Book Reviews

Lawyer-Client Confidences and the Constitution

Partisan Justice. By Marvin E. Frankel. New York: Hill & Wang, 1980. Pp. 134. \$9.95.

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This is not the book it should have been. Unfortunately, it is not even the book it once was. Marvin Frankel introduced the theme and most of the substance of *Partisan Justice*¹ in his 1974 Cardozo Lecture to the Association of the Bar of the City of New York. That lecture became an article in the *University of Pennsylvania Law Review*,² and Mr. Frankel then wrote three articles elaborating on the same theme.³ Those four pieces, slightly revised, have been gathered together to form the present book.

When the Cardozo Lecture was first presented, many of us felt a sense of excitement and anticipation. Mr. Frankel, then a highly respected federal district judge, was known for his keen and searching mind and for his eloquent and forthright style of expression. The engagement of those talents in the scholarly discussion of lawyers' professional responsibilities, which had begun in earnest less than a decade before,⁴ was a significant occasion. Since then, Mr. Frankel's views and analysis have become even more consequential, for in 1977 he became an influential member of the ABA's Commission on Evaluation of Professional Standards. That body, referred to as the Kutak Commission (for its Chairman, Robert J. Kutak), has undertaken to draft a new set of Model Rules of Professional

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1. M. FRANKEL, *PARTISAN JUSTICE* (1980) [hereinafter cited by page number only].

2. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

3. M. FRANKEL, *JUSTICE: COMMODITY OR PUBLIC SERVICE* (1978); Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465 (1976); Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516 (1976).

4. See *Symposium—Professional Responsibility*, 64 MICH. L. REV. 1469 (1966). There have probably been more substantive articles and books on lawyers' responsibilities published in the past one and one-half decades than had been written in the previous one and one-half centuries.

Conduct⁵ to replace the ABA's current Code of Professional Responsibility.⁶ Because of his early and leading role in discussing the issues and because of his important present position, Mr. Frankel had both a responsibility and an opportunity to make a major advance in the debate about lawyers' ethics. It is disappointing, therefore, that he has not taken on the crucial issues in the controversy.

I

As the title of his book indicates, Mr. Frankel has some strongly negative attitudes towards the adversary system. Mr. Frankel acknowledges that the "vital premise" of the adversary system is that "partisan advocacy on both sides" is the best way to discover the truth.⁷ The "thesis of this book," however, is that "the American version of the adversary process places too low a value on truth telling" and that the process allows us "too often to sacrifice truth to other values that are inferior, or even illusory."⁸ His proposals for change, the author concedes, are "fairly basic" and even "radical":¹⁰ they are directed to "breaking the adversary mold"¹¹ and would therefore effect an "appreciable revolution"¹² in lawyers' professional responsibilities to their clients.

In his initial essay into lawyers' ethics in 1974, Mr. Frankel was understandably tentative in putting forth his suggestions for revolutionary reform. His first article made "no pretense to be polished or finished wisdom"; it was intended merely "to suggest problems and raise doubts, rather than to resolve confusion; to disturb thought, rather than to dispense legal or moral truth." The modest purpose was only to "sketch" some "tentative lines" along which efforts to reform the adversary system "might" proceed.¹³ Moreover, Mr. Frankel conceded that it is "strongly arguable . . . that a simplistic preference for the truth may not comport with more fundamental ideals—including notably the ideal that generally

5. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Sixth Draft, Jan. 30, 1980) [hereinafter cited as MODEL RULES].

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969).

7. P. 12.

8. *Id.*

9. P. 4.

10. P. 83. The author puts the word in quotation marks, but not, apparently, by way of disclaimer.

11. P. 100.

12. P. 83. In view of those candid avowals, it is difficult to credit the author's profession of "a profound devotion to a soundly adversary mode of reaching informed decisions." P. 9. Mr. Frankel adds, in an understatement, that a "volume could be written on the consequent changes in procedure, in client-lawyer relations, and on the lawyer's self-image," if his views were to be fully adopted. P. 83.

13. Frankel, *supra* note 2, at 1031 (quoting Judge Charles E. Clark from Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 268-69 (1946)).

values individual freedom and dignity above order and efficiency in government.”¹⁴

Such candid disclaimers and generous concessions certainly tended to disarm criticism. Invited to comment at the time, I observed that one could hardly fault Mr. Frankel for failing to identify, in his initial, tentative effort, all of the values he might have had in mind.¹⁵ Nevertheless, I felt constrained to note that before we proceeded to modify our traditional—that is, our constitutional—system for administering justice, we must assess what values would have to be given a higher or lower priority than under our current system.¹⁶ I concluded the comment by urging Mr. Frankel to indicate which constitutional rights under the Fourth, Fifth, and Sixth Amendments his proposals would subordinate, and how we could achieve his proposed modifications of the adversary system without doing irreparable damage to some of the most precious aspects of our form of government.¹⁷

In publishing his book some six years later, Mr. Frankel has failed to meet that challenge. His failure is all the more noteworthy because, for three years now, he has served as a member of the Kutak Commission, participating in extensive deliberations on the very questions addressed in his book.¹⁸ In fact, Mr. Frankel recognizes his obligation to identify in detail the constitutional values at stake, and he promises to meet it. Referring to interests that are commonly said to outweigh truth as an absolute goal—“interests in privacy, personal dignity, security, autonomy, and other cherished values”—he asserts that “[t]he problem of how to weigh the competing values is, obviously, at the heart of the concerns to be addressed in these chapters.”¹⁹ Immediately following that assertion, Mr. Frankel states the thesis of his book—that we have too often sacrificed truth to “other values that are inferior, or even illusory.”²⁰

Surely those are strong words to use in describing admittedly “cherished values.” Which are inferior? Which illusory? If those values are “at the heart of the concerns . . . addressed” in the book, one would expect intensive analysis of them. Yet Mr. Frankel gives us almost none. He tells us a great deal about lawyers’ “excesses—the tricks, stratagems, dodges and ruses that wily advocates everywhere have learned and employed . . .

14. *Id.* at 1056-57 (footnote omitted).

15. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1062 (1975).

16. *Id.* at 1063.

17. *Id.* at 1066.

18. P. 80. The author continues to describe his work as being “more to raise questions than to propose definitive answers.” P. x. With the passage of years, that disclaimer is no longer adequate.

19. P. 12.

20. *Id.*

to win unfairly, take unfair advantage, and achieve . . . unjust results.”²¹ He includes barely a paragraph, however, describing in positive terms the Sixth Amendment right to counsel;²² he refers only in passing to the Fifth Amendment privilege against self-incrimination;²³ and he makes scant if any reference to privacy, personal dignity, autonomy, and other fundamental rights²⁴ that gain their vitality from the adversary system.

I continue to believe that the burden is fairly on those who propose “radical” or “revolutionary” changes in the adversary system to demonstrate the constitutional implications and propriety of those changes. Apparently, however, Mr. Frankel and his colleagues on the Kutak Commission, in dealing with lawyers’ professional responsibilities, are determined to ignore those fundamental aspects of positive law.²⁵ If the discussion is to proceed on a constitutional level, therefore, those of us who are concerned that radical departures from the adversary system will undermine basic values are going to have to put those values in issue.

II

Mr. Frankel directs his attack on the adversary system principally against lawyer-client confidences. He recommends rules that would effect a “pervasive broadening of the [lawyer’s] duty to reveal truth, even when it hurts.”²⁶ A lawyer, having elicited a client’s confidences, is to use the information to the detriment of the client’s interests as the client perceives them. If the lawyer learns that the client is going to commit perjury, the lawyer is to refuse to offer the testimony.²⁷ If the client testifies falsely, the

21. P. 7.

22. Pp. 5-6.

23. P. 76.

24. Mr. Frankel does acknowledge, with a tinge of sarcasm, that the adversary system is “cherished as an ideal of constitutional proportions” in part because “it embodies the fundamental right to be heard.” P. 12.

25. Professor Geoffrey C. Hazard, Jr., Reporter of the Kutak Commission, recently addressed what bearing positive law has on rules of professional conduct. Address by Geoffrey Hazard, Baron de Hirsch Meyer Lecture, Miami University Law School (Apr. 3, 1981). In his prepared text, Professor Hazard referred at length to the law of agency and torts, with citations to the *Restatement (Second) of Agency* (1958). He made no reference at all, however, to any aspect of constitutional law and at no point cited the Bill of Rights.

26. P. 81.

27. *Id.* This proposal was adopted by the Kutak Commission. See MODEL RULES, *supra* note 5, § 3.1(a)(3), at 59. Neither Mr. Frankel nor the Kutak Commission tells the lawyer how to carry out that obligation. See M. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 27-41 (1975) (it is impossible in some circumstances for lawyer to meet obligation to refuse to offer perjurious testimony without violating other obligations). The Comment to section 3.1 of the Model Rules explicitly rejects the method recommended in ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTIONS 167 (App. Draft 1971) (§7.7 of the standards relating to the defense function) on grounds similar to those expressed in M. FREEDMAN, *supra*, at 27-41. See MODEL RULES, *supra* note 5, § 3.1, Comment, at 63. In 1979 the ABA House of Delegates approved the Standards Relating to the Defense Function but rejected § 7.7.

lawyer is to divulge the client's confidences in order to rectify the falsehood.²⁸ If the client does not testify at all, but has confidentially revealed to the lawyer facts that would probably have a substantial effect on the determination of an issue material to the client's case, the lawyer is to give the information to the court, even though doing so is contrary to the client's interests and instructions.²⁹

Such rules would profoundly, and adversely, affect the lawyer-client relationship, the adversary system, and clients' fundamental rights.³⁰ Clients seeking to exercise their right to counsel would be able to do so only at the risk of compromising their privacy, autonomy,³¹ and privilege against self-incrimination. Clients concerned to protect those rights—a class of people that includes the innocent as well as the guilty—could do so only by forfeiting in large part their right to counsel. That forced choice is wrong, for “[w]hen the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.”³²

Let us first consider a case that would appear to be a compelling one for requiring the attorney to disclose the truth.³³ Fiorillo was indicted for committing perjury before a grand jury. The indictment alleged that he had falsely denied having had certain telephone conversations with Vone. Soon after the indictment, the United States Attorney received “competent and reliable information” that Fiorillo and his attorney, Terkeltoub, had met with Vone for three hours and had attempted to obstruct justice by inducing Vone to testify at the pending perjury trial that the conversations specified in the Fiorillo perjury indictment had not taken place. The United States Attorney therefore sought testimony from Terkeltoub before a grand jury inquiring into the attempted obstruction of justice.³⁴

The testimony sought was not protected by the traditional attorney-client privilege, the court said, both because it related to a meeting with a

28. P. 81. This proposal was adopted by the Kutak Commission. See MODEL RULES, *supra* note 5, § 3.1(b), at 59-60.

29. P. 83. This proposal was rejected by a majority of the Kutak Commission. See MODEL RULES, *supra* note 5, § 3.1, Comment, at 63.

30. Mr. Frankel makes no distinction in his book between criminal and civil cases, suggesting that he sees none of significance. He does note in passing that the rules in the Kutak Commission's Model Rules that reflect his proposals would apply “at least” in civil cases. P. 81. In fact, the Model Rules provide an exception to the required divulgence of confidences in criminal cases only insofar as “applicable law requires” that the attorney proceed without divulging confidences. See MODEL RULES, *supra* note 5, § 3.1(f), at 60-61. Neither Mr. Frankel nor the Kutak Commission tells the lawyer what applicable law requires, although Mr. Kutak has repeatedly stated that the Model Rules would “clearly differentiate right from wrong” and tell lawyers “‘exactly what they ought to do.’” See, e.g., *Legal Times of Wash.*, Aug. 6, 1979, at 28, cols. 1, 4 (quoting Robert J. Kutak).

31. For an extended discussion of the client's autonomy when it comes into conflict with the attorney's values, see Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978).

32. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977).

33. *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966).

34. See *id.* at 683-84.

third party and because it dealt with a conversation allegedly amounting to, or looking toward, the commission of a crime.³⁵ The government's demands for truth, the court added, carried with them "the heavy weight of history and public need commanding that the grand jury's investigations be as unfettered as possible."³⁶ Moreover, the court noted, "the Government comes here with the laudable purpose of guarding against suspected attacks on the integrity of the judicial process itself."³⁷

Nevertheless, Judge Marvin Frankel held that attorney Terkeltoub was "not only entitled, but probably required, to withhold answers to the grand jury's questions."³⁸ Judge Frankel explained: "it bears emphasis that while the witness before us is a lawyer, the crucial interests at stake belong to the whole community."³⁹ He then quoted with approval from Justice Jackson's opinion in *Hickman v. Taylor*,⁴⁰ a civil case: "the lawyer and the law office are indispensable parts of our administration of justice The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of . . . [disclosure requirements] impairing the lawyer's effective representation of his client."⁴¹

Judge Frankel noted further that privacy is "vital" to the lawyer's preparation, and that the prosecution is therefore constitutionally forbidden to eavesdrop on or to plant agents to hear the councils of the defense.⁴² The ultimate interest to be protected is the privacy and confidentiality of the lawyer's work in preparing the case. That protection would be "a thin illusion if the Government could have for the asking what it has, in rare lapses, sought by less genteel means."⁴³ Even in civil litigation, Judge Frankel added, "an exception to the policy underlying the privacy of [the attorney's] professional activities" will be justified "only in a 'rare situation.'"⁴⁴

Did Judge Frankel suffer a "misunderstanding [of] the ethical canons," or a "misconceiving [of] the adversary process"?⁴⁵ If not, what explains Mr. Frankel's current proposal that the government (or any other adverse party) should receive without even asking what it has been denied upon

35. *Id.* at 684 n.2.

36. *Id.* at 684.

37. *Id.*

38. *Id.*

39. *Id.*

40. 329 U.S. 495 (1947).

41. *In re Terkeltoub*, 256 F. Supp. 683, 684 (S.D.N.Y. 1966) (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

42. *Id.* at 685.

43. *Id.*

44. *Id.* at 686 (quoting *Hickman v. Taylor*, 329 U.S. 495, 513 (1947)).

45. P. 76.

formal motion and affidavit? Mr. Frankel, of course, is entitled to change his mind, but the readers of his book deserve an explication of the constitutional values he once characterized as vital and indispensable—values that he found sufficiently compelling to justify subordination of the search for truth.

III

The Supreme Court has explicitly linked lawyers' responsibilities to clients' constitutional rights. That linkage rests on the court's understanding that "[t]he Constitution recognizes an adversary system as the proper method of determining guilt."⁴⁶

The most obvious constitutional component of the adversary system is the Sixth Amendment right to counsel, which the Supreme Court has called "fundamental and essential"⁴⁷ and which has been described as the "most fundamental right" because it affects the ability to assert any other right one might have.⁴⁸ At the same time, the Court has characterized the Fifth Amendment privilege against self-incrimination as "the essential mainstay of our adversary system."⁴⁹ Both of those constitutional rights underlie, and are protected by, the lawyer-client privilege of confidentiality.⁵⁰

A few key cases should suffice to point up the Supreme Court's recognition of the constitutional obstacles to adopting Mr. Frankel's proposals. In *Trammel v. United States*, the Supreme Court observed that the lawyer-client privilege rests on the need for the lawyer—not only as advocate, but as counsellor—to know all that relates to the client's reasons for seeking representation.⁵¹ The privilege is therefore "rooted in the imperative need for confidence and trust" between lawyer and client.⁵² Without that confidence and trust, and the full communication that flows from it, the lawyer cannot carry out his or her professional responsibilities.⁵³ In short, violating confidentiality deprives the client of effective assistance of counsel under the Sixth Amendment.

In *Fisher v. United States*,⁵⁴ the Supreme Court considered "whether the attorney-client privilege applies to documents in the hands of an attor-

46. *Singer v. United States*, 380 U.S. 24, 36 (1965).

47. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

48. *United States v. DeCoster*, 487 F.2d 1197, 1201 (D.C. Cir. 1973).

49. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

50. *Cf. United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) ("[T]he Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney.")

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

52. *Id.*

53. *See id.*

54. 425 U.S. 391 (1976).

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ney which would have been privileged in the hands of the client by reason of the Fifth Amendment.”⁵⁵ In answering the question in the affirmative, the Court noted that the lawyer-client privilege is recognized in order “to encourage clients to make full disclosure to their attorneys.”⁵⁶ The Court went on to make the following common-sense observation:

As a practical matter, 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.⁵⁷

As that statement indicates, the Court has, in Professor Whitebread’s words, “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.”⁵⁸

Finally, in *Upjohn Co. v. United States*,⁵⁹ the Supreme Court wrote that the attorney-client privilege is “‘founded upon the necessity’” of legal counsel,⁶⁰ that knowledge of all facts is “‘essential to proper representation,’”⁶¹ and that the assistance of counsel “‘can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.’”⁶² That case and others⁶³ underscore the Court’s view that the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination together give constitutional expression to the adversary system, and that each gives constitutional basis to the lawyer-client privilege of confidentiality.

55. *Id.* at 402.

56. *Id.* at 403.

57. *Id.*

58. C. WHITEBREAD, *CRIMINAL PROCEDURE* 257 (1980). See also Seidelson, *The Attorney-Client Privilege and Client’s Constitutional Rights*, 6 HOFSTRA L. REV. 693 (1978).

59. 49 U.S.L.W. 4093 (U.S. Jan. 13, 1981).

60. *Id.* at 4094 (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

61. *Id.* at 4095 (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 4-1 (1969)).

62. *Id.* at 4094 (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

63. For example, in *United States v. Havens*, 100 S. Ct. 1912 (1980), the Court permitted the government to impeach a defendant by using evidence that was unavailable in the government’s case in chief because of the exclusionary rule. The court stated that “truth is a fundamental goal of our legal system,” and that “when defendants testify, they must testify truthfully or suffer the consequences.” *Id.* at 1916. Those consequences include, as the Court had said in *Harris v. New York*, 401 U.S. 222 (1971), “the risk of confrontation with prior inconsistent utterances,” which is the “traditional truth-testing [device] of the adversary process.” *Id.* at 225-26. It is significant that, despite the Court’s assumption that perjury was presented in both *Havens* and *Harris*, the Court did not suggest in either case that counsel had acted improperly in not disclosing it. *Cf.* *New Jersey v. Portash*, 99 S. Ct. 1292 (1979) (defendant had right to testify in his defense without being impeached through use of his own materially inconsistent grand jury testimony, which had been elicited under grant of immunity).

Other policies that underlie lawyer-client confidentiality—derived from the Constitution and from other legal sources—must also be addressed by anyone proposing radical changes in the confidentiality privilege. Citizens in our society are governed by extensive and complex laws and regulations; they therefore require legal assistance in understanding their rights and obligations and in achieving equal protection of the laws. Confidential legal counsel thus benefits citizens in their encounters with law. It also benefits society. The lawyer who has been taken fully into the client's confidence is thereby in a position to counsel the client to act in socially desirable ways, when, without the benefit of an attorney's advice, the client might act improperly.

Professor Charles Fried has pointed out an additional value embodied in lawyer-client confidentiality. He has explained that our social institutions are so complex that, without the assistance of an expert adviser, a lay person cannot exercise the personal autonomy to which he or she is morally and constitutionally entitled. "Without such an adviser," he has noted, "the law would impose constraints on the lay citizen (unequally at that) which it is not entitled to impose explicitly."⁶⁴ Thus, the lawyer's purpose is "to preserve and foster the client's autonomy within the law."⁶⁵ Professor Sylvia A. Law echoed those ideas when she wrote:

A lawyer has a special skill and power to enable individuals to know the options available to them in dealing with a particular problem, and to assist individuals in wending their way through bureaucratic, legislative or judicial channels to seek vindication for individual claims and interests. Hence, lawyers have a special ability to enhance human autonomy and self-control.⁶⁶

In *Upjohn Co.*, the Supreme Court recognized those values served by the privilege of confidentiality. The Court observed that the privilege embraces both the advice given by the lawyer, and the information that must be given to the lawyer "to enable him to give sound and informed advice."⁶⁷ In addition, the Court quoted with approval Ethical Consideration 4-1 of the *ABA Code of Professional Responsibility*:

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. It is for the lawyer in the exercise of his independent

64. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976).

65. *Id.*

66. Law, *Afterword: The Purpose of Professional Education*, in LOOKING AT LAW SCHOOL 205, 212 (S. Gillers ed. 1977).

67. *Upjohn Co. v. United States*, 49 U.S.L.W. 4093, 4095 (U.S. Jan. 13, 1981).

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professional judgment to separate the relevant and the important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.⁶⁸

The Court added that a broad protection of confidentiality serves to foster sound advice and valuable efforts by counsel to ensure the client's compliance with the law.⁶⁹

Thus, the lawyer's role—in civil and criminal practice, in counseling and in litigating—remains critically important to the rights of citizens in a free society. Justice Jackson summed it up when he observed: “[l]aw-abiding people can go nowhere else [but to the lawyer] to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs.”⁷⁰ So too did Justice Stevens: “the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen.”⁷¹ That crucial role would be undermined by rules that impaired the relationship of confidence and trust between lawyer and client.

Marvin Frankel's proposals in *Partisan Justice* are fundamentally inconsistent with the constitutional components of the adversary system, and with the values and policies to which they give meaning. A lawyer cannot establish a relationship of confidence and trust while giving the client a *Miranda* warning.⁷² As acknowledged by the Kutak Commission: “The warning may lead the client to withhold or falsify relevant facts, thereby making the lawyer's representation . . . less effective.”⁷³ Moreover, even if such a warning were not given, it would not be long before the public became aware that the lawyer is a conduit of confidences to the court and to adverse parties. The burden would then be upon the client to keep the lawyer “selectively ignorant”⁷⁴ by deciding what is incriminating and

68. *Id.* (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 4-1 (1969)).

69. *Id.* at 4095. The point is no less valid in the case of perjured testimony. Judge James G. Exum, Jr., of the North Carolina Supreme Court, has written that “experienced defense lawyers have pointed out time and again that, permitted to continue to counsel with their criminal clients up to the very hour of the client's proposed testimony, they almost always were successful in persuading the client not to take the stand to testify falsely.” Exum, *The Perjurious Criminal Defendant: A Solution to His Lawyer's Dilemma*, 6 SOC. RESPONSIBILITY: JOURNALISM, L., MED. 16, 20 (1980).

70. *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

71. *Brewer v. Williams*, 430 U.S. 387, 415 (1977) (Stevens, J., concurring).

72. See MODEL RULES, *supra* note 5, § 1.4(b), at 12. My objection, of course, is not to giving such a warning. If the lawyer is going to betray the client's confidences, the client is entitled to notice. My basic objection is to the betrayal of confidences, and to the adverse consequences of such betrayal becoming a practice among lawyers.

73. *Id.* § 1.4(b), Comment, at 14.

74. See M. FREEDMAN, *supra* note 27, at 4-5, 35-36.

what exculpatory, and by withholding what the client believed, correctly or incorrectly, to fall into the former category. That kind of decision, however, is uniquely the lawyer's responsibility by virtue of special training and skills.⁷⁵

The essential fallacy of Mr. Frankel's proposal can be briefly summarized. He begins with the proposition that lawyers know a great deal of truth about their client's matters. That is accurate enough. He then proceeds to the notion that if the lawyers were to share that knowledge with their clients' adversaries and judges, there would be more truth in the legal system. That is wrong, or, at least, it is correct only in the short run. The inevitable result would be that clients would withhold the less pleasant and comfortable truths from their lawyers. Lawyers might then be able to say that they were unaware of perjury or other wrongs committed by their clients, but the incidence of such misconduct would not decrease. Indeed, misconduct would be likely to increase, because one of the costs of destroying confidence and trust between lawyers and clients is that lawyers would lose the opportunity to give sound legal and moral advice based on full knowledge of the matters entrusted to them. As a consequence, our clients, and society in general, would be the losers.

75. See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).