by the trappings of his craft, and it is within these dimensions, Curtis contends, that the dilemma of defending the guilty must be addressed. *Id.* at 9-13. To subject the question to a conventional moral analysis would be to ignore the fact that the attorney must function in an adversarial system.

For contemporary treatment of Curtis' article and the ethical issues it raised, see Bregar, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. Rev. 282 (1982); Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 Md. L. Rev. 451 (1981); Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 79 DUKE L.J. 1251 (1979); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63 (1980).

<sup>3</sup> Curtis, *supra* note 1, at 20.

<sup>4</sup> *Id.* at 21-22.

## II. WHAT IS THE QUESTION?

Most people do not mean to question the defense of those accused of computer crime, embezzlement, or tax evasion. Usually the inquirer is asking how you can defend a robber, a rapist, a murderer.<sup>6</sup> In all its components, the question is: first, how *can* you when you know or suspect that if you are successful, your client will be free to commit other murders, rapes and robberies? Second, how can *you* defend a guilty man—you, with your fancy law degree, your nice clothes, your pleasing manner? Third, how can you *defend*—move to suppress the evidence of clear guilt found on the accused's person, break down on cross-examination an honest but confused witness, subject a rape victim to a psychiatric examination, reveal that an eyewitness to a crime has a history of mental illness?

## III. WHAT ARE THE ANSWERS?

*The Garbage Collector's Reason.* Yes, it is dirty work, but someone must do it. We cannot have a functioning adversary system without a partisan for both sides. The defense counsel's job is no different from, and the work no more despicable than, that of the lawyer in a civil case who arranges, argues, and even orients the facts with only the client's interests in mind.

This answer may be elegantly augmented by a civil libertarian discussion of the sixth amendment and the ideal of the adversary system as our chosen mode for ascertaining truth. Also, the civil libertarian tells us that the criminally accused are the representatives of us all. When their rights are eroded, the camel's nose is under and the tent may collapse on anyone. In protecting the constitutional rights of criminal defendants, we are only protecting ourselves.

*The Legalistic or Positivist's Reason.* Truth cannot be known. Facts are indeterminate, contingent, and, in criminal cases, often evanescent. A finding of guilt is not necessarily the truth, but a legal conclusion arrived at after the role of the defense lawyer has been fully played. The sophist would add that it is not the duty of the defense lawyer to act as factfinder. Were she to handle a case according to her own assessment of guilt or innocence, she would be in the role of judge rather than advocate. Finally, there is a difference between legal and moral guilt; the defense lawyer should not let his apprehension of moral guilt interfere with his analysis of legal guilt. The example usually given is that of the person accused of murder who can respond successfully with a claim of self-de-

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<sup>6</sup> In recent years, however, as white-collar crime has increased in both amount and sophistication, liberal critics of the criminal justice system have begun to raise the question in the context of the rich and powerful defendants and the way in which their almost unlimited legal resources twist results.

fense. The accused may feel morally guilty but not be legally culpable. The odds-maker chimes in that it is better that ten guilty people go free than that one innocent be convicted.

*The Political Activist's Reason.* Most people who commit crimes are themselves the victims of horrible injustice. This statement is true generally because most of those accused of rape, robbery and murder are oppressed minorities. It is also often true in the immediate case because the accused has been battered and mistreated in the process of arrest and investigation. Moreover, the conditions of imprisonment may impose violence far worse than that inflicted on the victim. A lawyer performs good work when he helps to prevent the imprisonment of the poor, the outcast, and minorities in shameful conditions.

*The Social Worker's Reason.* This reason is closely akin to the political activist's reason but the emphasis is different. Those accused of crime, as the most visible representatives of the disadvantaged underclass in America, will actually be helped by having a defender, notwithstanding the outcome of their cases. Being treated as a real person in our society (almost by definition, one who has a lawyer is a real person) and accorded the full panoply of rights and the measure of concern afforded by a lawyer can promote rehabilitation. Because the accused comes from a community, the beneficial effect of giving him his due will spread to his friends and relatives, decreasing their anger and alienation. To this might be added the humanitarian's reason: the criminally accused are men and women in great need, and it is part of one's duty to one's fellow creatures to come to their aid.

*The Egotist's Reason.* Defending criminal cases is more interesting than the routine and repetitive work done by most lawyers, even those engaged in what passes for litigation in civil practice. The heated facts of crime provide voyeuristic excitement. Actual court appearances, even jury trials, come earlier and more often in one's career than could be expected in any other area of law. And winning, ah winning has great significance because the cards are stacked for the prosecutor. To win as an underdog, and to win when the victory is clear—there is no appeal from a "Not Guilty" verdict—is sweet.

My own reason for finding criminal defense work rewarding is an amalgam in roughly equal parts of the social worker's and the egotist's reason. I once represented a woman, call her Geraldine, who was accused under a draconian federal drug law of her third offense for possessing heroin. Under this law, since repealed, the first conviction carried a mandatory sentence of five years with no possibility of probation or parole. The second conviction carried a penalty of ten years with no probation and no parole. The third conviction carried a sentence of twenty years on the same terms. Geraldine was forty-two years old. During the few years of her adult life not spent in incarceration imposed by the state, she had been imprisoned in heroin addiction of the most dreadful sort. She was black, poor, and ugly—and there was no apparent defense to the charge.

But even for one as bereft as Geraldine, the general practice was to mitigate the harshness of the law by allowing a guilty plea to a drug charge under local law which did not carry the mandatory penalties. In this case, however, the prosecutor refused the usual plea. Casting about for a defense, I sent her for a mental examination. The doctors at the public hospital reported that Geraldine had a mental disease: inadequate personality. When I inquired about the symptoms of this illness, one said: "Well, she is just the most inadequate person I've ever seen." But there it was—at least a defense—a disease or defect listed in the Diagnostic and Statistical Manual of that day.

At the trial I was fairly choking with rage and righteousness. I tried to paint a picture of the impoverishment and hopelessness of her life through lay witnesses and the doctors (who were a little on the inadequate side themselves). The prosecutor and I came close to blows. At one point, he told the judge he could not continue because I had threatened him (which I had—with referral to the disciplinary committee if he continued what I thought was unfair questioning). Geraldine observed the seven days of trial with only mild interest, but when after many hours of deliberation the jury returned a verdict of "Not Guilty by Reason of Insanity," she burst into tears. Throwing her arms around me, she said: "I'm so happy for you."

Embodied in the Geraldine story, which has many other aspects but which is close to true as I have written it, are my answers to the question: "How can you defend someone you know is guilty?" By direct application of my skills, I saved a woman from spending the rest of her adult life in prison. In constructing her defense, I became intimate with a life as different from my own as could be imagined, and I learned from that experience. In ways that are not measurable, I think that Geraldine's friends and relatives who testified and talked with me were impressed by the fact that she had a "real" lawyer provided by the system. But in the last analysis, Geraldine was right. The case became my case, not hers. What I liked most was the unalloyed pleasure of the sound of "Not Guilty." There are few unalloyed joys in life.

#### IV. WHO IS ASKED THE QUESTION?

Criminal defense lawyers fall into several categories. First, there are lawyers who take criminal cases for fees. Among these are the big names who make headlines and are often known for their oratory, flamboyant life-styles, and high prices. There are many other lawyers who make a living from fee-paying criminal clients. Some of them would identify themselves as drug lawyers, gamblers' lawyers, and maybe even middle-class murderers' lawyers. There are also litigation lawyers who do not consider themselves specialists in criminal law, but will take some criminal cases for fees. Finally, there are the hustlers and hacks who live by a combination of court-appointed compensated cases and whatever fees can

be collected from defendants (or their families), who mistrust the "free lawyer" they could probably obtain from the government.<sup>6</sup>

The other large group within the profession of criminal defense lawyers are those paid by the government, either as public defenders in organized institutional programs or as appointed counsel, but on such a regular basis that it is the bulk of their practice. Within this subset, the practice varies greatly from the overworked offices where lawyers on the whole merely process most clients, to quite sophisticated institutions where some effort is made in many cases to afford a true defense.

The attitude of these various lawyers toward defending the guilty can be gleaned from the confessional literature of the defense bar. There are literally hundreds of books by and about defenders. They are also often the subjects of popular media articles in which inevitably "the question" is asked. Much of what is written is trashy, unreflecting, self-indulgent, and anecdotal to the point of being tiresome.<sup>7</sup> Yet the books and articles provide insight into the attitude of criminal defense lawyers. Although some personalized version of the various reasons why one might do the work often emerges, the fundamental mind-set of most criminal defense lawyers toward defending the guilty is one of staggering indifference to the question.

From lawyers of impeccable professional integrity to those with whom we might be embarrassed to share a profession, all reiterate that innocence or guilt is of no real concern in their daily work. In their trial stories, they usually say nothing at all about the subject. On the general issue, they say it is far easier to defend the guilty because the defense lawyer always wins. If the defendant is acquitted, the lawyer has worked a minor miracle; if convicted, the correct result was reached. Most defense lawyers have reached a state of reasonable doubt in their own minds by the time of trial. Those rare trials of a defendant whom the lawyer truly believes to be innocent, as compared to one about whom she has a reasonable doubt, are grueling and frightening experiences, in which the usual will to win is elevated to a desperate desire to succeed.

But we also learn from the literature that the indifference to their clients' guilt takes its psychological toll on members of the defense bar. Although the books and articles are filled with stories of great victories, the lawyers reveal their feelings of isolation. They alone go through life being

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<sup>6</sup> In an interview of 149 defendants from New York and Los Angeles, 64% preferred retained counsel over appointed counsel. The interviewees felt that retained counsel did a better job and possessed more power. In essence, the defendants felt that "[y]ou get what you pay for." R. HERMANN, E. SINGLE & J. BOSTON, *COUNSEL FOR THE POOR* at 91-92 (1977).

<sup>7</sup> For an excellent appraisal and summary of the literature in the area, see generally, Boudin, *Book Review*, 35 *STAN. L. REV.* 3 (1982) (reviewing A. DERSHOWITZ, *THE BEST DEFENSE* (1982)). A recent lively addition to the confessional literature of the defense bar is KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE* (1983) which anecdotally portrays many of the prevalent attitudes.

asked constantly to explain their professional existence. One can appreciate the exasperation of the lawyer who won an acquittal for a policeman who shot a ten-year-old black child in the back. At the victory party, a journalist acknowledged to the lawyer that he had done a good job on behalf of his client, but then said: "Didn't you have a deeper obligation . . . to society . . . to see that justice was done?" The defense attorney replied "What the hell is justice?"<sup>8</sup>

The defender is not only isolated from a public that misapprehends his work, but is often isolated from his clients as well. The client is usually not of the lawyer's social class, often not of the lawyer's race, and even the English-speaking defendant does not talk the same language. For those engaged in routine criminal work, the clients are primarily "impoverished defendants who have committed unspectacular crimes without imagination or style."<sup>9</sup>

Finally, there is what might be called the professional isolation of the defender. He is rarely the president of the local bar or the candidate for a federal judgeship; he does not have an elegant office with the latest in computer technology. The admiration he receives, if he succeeds, is bestowed grudgingly. Because of the defender's work and clientele, a cloud hangs over him; he is in danger of being accused of perjury, charged with complicity in crime, or held in contempt of court. One of the surprising aspects reflected in the defense bar literature is how often this threat becomes a reality for defenders.<sup>10</sup>

When to this picture we add its background, the hurly-burly atmosphere of most criminal courts, a new emphasis for the question appears. *How can you?* In a recent melodramatic novel about the life of a criminal defense lawyer, the courthouse is described:

The superior court building was home to him . . . . He felt comfortable here, even safe. The building was huge and dirty, with chewing gum ground into the grouting of its polished aggregate floors, but its immensity gave it a kind of grimy dignity. Everywhere he looked there were knots of people, the guilty and the bureaucrats of guilt, the retinue of the law-abiding dependent on and supported by the guilty. Lawyers with briefcases and district attorneys and public defenders with manila folders filled with case material and policemen appearing as witnesses wearing their badges clipped to their off-duty windbreakers and lumber jackets.

<sup>8</sup> P. HOFFMAN, *WHAT THE HELL IS JUSTICE: THE LIFE AND TRIALS OF A CRIMINAL LAWYER* 243 (1974). See also A. STRICK, *INJUSTICE FOR ALL* 25-34 (1977) (describing the techniques of trial by ordeal).

<sup>9</sup> Oaks & Lehman, *Lawyers for the Poor*, in *THE SCALES OF JUSTICE* 95 (A. Blumberg ed. 1970).

<sup>10</sup> See G. GETTY & J. PRESLEY, *PUBLIC DEFENDER* 319 (1974). The authors illustrate this isolation by noting the volume of "revolting" mail received during the trial of Richard Speck, subsequently convicted of killing eight student nurses in Chicago.

Even the innocent took on the tainted look of the guilty. No one seemed to talk out loud, certainly not the blank-faced relatives of the accused. It was a building of whispers, of furtive looks and missed eye contact, of snatches of overheard conversation. . . . Nothing in the building ever seemed to work. . . . The building reminded him of the system of justice itself. Why do I love it? Why do I love the assumption of guilt?<sup>11</sup>

Dantesque, perhaps, but also close to the atmosphere in which most criminal defense lawyers, at least in urban areas, work.

### V. IS THE QUESTION RIGHT?

The persistence and insistence of the question is based on the image of the defense lawyer who uses daring courtroom skills and legal technicalities to free a homicidal maniac. Yet this is a fantasy almost never realized. The vast majority of those accused of crime plead guilty,<sup>12</sup> in some jurisdictions as many as ninety percent of those charged.<sup>13</sup> In one sense this may appear to be a fair result, since most defendants are guilty of something along the lines of the accusation. Yet, in some places many of those who plead guilty do so without their lawyers' serious consideration of possible defenses or extenuating circumstances. The existence of an adversary system designed to protect precious rights while determining individual guilt is a popular myth; rather, we have a bureaucratic mill grinding out guilty pleas for all alike. Overburdened defense lawyers, without investigation or preparation, arrange for the going rates on cases, and trade one off against the other. The appropriate question for many defense lawyers becomes "How can you participate in such a process?" or even "Why *don't* you defend the guilty?"<sup>14</sup>

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<sup>11</sup> J. DUNNE, *DUTCH SHEA JR.* 87 (1982).

<sup>12</sup> A. ROSSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 33-34 (1976); see *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967).

<sup>13</sup> A 15-year study of criminal cases processed in New York City Metropolitan Court found that more than 90% of the defendants pleaded guilty each year. A. BLUMBERG, *CRIMINAL JUSTICE* 28-29 (1974).

<sup>14</sup> Whether the guilty plea system does in fact determine guilt or innocence is open to serious question:

While the conviction of the innocent would be a problem in any system we might devise, it appears to be a greater problem under plea bargaining. With the jury system the guilt of the defendant must be established in an adversary proceeding and it must be established beyond a reasonable doubt to each of twelve jurors. This is very staunch protection against an aberrational conviction. But under plea bargaining the foundation for conviction need only include a factual basis for the plea (in the opinion of the judge) and the guilty plea itself. Considering the coercive nature of the circumstances surrounding the plea, it would be a mistake to attach much reliability to it. Indeed . . . guilty pleas are acceptable even when accompanied by a denial of guilt.

The realities of a criminal justice system in which few are actually defended seldom surface in print. *Life Magazine*, however, once followed an experienced public defender on his daily rounds in New York City.<sup>15</sup> The defender entered a crowded cell-block on the day of trial to discuss a proposed deal with a client he had never seen before. Highlights of the conversation between Erdmann (the lawyer) and Santiago (the client) were recorded:

"If you didn't do anything wrong," Erdmann says to Santiago, "then there's no point even discussing this. You'll go to trial."

Santiago nods desperately. "I ain't done nothing! I was asleep! I *never* been in trouble before." This is the first time since his initial interview [with a law student] seven months ago that he has had a chance to tell his story to a lawyer, and he is frantic to get it all out. Erdmann cannot stop the torrent, and now he does not try. . . . "I been here 10 months. I don't see no lawyers or nothing. I ain't had a shower in two months, we locked up 24 hours a day, I got no shave, no hot food, I ain't *never* been like this before, I can't stand it, I'm going to kill myself. I got to get out, I ain't —."

Now Erdmann interrupts, icily calm. . . . "Well, it's very simple. Either you're guilty or you're not. If you're guilty of anything you can take the plea and they'll give you a year; and, under the circumstances, that's a very good plea and you ought to take it. If you're *not* guilty, you have to go to trial."

. . . .  
"I'm innocent. I didn't do nothing. But I got to get out of here. I got to —."

"Well, if you *did* do anything and you are a little guilty, they'll give you time served and you'll walk."

. . . .  
"I'll take a plea. But I didn't do nothing."

. . . .  
"No one's going to let you take the plea if you aren't guilty."

"But I didn't *do* nothing."

"Then you'll have to stay in and go to trial."

"When will that be?"

"In a couple of months. Maybe longer."

Santiago has a grip on the bars. "You mean if I'm guilty I get out today?"

"Yes." . . .

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Kipris, *Criminal Justice and the Negotiated Plea*, 86 *ETHICS* 93, 105 (1976).

Interviews with 724 defendants who entered guilty pleas established that more than 51% still claimed to be innocent. A. BLUMBERG, *supra* note 13, at 91.

<sup>15</sup> Mills, *I Have Nothing to Do With Justice*, 70 *LIFE*, March 12, 1971, at 56.

"But if I'm innocent, I got to stay in?"  
"That's right."<sup>16</sup>

The wrong question is asked and nobody really cares, because most of those accused of crime are poor and often are minorities.<sup>17</sup> A "we/they" mentality allows the shameful discontinuity between the criminal justice system described on paper and that which occurs in reality. Yet unlike other sores on the body politic that arise from fear and prejudice, the breakdown of the criminal justice system is a tractable problem—once we determine to solve it. There simply should be more lawyers doing defense work. These could be drawn both from expanded public defender offices and from the litigating bar generally. If there were a large base of lawyers willing to represent the criminally accused, the question of how one defends the guilty would be subsumed in the greater question of what lawyers' work is about. This is where the question belongs.

The ethical dilemmas and amoral stance toward society are really no different when a lawyer chooses to represent someone guilty of a crime than when he represents a "bad" person in a civil case—even if, or perhaps especially if the "bad" person is in corporate form. Criminal cases are said to be different in terms of the heatedly controverted facts, the extreme high stakes, and the resultant ethical pressures on the lawyer. Yet many civil cases are hotly contested for huge sums and there are great pressures to win by shading the facts, crossing the line in witness preparation, destroying or creating evidence. The root of the perception of lawyers as dishonest is the tradition of unmitigated devotion to the client's interest. This attitude may appear dramatically deviant when the client is one accused of some awful crime. But unless and until we shift the focus of lawyers work, the defense of the guilty should be regarded in the same way as the civil representation of the "bad."

To inspire many more lawyers to enter the lists, let us finally turn to an exemplary life—in the mode of nineteenth century biographies of saints and statesmen, presented for their pedagogic effect. In all of the writing by and about criminal defense lawyers, only one of them is universally recognized as being exemplary: Clarence Darrow. Most of the things that defense lawyers dread happened to him: notably, indictment for obstruction of justice in a case where it was said that he arranged to bribe a potential juror;<sup>18</sup> public obloquy for and misunderstanding of his repre-

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<sup>16</sup> *Id.* at 60-62.

<sup>17</sup> J. RIEMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* 127 (1979).

<sup>18</sup> Darrow defended James and Joseph McNamara, who in 1911 were accused of killing 21 people in a dynamite explosion at the Los Angeles Time building. The killings stemmed from a labor dispute. Shortly before the prosecution accepted guilty pleas in exchange for the lives of the McNamara brothers, Bert Franklin, the defense attorney conducting the examination of jurors, was arrested for bribing a juror with \$4,000. Franklin received a promise of immunity on condition that he implicate Darrow in a conspiracy to bribe jurors. At that trial, after deliberating for less than 10 minutes, a jury acquitted Darrow.

sensation of Leopold and Loeb; frequent condemnation of all his activities because he represented the despised. Darrow had the characteristic criminal defense lawyer's view of defending the guilty, as exemplified in a conversation with a friend who asked him, some years after an acquittal in a famous case, whether the accused had actually done it. Darrow said: "I don't know; I never asked him."<sup>19</sup>

One of his law partners said that Darrow "would defend anyone who was in trouble. . . . Though his motivations were different, he sometimes used the same methods as cheap criminal lawyers."<sup>20</sup> Yet Darrow comes to us from the pages of the not-so-distant past as a mythic figure. This has not happened solely because of his amazing oratorical talent, which was the mark of his practice. Rather, the kind judgment of history is a result of his ability to convey directly to juries and judges the humanist values that compelled him to defend the guilty. In virtually all of his cases, Darrow spoke much more about the defendant as an individual, the societal conditions that had produced the crime, the philosophical difficulty of distinguishing right from wrong (particularly for historical purposes), than he ever spoke about the facts of the case or the particulars of the defense.

Perhaps the most striking example of a "Darrow defense" was in the Sweet case, which Darrow tried when he was an old man. Doctor Ossian Sweet and some of his friends and relatives were tried for murder in Detroit in 1925. The case arose when Sweet, who was black, bought and moved into a house in a white neighborhood. A mob gathered one night in front of the house, rocks were hurled at it, and ominous threats were uttered. The men in the house were heavily armed and they fired. A man across the street was killed on his own porch and another man severely injured.

The first trial ended in a hung jury; in the second, Darrow spoke for eight hours in final argument, almost none of it devoted to the law of self-defense, defense of the home or others, the lack of ballistics testing, or the inability of the government to prove beyond a reasonable doubt whose gun fired the shot. Rather, "he went back through the pages of history and the progress of the human race to trace the development of fear and prejudice in human psychology."<sup>21</sup> His peroration was as follows:

I do not believe in the law of hate. I may not be true to my ideals always, but I believe in the law of love, and I believe you can do nothing with hatred. I would like to see a time when a

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C. DARROW, *THE STORY OF MY LIFE* 172-89 (1932). Darrow's career as a labor attorney ended with the McNamara case, after which he devoted himself almost exclusively to criminal defense. J.E. SAYER, *CLARENCE DARROW: PUBLIC ADVOCATE* 2-3 (1978).

<sup>19</sup> I. STONE, *CLARENCE DARROW FOR THE DEFENSE* 254 (1941).

<sup>20</sup> *Id.* at 355.

<sup>21</sup> I. STONE, *supra* note 19, at 484.

man loves his fellow man and forgets his color or his creed. We will never be civilized until that time comes. I know the Negro race has a long road to go. I believe the life of the Negro race has been a life of tragedy, of injustice, of oppression. The law has made him equal, but man has not. And, after all, the last analysis is, what has man done . . . and not what has the law done. I know there is a long road ahead of him before he can take the place which I believe he should take. I know that before him there is suffering, sorrow, tribulation and death among the blacks and perhaps the whites. . . .

What do you think is your duty in this case? I have watched day after day these black, tense faces that have crowded this court. These black faces that now are looking to you twelve whites, feeling that the hopes and fears of a race are in your keeping.

The case is about to end, gentlemen. To them it is life. Not one of their color sits on this jury. Their fate is in the hands of twelve whites. Their eyes are fixed on you, and their hopes hang on your verdict.

I ask you, on behalf of this defendant, on behalf of these helpless ones who turn to you and more than that—on behalf of this great state and this great city which must face this problem and face it fairly—I ask you, in the name of progress and of the human race, to return a verdict of not guilty in this case.<sup>22</sup>

It is interesting that neither this, nor virtually any, of Darrow's famous summations would be considered proper in any courtroom today. There is clearly an appeal to the prejudices, passions, and sympathy of the jury that violates codes of professional responsibility,<sup>23</sup> as well as an expression of personal opinion and belief that steps over the line of accepted practice. Yet Clarence Darrow's view of defense lawyering, with its constant reference to a perspective larger than the individual and the facts of the crime, is still with us. We are not allowed to say the things he said so eloquently and explicitly. But whenever a defense lawyer truly represents his client the factfinder, be it judge or jury, on a guilty plea or a trial, sees and senses what Darrow said. Among the defense bar today there are

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<sup>22</sup> *Id.* at 484-85. After deliberating for three hours, the jury came back with a verdict of acquittal for Sweet. The state's attorney dismissed the charges against the remaining defendants.

<sup>23</sup> The ABA Code of Professional Responsibility states:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused.

CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4) (1980).

hundreds of lesser Darrows, giving partial and implicit expression to what he could more openly state: that the causes of crime are unknown, perhaps unknowable, and that, in the end, we all share a common humanity with the accused.

To draw the final example from Darrow's life, we must realize that his reasons for defending the guilty were an amalgam of the humanitarian, egotistical, and cynical-realist, the last of which would be worthy of old Charles Curtis. In his autobiography, Clarence Darrow summarized his life at the defense bar:

Strange it may seem, I grew to like to defend men and women charged with crime. It soon came to be something more than the winning or losing of a case. I sought to learn why one goes one way and another takes an entirely different road. I became vitally interested in the causes of human conduct. This meant more than the quibbling with lawyers and juries, to get or keep money for a client so that I could take part of what I won or saved for him: I was dealing with life, with its hopes and fears, its aspirations and despairs. With me it was going to the foundation of motive and conduct and adjustments for human beings, instead of blindly talking of hatred and vengeance, and that subtle, indefinable quality that men call "justice" and of which nothing really is known.<sup>24</sup>

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<sup>24</sup> C. DARROW, *supra* note 18, at 75-76.

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## Document: Wo u ld yo u defend him ?

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### Wo u ld yo u defend him ?

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### Body

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The trauma nurses who took care of Boston bombing suspect Dzhokhar Tsarnaev after his arrest have a straightforward explanation. "I don't get to pick and choose my patients," one told the Boston Globe.

The three public defenders assigned to Tsarnaev would have been similarly constrained. But what about the two prominent defense lawyers who have offered their services? Why choose to represent a man accused of turning the Boston Marathon finish line into a war zone?

Likewise, how can the lawyers representing Cleveland's Ariel Castro fight for a man who pleaded guilty on Friday to 937 counts related to the kidnapping, imprisonment and rape of three women? And what about the attorneys for the recently acquitted but still controversial George Zimmerman? Do they really believe he is completely innocent of any wrongdoing in shooting an unarmed teen?

I have been a criminal defense lawyer for more than 30 years, first as a public defender and now as a law professor running a criminal defense clinic. My clients have included a young man who gunned down his neighbor in front of her 5-year-old daughter while trying to steal her car, a man who beat a young woman to death for failing to alert drug associates that police were coming and a woman who smothered her baby for no apparent reason. These are the kinds of cases that prompt people to ask: "How can you represent those people?" All criminal defense lawyers are asked this; it's such a part of the criminal defense experience that it's simply known as "the question."

Most of us have a repertoire of stock replies about how the system can't work without good lawyers on both sides, or the harshness of punishment, or the excessive number of people - especially minorities - locked up in this country. Capital defenders such as Tsarnaev lawyer Judy Clarke tend to cite their opposition to the death penalty.

But our motivations are usually personal and sometimes difficult to articulate. I often say I was inspired by "To Kill a Mockingbird." There is no more compelling figure than Atticus Finch defending a wrongly accused poor black man. Innocence, though, is not a chief driver for me. To the contrary, I often call my life's work "the guilty project." Criminal defense is, for the most part, defending the factually guilty - people who have done something wrong, though maybe not exactly what is alleged.

That works for me because, as it happens, I like guilty people. I prefer people who are flawed and complicated to those who are irreproachable. As legendary American lawyer Clarence Darrow put it more than 80 years ago: "Strange as it may seem, I grew to like to defend men and women charged with crime. . . . I became vitally interested in the causes of human conduct. . . . I was dealing with life, with its hopes and fears, its aspirations and despairs."

Defense lawyers try to find the humanity in the people we represent, no matter what they may have done. We resist the phrase "those people" because it suggests too clear a line between us and them. Clarke has managed to do this with some of the most notorious criminals of the past two decades, including "Unabomber" Ted Kaczynski. "Even if it's the smallest sliver of common ground, Judy's going to be able to find that," said Kaczynski's brother, David. "There's no doubt in my mind that Judy saw my brother's humanity despite the terrible things he'd done."

We may even come to develop affection for our clients - as did the Boston nurses, who caught themselves calling Tsarnaev "hon." "There are very few clients I have had who I didn't like," Miriam Conrad, another Tsarnaev lawyer, has said.

Criminal lawyers are sometimes accused of investing all our sympathy in our clients and having none for victims. But we are human beings; we have feelings. Over the years there has been a handful of cases that tested me: sympathetic victims, unspeakably cruel crimes, clients who seemed to lack any conscience. I once represented a young man accused of an armed rape of a recent college graduate who was an AmeriCorps volunteer. She could have been me at that age - full of passionate idealism. It was hard to face her in court. I represented a man accused of child abuse who seemed to hate everyone, especially women. I admit I derived some satisfaction from the fact that his defense lawyer, prosecutor and judge were all women - even though I did everything I could on his behalf.

The people I have in mind when I say "I like guilty people" are not those who commit acts of such depravity that it's painful to read news stories about them. I mean the vast majority of my clients, who, for a variety of reasons, have committed crimes but who are not evil.

My car-thief client was only 16 when he killed his neighbor. He was immature and impulsive, and he'd had a hard time fitting in. He'd never been in trouble with the law, but on that day he got in trouble at school and was trying to escape his dad's wrath when he grabbed a gun to frighten his neighbor into giving him her car. Thirty years later, he still can't believe he pulled the trigger. He has grown up in prison and is more than sorry for what he did. I've been trying to get him released on parole.

My baby-killing client has no recollection of harming her 18-month-old. She accepts that she must have done it and feels regret and shame. In prison for more than 26 years, she has shown herself to be a woman of faith and service, working in the prison hospital and the Catholic chaplain's office. I took her case because she has served her sentence and been a model prisoner, yet she has been repeatedly denied parole.

My drug-dealing client knew the woman he killed - he once bought presents for her kids. He wishes he had made different choices on that day and at other points in his life. Released from prison after 20 years, he is grateful to have a second chance.

I realize this may be what every defender says: My clients, no matter what they may have done, aren't wicked. They are damaged, deprived or in distress. Their crimes can be understood as the products of awful lives, or of being young, hot-headed and lacking in judgment, or of not having the mental wherewithal to know what they were doing. There is always a story. Castro lawyers Craig Weintraub and Jaye Schlachet were typical in insisting, after meeting with their client for several hours, that he isn't the "monster" he had been made out to be.

If knowing our clients makes it too easy to explain how we can represent them, maybe it's better to ask whether we would represent other people's clients.

Defending Castro would be especially difficult for me. Although I have never turned down a court appointment based on the nature of the case, there are crimes I find especially abhorrent: child abductions that feature sexual abuse and hate crimes of all sorts. With its kidnapping, sexual assault and torture, Castro's is exactly the kind of case I find hard to stomach. It's distressing to read fiction about these kinds of crimes - such as Alice Sebold's "The Lovely Bones" or Emma Donoghue's "Room" - let alone grapple with the real thing.

I don't envy the lawyers representing Tsarnaev. He is young - I can understand why those nurses were instinctively kind to him - but there is overwhelming evidence that he killed, maimed and terrorized innocent people in the place where he grew up. I'd want to say to him: "What the hell were you thinking?" But good defense lawyers resist the urge to pile on; it isn't a useful way to form a relationship.

Still, there's something about cases in which everyone is calling for blood that makes it easier to fight for people like Tsarnaev and Castro. Maybe there's a contrarian streak in all good criminal lawyers. Frankly, the uproar over the image of Tsarnaev on the cover of Rolling Stone made me want to stand up for him - or at least for the editors of the magazine.

I confess that I gravitate more to Trayvon Martin - the young black man unfairly targeted - than neighborhood-watch volunteer Zimmerman. But that doesn't mean I couldn't have defended Zimmerman.

Prominent criminal lawyer Edward Bennett Williams once noted that he took on difficult cases for unpopular clients "not because of my own wishes, but because of the unwritten law that I might not refuse." That unwritten law still motivates criminal lawyers, along with the knowledge that none of us would want to be defined by the very worst thing we ever did.

We represent "those people" because we can always find aspects of them that represent us.

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