

# *Fordham Urban Law Journal*

---

*Volume 4, Number 2*

1975

*Article 3*

---

## A Critique of Lawyers' Ethics in an Adversary System

William R. Meagher\*

\*

Copyright ©1975 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

# A Critique of Lawyers' Ethics in an Adversary System\*

William R. Meagher

## Abstract

Monroe Freedman's book is largely a reiteration of his unorthodox views, previously aired in various law reviews and other professional publications, regarding ethical standards that should govern the conduct of the trial advocate. Since his positions contradict the behavioral principles codified in two publications of the American Bar Association—the Code of Professional Responsibility and the Standards Relating to the Defense Function—the author adopts the apologetic strategy of impugning both the credibility and the viability of these precepts in order to justify his contrary stance and to clear the way for its general acceptance.

**KEYWORDS:** ethics, Monroe Freedman, Code of professional Responsibility, Standards Relating to the Defense Function, norms, lawyer, attorney

---

\*Member of the New York Bar. Mr. Meagher received his A.B. and LL.B. cum laude from Fordham University. Mr. Meagher is counsel to Skadden, Arps, Slate, Meagher & Flom, New York City, and an adjunct professor at Fordham University School of Law

## A CRITIQUE OF LAWYERS' ETHICS IN AN ADVERSARY SYSTEM†

William R. Meagher\*

Monroe Freedman's book is largely a reiteration of his unorthodox views, previously aired in various law reviews and other professional publications, regarding the ethical standards that should govern the conduct of the trial advocate. Since his positions contradict the behavioral principles codified in two publications of the American Bar Association—the Code of Professional Responsibility and the Standards Relating to the Defense Function—the author adopts the apologetic strategy of impugning both the credibility and the viability of these precepts in order to justify his contrary stance and to clear the way for its general acceptance.

What ethical norms does he advocate? Well, take for example his position in a hypothetical regarding the use by criminal defense counsel of perjured testimony known to him to be false. A robbery occurs at 16th and P Streets at 11:00 P.M. Defendant, although innocent, is charged with the crime. At first, defendant denies that he was in the vicinity, but persuaded by counsel to tell all upon counsel's assurance that he will not be prejudiced, defendant admits he was at 15th and P Streets at 10:55 P.M. on the night of the crime, but asserts that he was walking east, away from the scene of the crime. At the trial, one prosecution witness falsely identifies defendant as the robber. A second prosecution witness correctly places defendant at 15th and P Streets at 10:55 P.M., but cross-examination casts some doubt upon the witness' reliability. Defendant then insists upon taking the stand to deny the mistaken identification of him as the robber, and also to deny the truthful testimony placing him at 15th and P Streets five minutes before the crime. In these circumstances what are counsel's professional responsibilities?

---

† *Lawyer's Ethics is an Adversary System*. By Monroe H. Freedman. New York: The Bobbs-Merrill Company, Inc., 1975. Pp. xiii, 270. \$12.50.

After considering the highly controversial nature of Mr. Freedman's book and the reviewer's vigorous disagreement with many of Mr. Freedman's notions, the Editors decided that this review merits a more prominent place than the traditional, terminal location of book reviews.

\* Member of the New York Bar. Mr. Meagher received his A.B. and LL.B. *cum laude* from Fordham University. Mr. Meagher is counsel to Skadden, Arps, Slate, Meagher & Flom, New York City, and an adjunct professor at Fordham University School of Law.

The author answers:<sup>1</sup>

In my opinion, the attorney's obligation in such a situation would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward. Any other course would be a betrayal of the assurances of confidentiality given by the attorney in order to induce the client to reveal everything, however damaging it might appear.

A substantial portion of the book is an attempt to justify this position. Freedman first analyzes what he terms the trial lawyer's "trilemma," which arises from three conflicting professional obligations: first, in order to prepare the defense properly, counsel must know all that his client knows; second, counsel must keep confidential all that his client tells him; and third, counsel, as an officer of the court, must be candid with the court. These obligations are thrown into conflict by the client's exercise of his "right" to testify when both he and his attorney know that the testimony which he is about to give is false. Freedman resolves the conflict in favor of the perjurious client by making paramount the attorney's "obligation" of "confidentiality," and subordinating all other professional obligations he may have. However, this position, if adopted, would involve the attorney in serious ethical and even criminal difficulties.

First of all, in the case supposed, the client has committed perjury<sup>2</sup> and obstruction of justice.<sup>3</sup> The attorney has probably suborned this perjury and conspired with the client to commit perjury. Certainly he has facilitated the crime.<sup>4</sup> Although Freedman suggests that defense counsel lacks the criminal intent required for subornation, the presence of this intent appears from counsel's deliberate elicitation of the client's false testimony and his argument in summation based upon it.<sup>5</sup>

Quite apart from his criminal involvement, the attorney's conduct violates the Code of Professional Responsibility. Disciplinary

---

1. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 31 (1975) [hereinafter cited as FREEDMAN].

2. See, e.g., MODEL PENAL CODE §§ 241.1(1)-(2) (1962); N.Y. PENAL LAW § 210.15 (McKinney 1975).

3. See, e.g., MODEL PENAL CODE § 242.1 (1962); N.Y. PENAL LAW § 195.05 (McKinney 1975).

4. See, e.g., MODEL PENAL CODE § 5.02(1) (1962); N.Y. PENAL LAW § 115.00 (McKinney 1975).

5. See, e.g., MODEL PENAL CODE § 202(1)-(8) (1962); N.Y. PENAL LAW § 20.00 (McKinney 1975).

Rule 7-102(A)(4) of the Code expressly forbids counsel, in his representation of a client, to "[k]nowingly use perjured testimony or false evidence." The author finds the word "knowingly" to be obscure and ambiguous, because it is not indicated whether "subjective" or "objective" knowledge is intended. However, this theoretical obscurity is irrelevant to the case hypothesized since the lawyer's foreknowledge of the client's perjury is one of the facts assumed.<sup>6</sup>

Indeed, this very knowledge releases the attorney from the obligation of confidentiality.<sup>7</sup> Once the attorney no longer has the *obligation* of confidentiality, he becomes duty-bound not know-

---

6. The Code of Professional Responsibility forbids a lawyer, in his representation of a client, to:

- (3) Conceal or *knowingly* fail to disclose that which he is required by law to reveal.
- (4) *Knowingly* use perjured testimony or false evidence.
- (5) *Knowingly* make a false statement of law or fact.
- (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.
- (8) *Knowingly* engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-102(A)(3) -(8) (emphasis added).

Freedman contends that the Code of Professional Responsibility employs "the concept of knowing in a vague and undifferentiated way." FREEDMAN 57. He concludes that "[a]s a result [of the Code of Professional Responsibility's use of the concept of knowing], we are left without any significant guidance in drawing possible distinctions between criminal and civil litigation, and among different kinds of conduct that might be improper." *Id.* Inconsistently, at another place, he criticizes those lawyers who claim they never really "know" whether or not a client is guilty, and those others who "don't want to know the facts." In any event, it is extremely doubtful that any member of the bar reading Disciplinary Rules 7-102(A)(3)-(8) of the Code of Professional Responsibility in good faith would find the words "knowingly" or "knows" too obscure and vague for guidance.

7. Disciplinary Rule 4-101(C)(3) of the Code of Professional Responsibility provides that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." Freedman contends that this obligation of "disclosure of the [client's] confidence is only permissible, not mandatory." FREEDMAN 6. A footnote to Disciplinary Rule 4-101(C)(3) states:

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

ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 4-101(C)(3) n.16. It must be noted that the sole purpose of the footnotes to the Code of Professional Responsibility was "to enable the reader to relate the provisions of . . . [the] Code to the ABA Canons of Professional Ethics . . . ." *Preamble to id.* n.1.

ingly to use perjured testimony, even though his refusal may result in revealing the client's imminent perjury.<sup>8</sup> In short, the seal of secrecy is broken to enable counsel to meet his obligation to reveal, and possibly to prevent, the client's false swearing.

While it is true, as the author states, that the defendant in a criminal case has a "right to tell his story,"<sup>9</sup> it is equally true that he has no right to testify falsely. The defendant's constitutional privilege against self-incrimination secures to him the right to refuse to testify without any prejudicial inferences from such refusal, or comment about it; but if he elects to take the stand he must, in accordance with his oath, "testify to the truth, the whole truth, and nothing but the truth."

As a practical matter, in the case supposed, the active involvement of counsel in the client's perjury seems unavoidable if, as the author suggests, the attorney is "to proceed in the normal fashion in presenting the testimony . . ." <sup>10</sup> Except in emergency situations, the experienced trial lawyer will not put his witnesses on the stand without preparation. This customarily involves not only a review of the direct examination, but also a preview of the questions that are likely to be asked on cross-examination and how the witness is to handle them. When the testimony to be given on direct is known to counsel to be perjurious, and the answers to be given on cross must therefore be designed to conceal and maintain this perjury, testimonial preparation of the client inevitably involves counsel in the creation and preparation of evidence which he knows to be false in violation of the Code of Professional Responsibility.<sup>11</sup>

Freedman concedes that there is some distinction between "perjury by the criminal defendant, who has the right to take the stand,

---

8. See ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-102(A)(4).

9. FREEDMAN 31.

10. *Id.*

11. Here the author is inconsistent. While contending that the defense lawyer may ethically put his perjurious client on the stand and question him as he would any truthful witness, he considers clearly unethical the pre-trial preparation of a client's testimony involving the lawyer's "actively participating in . . . a factual defense that is obviously perjurious." *Id.* at 73. Indeed, it is hard to perceive in what respect the interrogation of the perjurious client in a courtroom is not greater participation in the client's perjury than his interrogation in the office of his attorney. The author's footnoted "distinction" between active participation in a false defense and "accepting a client's decision to commit perjury, and presenting that perjury to the court," *id.* at 73 n.\*, is so flimsy as to be intellectually invisible.

and perjury by collateral witnesses"<sup>12</sup> who do not have that right. That is to say, while permitting the client to perjure himself is obligatory, the use of a perjurious witness may not be permissible. But, as a practical matter, it is likely that once the defendant has told his perjurious story, he will insist on perjurious corroboration. Suppose in the case at hand, that defendant, after testifying that he was not in the vicinity of the crime at the time of the robbery, is asked on cross-examination where he was at that hour. Defendant has to place himself somewhere; and so he lies that he was at home with his wife and mother watching the eleven o'clock news. Suppose further that he then insists on having his wife and mother called as witnesses to support his false alibi. It is difficult to see how defense counsel, if under an obligation of confidentiality, could refuse to place the wife and mother on the stand, elicit their perjurious testimony, and use it effective in summation. Indeed, if the author were the attorney, he would appear to have no compunction about concealing their perjury for he says:<sup>13</sup>

Certainly a spouse or parent would be acting under the same human compulsion as a defendant, and I find it difficult to imagine myself denouncing my client's spouse or parent as a perjurer and, thereby, denouncing my client as well.

Thus, defense counsel's initial submission to his client's insistence on testifying falsely enmeshes him in an ever-expanding network of perjuries.

The author laments that critics of his position do not offer any practical guidance as to what defense counsel should do to avoid the ethical difficulties thus presented. To the suggestion that counsel withdraw from the case, Freedman responds that "[i]n terms of professional ethics, the practice of withdrawing . . . is difficult to defend, since the identical perjured testimony will ultimately be presented."<sup>14</sup> This, of course, assumes that another advocate can readily be found who will go along with the client's forensic charade—a sad commentary on the "ethics" of the criminal bar. The further suggestion that by withdrawing, the attorney loses the opportunity to discourage the client from presenting the perjured testimony is

---

12. FREEDMAN 32 (footnote omitted).

13. *Id.* at 32.

14. *Id.* at 33.

facetious since in the case supposed the attorney has already advised the client that the proposed testimony is unlawful and nevertheless the client has made the "decision to go forward."

It is next objected, by the author, that where the defense lawyer must seek the court's permission to withdraw (as in the case of court-appointed counsel) he can do so only by stating he has "an ethical problem," thereby raising an implication of the client's guilt in "gross violation of the obligation of confidentiality . . . ."<sup>15</sup> This, of course, assumes that the obligation of confidentiality continues despite the client's proposed perjury and the attorney's ethical duty to prevent or reveal it. And it should be observed that any resulting prejudice to the defense occasioned by the lawyer's withdrawal is caused not by counsel's violation of any rights of the client, but by the client's insistence on committing a penal wrong.

This pervasive obligation of confidentiality, the author further argues, makes unacceptable the "solution" of the American Bar Association Standards Relating to the Defense Function, which is to let the client testify in narrative form without counsel's interrogation or reference to the testimony in summation.<sup>16</sup> But here again, any inference of the defendant's guilt arising from this procedure is caused not by the lawyer's abstention, but by the client's wrongful insistence upon defending against one alleged crime by committing another.

In this connection, Freedman emphasizes that "jurors assume that the defendant's lawyer knows the truth about the case . . . [and] the jury will frequently judge the defendant by drawing inferences from the attorney's conduct in the case."<sup>17</sup> But this is all the more reason why the trial advocate's presentation of perjurious testimony is to be avoided. In presuming that the lawyer knows the truth about the case, the jurors naturally assume that his interrogation of his client and witnesses is designed to elicit the truth that the lawyer knows. Thus, the interrogating lawyer impresses the testimony he elicits with the stamp of his personal credibility. Indeed, the questions asked, the tone and inflection of counsel's voice, his gestures, facial expressions, and his total demeanor

---

15. *Id.* at 34.

16. STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.7(c) in ABA, THE ADMINISTRATION OF JUSTICE 133 (1974) [hereinafter cited as ABA DEFENSE STANDARDS].

17. FREEDMAN 37.



must, in order to be psychologically effective, impress the court and jury with his belief in the veracity of his evidence and the merits of his client's case. When counsel, behind this facade of sincerity, presents falsehood as truth, he prostitutes himself and perverts the judicial process.

Therefore, it must be accepted as a first principle that under no circumstances may counsel present evidence known to him to be false in any case, criminal or civil. It is the departure from this basic absolute that leads to the "trilemma" which the author finds inescapable. This "trilemma" actually need not arise: it can be avoided by a clear understanding at the very threshold of the lawyer-client relationship regarding the ethical limits beyond which counsel may not and will not go. Then the client will have no right to claim later that he was deceived by promises of confidentiality to make prejudicial disclosures which the attorney is required at all costs to conceal.

In this connection, it should be observed that trial counsel has the professional responsibility (to which Freedman does not refer) to take charge of the conduct of the case, certainly as far as procedural matters are concerned;<sup>18</sup> and while the client should be kept advised of the procedures to be followed, the final decision regarding their adoption should rest with counsel.<sup>19</sup> The layman-client has no more business telling his trial lawyer how the case is to be tried than the layman-patient has any business telling his surgeon how the operation is to be performed. On the other hand, the attorney abdicates his proper function when he puts the client in charge. The lawyer's professional control of the case necessarily includes the power to decide whether or not the client is to testify and what witnesses are to be called. If the client understands this at the very outset, the author's "trilemma" need hardly arise. Should the client decline to give this control, counsel should refuse to take the case.<sup>20</sup>

---

18. ABA CODE OF PROFESSIONAL RESPONSIBILITY E.C. 7-7. It should be noted that these procedural matters must arise "[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client . . . ." *Id.* Counsel must exercise his discretion in such matters "in a manner consistent with the best interests of his client." *Id.* E.C. 7-9.

19. *Id.* E.C. 7-7. These instances must be distinguished from situations where only the client has the right to decide on the course of action. *See id.* If a client is lax in making a decision where counsel is not free to do so unilaterally, counsel "ought to initiate this decision-making function . . . ." *Id.* E.C. 7-8.

20. Discussion of this subject is concluded by the author with a reference to a 1972 survey of lawyers in the District of Columbia said to show that "when asked what to do when the

Turning to a related topic, Freedman apparently sees inconsistency between the American Bar Association's condemnation of presenting perjured testimony<sup>21</sup> and its non-disapproval of cross-examining a witness who the cross-examiner knows is telling the truth.<sup>22</sup> He puts the case of the defense lawyer who, after being told by the defendant that he did in fact rape the prosecutrix as charged, attacks her credibility on cross-examination by attempting to get admissions of her consensual sexual intercourse with other men. Freedman deplores the rule that while counsel may not ethically put the defendant on the stand to deny the rape, he may ethically cross-examine the rape victim in an attempt to impair her credibility.<sup>23</sup> In both cases, he says, "the lawyer participates in misleading the finder of fact."<sup>24</sup> However, there is a well-recognized difference between the two situations. In eliciting perjurious testimony, counsel is deliberately using false evidence, known to him to be false; and if the client is guilty, such use is intended to bring about a miscarriage of justice by an unjustified acquittal. On the other hand, in cross-examining the truthful witness, counsel is not seeking to make the witness lie, but rather to elicit true facts which the jurors may consider in determining the credibility of the witness' testimony.

---

client indicates an intention to commit perjury, 95% indicated that they would call the defendant, and 90% . . . that they would question the witness in the normal fashion." FREEDMAN 38. Significantly, "virtually all," *id.* at 39, those interviewed insisted on anonymity. In any event, if this survey accurately reflects the consensus of the District of Columbia bar, the criminal lawyers practicing in that jurisdiction have indeed become criminal.

21. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-102(A)(4).

22. ABA DEFENSE STANDARDS § 7.6(b). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-101(A)(1).

23. In rape cases, defense counsel has the obligation to cross-examine the prosecutrix as to her prior consensual sex relations in order to establish a statutory defense. Under the Model Penal Code it is a defense to a prosecution for rape "that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others." MODEL PENAL CODE §213.6(4) (1962); *see* J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 200 (3d ed. 1940). *But see* N.Y. CRIM. PRO. LAW § 60.42 (McKinney Supp. 1975). Whether this evidence should be made admissible is a debatable public policy question. Recently an Advisory Group on the Law of Rape (including two women High Court judges) recommended to Britain's Home Secretary that such evidence should be inadmissible. Weinraub, *In Britain a Move is Afoot to Update Laws on Rape*, N.Y. Times, Dec. 13, 1975, at 22, col. 4.

24. FREEDMAN 45. Freedman considers counsel's participation in cross-examination of the truthful witness more questionable than his participation in the direct examination of the lying client, because on direct examination only non-leading questions may be asked while on cross-examination the lawyer takes an active aggressive role in asking leading questions. This seems a tenuous distinction at best.

Moreover, when counsel calls a perjurious witness he fraudulently vouches for the credibility of that witness; he does not similarly vouch for the credibility of opposing witnesses, whose testimony he has the obligation to test by legitimate cross-examination.<sup>25</sup>

In any event, the author ultimately concludes that the criticized cross-examination is both permissible and required; but he suggests that the lawyer who finds presentation of the consensual intercourse defense personally unconscionable may decline to accept the defense of rape cases. Peculiarly, he makes no similar suggestion to the lawyer whose client insists on presenting a perjurious defense.

When the author comes to lecture the prosecutor on his ethical responsibilities, he ascends a loftier and sounder platform. All will agree that a prosecutor may not abuse the powers of his office; that his duty is to protect the innocent as well as to convict the guilty; and that even in convicting the guilty he must be meticulous in his avoidance of improper means.<sup>26</sup> Also well taken is the author's position that prosecutors should avoid press conferences announcing indictments, with the attendant fanfare of television and radio coverage, leading oftentimes to prejudgment of the accused person's guilt.

However, the author's defense orientation impels him to favor other prosecutorial strictures that seem excessively stringent. For example, in considering the ethical standards that should control the prosecutor's investigatory function, singling out one individual as a target for inquiry is condemned. Thus, Attorney General Robert Kennedy is criticized for his "get Hoffa" campaign, although it resulted in Hoffa's criminal convictions. The criticism is put on the ground that the probe of Hoffa's activities had the appearance of a private vendetta arising from a rumored Hoffa to Kennedy personal insult. Applying the American Bar Association's

---

25. In the suppositious case the situation would be quite different if defense counsel, having no information or proof that the prosecutrix had prior sexual intercourse, were to cross-examine her in such a way as to indicate to the jury his possession of such information. This illustration defuses Freedman's charge that the organized bar, in its approach to ethical problems, takes the position that "[c]ross-examination . . . is good, and therefore any lawyer, under any circumstances and regardless of the consequences, can properly impeach a witness through cross-examination." *Id.* at 45-46.

26. Examples of "improper means" include, but are not limited to, withholding exculpatory evidence, suppressing evidence that weakens his case, and improper cross-examination designed to destroy a defense witness who he knows to be telling the truth.

Standard that "[a] prosecutor should avoid the appearance of a conflict of interest with respect to his official duties,"<sup>27</sup> Freedman contends that Kennedy was ethically required to withdraw from the Hoffa case and to seek the appointment of a special prosecutor. This would seem far too heady and impractical a nostrum; it would open wide the door to baseless claims of apparent conflicts of interest and applications for the appointment of scores of special prosecutors, both state and federal, entailing heavy expense and interminable delay.<sup>28</sup>

Wholly apart from the special Kennedy-Hoffa situation, many crimes, especially conspiracies, would go unproved without the testimony of at least one of the principals. More often than not, this principal must be made a defendant before he can be made a prosecution witness: he must be singled out for intensive investigation in the hope of unearthing facts warranting his indictment either for the conspiracy or a wholly unrelated crime. That indictment, if obtained, may then be used as pressure to make the defendant talk. Thus, it is sometimes necessary to make a suspect a person to be "gotten" in order that a good case against others may be made.<sup>29</sup>

What ethical standards should govern the prosecutor in deciding whether to seek an indictment? Surely, he should proceed with the utmost caution, for an indictment brands the defendant a searing stigma that even later acquittal cannot entirely extirpate. But the author would go so far as to forbid the prosecutor to obtain an indictment unless he *personally* is "satisfied beyond a reasonable doubt that the accused is guilty."<sup>30</sup> If this restriction were imposed, few indeed would have the courage to assume the scrupulous ethical burdens of a prosecutor, and few indictments indeed would be returned. Furthermore, the substitution of the prosecutor's personal opinion of a suspect's guilt or innocence for the grand jury's conclusions on the evidence would transfer to him a power confided to them in distortion of the criminal process. On the other hand, while

---

27. STANDARDS RELATING TO THE PROSECUTION FUNCTION § 1.2 in ABA, THE ADMINISTRATION OF CRIMINAL JUSTICE 84 (1974).

28. The claim of a similar Robert Morgenthau-Roy Cohn feud stimulating the criminal prosecutions of the latter did not raise the suggestion that a special prosecutor be appointed to supersede Morgenthau as United States Attorney for the Southern District of New York.

29. Any promises made to the witness regarding the disposition of his indictment or the leniency of his sentence, if he pleads guilty, is of course the proper subject of cross-examination and argument to the jury.

30. FREEDMAN 85.

it is true that a grand jury of laymen invariably turns to the prosecutor for legal guidance in weighing the sufficiency of the evidence for an indictment, the ultimate conclusion is exclusively the jury's to draw, and an honest impersonal appraisal of the evidence by the prosecutor is all that should be ethically required of him.

Moreover, grand juries are not legally required to find guilt beyond a reasonable doubt in order to indict, but only "probable cause" to believe that such guilt exists.<sup>31</sup> The Code of Professional Responsibility also requires only that the charges be supported by "probable cause."<sup>32</sup> Disagreeing with these legal and ethical standards, Freedman would not only apply the personal "reasonable doubt" test proposed, but would also impose a sanction that "a prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt."<sup>33</sup> But what "fair-minded person" is to search the prosecutor's conscience? The impracticality of this proposal is obvious: it would afford opportunity for multiple attacks on indictments, and on the prosecutor obtaining them, subjecting him to retroactively applied vague and indefinite ethical standards in disciplinary proceedings involving disclosure and appraisal by grievance committees of secret grand jury testimony; and it would immobilize the prosecutor in a straightjacket of "ethical" inhibitions.

Freedman next attacks the widely used practice of plea bargaining, and much of his criticism has been voiced by others. There is no justification for the "overcharge" of a more serious offense than the evidence warrants simply to coerce a defendant into bargaining for a plea to a lesser crime. Indeed, there is considerable agitation generally for the abolition of plea bargaining altogether,<sup>34</sup> although the author does not go that far. He does not mention, however, the salutary uses of plea bargaining in the solution and successful prosecution of crimes. Many of the convictions in the

---

31. See, e.g., *Jaben v. United States*, 381 U.S. 214 (1965); *People v. Karl*, 41 App. Div. 2d 1001, 344 N.Y.S. 2d 118 (3d Dep't 1973) (mem.); *People v. Martinez*, 80 Misc. 2d 735, 364 N.Y.S. 2d 338 (Crim. Ct. 1975); N.Y. CRIM. PRO. LAW 190.65(1) (McKinney 1971). See generally FED. R. CRIM. P. 4, 5.1, 6, 7.

32. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-103(A).

33. FREEDMAN 88.

34. See, e.g., *Illegitimacy of Plea Bargaining*, FEDERAL PROBATION, Sept. 1974, at 18.

Watergate conspiracy, for example, would have been hardly possible but for the testimony of John Dean, although given only after intensive plea bargaining and the granting of testimonial immunity.

In the trial of an indictment, Freedman would forbid the prosecutor to use prior convictions of the defendant on cross-examination—a practice which he regards as a “species of unethical coercion” preventing the defendant from taking the stand in his own defense. Thus, solely for a testifying convict’s benefit, the jurors are to be deprived by “ethical” fiat of a long recognized test of credibility.

Other well-directed criticism is leveled at the prosecution’s use of the perjured testimony of policemen, which the author claims goes unpunished and undisciplined—a result he attributes to the close relationship between police and prosecutor in the performance of their respective duties. But here again his suggested “obvious solution” is excessive:<sup>35</sup>

In any case involving charges of police abuse . . . a special prosecutor, who is not in a daily working relationship with the police, should be appointed to handle both the police officer’s charge against the citizen and the citizen’s charge against the officer.

But would not such a solution encourage routine charges of police brutality as an easy means to procure disqualification of the prosecutor and the appointment of a special prosecutor in his place? And would it not also require preliminary hearings of the police abuse accusation and of the alleged disqualifying relationship between the particular prosecutor and the police, before any trial on the merits of the crime with which the defendant is charged? These convoluted proceedings would further increase delays in the trial of criminal cases, which defendants and the public alike deplore.

The remainder of the book considers such perennially controversial problems as (1) certification of trial lawyers (labeled a “dubious remedy” for professional incompetence, but reluctantly found acceptable if applied to those now practicing as well as those newly admitted); (2) liberalization of the ethical limitations restricting lawyer advertising;<sup>36</sup> and (3) the comparative merits, ethical and

---

35: FREEDMAN 93.

36. The American Bar Association Committee on Ethics and Professional Responsibility has recently proposed changes to the Code of Professional Responsibility which would permit lawyers to advertise in a restricted manner. ABA, *Legal Profession Is Considering Code Amendments to Permit Restricted Advertising by Lawyers*, 62 A.B.A.J. 53 (1976).

professional, of the British and American Bars.<sup>37</sup>

In closing, the repeated exposure of Freedman's unorthodox positions no longer serves to shock, alarm, or inform the legal profession. However, the publication of this work at this particular time seems most unfortunate; for it makes the author's peculiarly lax ethical standards accessible to the general public, who are not likely to appraise them with a critical eye, and whose present confidence in and respect for the legal profession, now perhaps at its slimiest bottom in the backwash of Watergate, will hardly be elevated by this heterodoxy which approves as permissible and indeed mandatory, practices traditionally and rightfully condemned as unethical.<sup>38</sup>

---

37. With regard to this last topic, the author finds that the claimed superiority of the "English" bar is a "myth," and estimates that in "litigating ability . . . barristers, as a group, are inferior to litigating attorneys in the United States." FREEDMAN 111. Before a sweeping generality of this kind may gain acceptance, far more data than the author's "research" has unearthed will be required, and even then only the most temerarious would venture such an odious comparison.

38. This Review has considered the principal subjects covered by 125 pages of text. The remainder of the book consists of an appendix which includes the author's annotated version of the Code of Professional Responsibility.

