

# **CRIMINAL LAW**

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Opinions

# How can anyone defend Harvey Weinstein? Duty.

By Abbe Smith

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The outcry at Harvard University about Winthrop House dean and law professor Ronald Sullivan joining Harvey Weinstein's defense team is a ramped-up, #MeToo version of what criminal lawyers call the "cocktail party question." We hear it all the time: "How can you represent those people?" Those of us who are both criminal defense lawyers and feminists are sometimes asked a variation: "How can you represent rapists?"

This happened to Hillary Clinton when she ran for president. Suddenly, the fact that she had accepted a court appointment to represent an indigent man accused of child sexual assault when she was a young lawyer practicing in Arkansas became news. As Clinton explained during an interview, "I had a professional duty to represent my client to the best of my ability, which I did."

Of course, Weinstein is not indigent — far from it — and Sullivan has no obligation to take his case. Lawyers in the United States have a choice in whom they represent — unless they are public defenders who are required to defend those who qualify for their services. As a former director of the Public Defender Service for the District of Columbia, Sullivan knows this distinction well. He made a choice to defend Weinstein.

There are good reasons for doing so: Able defense lawyers are essential to the functioning of the adversary system. They ensure that the government meets its burden of proof, which ultimately protects all of us. It is especially important to hold the government to its burden when the accused is a social pariah, as Weinstein has become. He is the galvanizing force behind the #MeToo movement and has become the face of predatory rape. The rush to judgment against Weinstein has been swift and harsh. No one is sticking their neck out for him. (Weinstein has denied all of the charges.)

We ought to know better in the age of the Innocence Project. Things are not always what they seem. Mistakes happen. Process matters. There ought at least to be a trial before a public hanging. That's where defense lawyers come in.

But none of this answers how Sullivan — husband (of a strong feminist), father, dean and public-interest lawyer — could feel okay about zealously defending a man accused of rape. Working for Weinstein, he will have to do what Justice Byron White once described as the defense lawyer's unique ethical duty: to "defend his client whether he is innocent or guilty. . . . [and] put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth."



**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-

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

11. Opinion 150, Committee on Professional Ethics and Grievances of the American Bar Association (1935), 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

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 TRAYER, *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

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*.

## MANDATORY RELEASE - PROSPECTIVE APPLICATION!

*Unless paroled or released to probation supervision, ADOC responsible for releasing /ABPP responsible for supervising "mandatory releases"*

- Sentenced to 5 years or less = release to ABPP supervision no less than 3 months and no more than 5 mos. prior to minimum release date.
- More than 5 years, but less than 10 = release to ABPP supervision no less than 6 months and no more than 9 mos. prior to minimum release date.
- 10 years or more = release to ABPP supervision no less than 12 months and no more than 24 mos. prior to minimum release date.



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NOTE → N/A to sex offenses involving a child.

NOTE → Supervision must be to "intensive program" under ABPP.