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1982

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Albert Alschuler

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#### Recommended Citation

Albert Alschuler, "The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel," 54 *University of Colorado Law Review* 67 (1982).

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# THE SEARCH FOR TRUTH CONTINUED, THE PRIVILEGE RETAINED: A RESPONSE TO JUDGE FRANKEL\*

BY ALBERT W. ALSCHULER

Usually I do not count one of my publications a success when, so far as I can tell, only one person has read it.<sup>1</sup> Nevertheless, when the one person is Marvin Frankel and when he reports that this publication has "prompted in substantial part" the refinement of his views on the adversary system presented in the John R. Coen Lecture at the University of Colorado Law School,<sup>2</sup> I flatter myself that I have done something worthwhile. Judge Frankel's work on the adversary system is an extraordinary contribution to the legal scholarship of our time, and the Coen Lecture has brought one of his proposals for reform of the adversary system into sharp relief.

I do not quarrel with Judge Frankel's basic criticism of current courtroom procedures — that they value truth too little. The disagreement between us centers on the extent to which an appropriate remedy for the excesses of our adversary system lies in a modification of the attorney-client privilege and the lawyer's obligation of confidentiality. After accentuating the negative by reviewing the area of disagreement, this article endorses a significant part of Judge Frankel's discussion and suggests that, although he and I differ basically on some matters of principle, we may not be as far apart in practice as we seem.

The Coen Lecture seems to invite a bifurcated response, for it advances two distinct proposals. Nevertheless, the lecture discusses these proposals as though they were one. Judge Frankel initially proposes that "counsel should be under a duty in civil litigation to disclose all material evidence favorable to the other side."<sup>3</sup> A few pages

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\* I am grateful for the capable research assistance of J. Clay Ruebel and for the valuable suggestions of Clifford J. Calhoun and Alfred T. McDonnell.

1. The publication is Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981) [hereinafter cited as *The Preservation of a Client's Confidences*].

2. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 51-52 (1982) [hereinafter cited without cross-reference as *The Search for Truth Continued*].

3. *Id.* at 51.

later he asks, "Why not substitute a single, simple rule that calls upon the opposing party to divulge everything that party knows that is relevant?"<sup>4</sup> The initial formulation refers to "counsel," but the second speaks of "the opposing party."<sup>5</sup> This rapid substitution of targets indicates Judge Frankel's apparent belief in the near interchangeability of lawyers and their clients — a belief that overleaps the most difficult issues of professional ethics.

Most of these ethical issues arise from the inherent moral complexities of a three-party situation in which one party, a lawyer, has undertaken (or proposes to undertake) an obligation of service to a second, his client. When, if ever, should the lawyer's obligation of service lead him to behave differently toward a third party than he would if acting independently?<sup>6</sup> To what extent, if at all, should the lawyer serve someone whose conduct toward a third party is illegal; or whose conduct toward a third party is legal but ethically dubious or improper; or whose conduct, although not ethically dubious or improper, seems less than ideal; or whose conduct, however moral it may be, departs from the course that the lawyer would choose for himself? What should the lawyer's obligation be when he considers his service undesirable but when withdrawal (or a simple withholding of services) is not a realistic option so that he must do either more or less? When, if at all, should a lawyer not only decline to serve but "blow the whistle" or act affirmatively in some other way to thwart the objectives of a person who has sought his services? Certainly one can favor a straightforward proposal for expanded civil discovery — a proposal that the *parties* to civil litigation should be obliged to disclose information that they now are entitled to conceal — without favoring restriction of the attorney-client privilege or the attorney's obligation of confidentiality. Judge Frankel does not seem to sense much difference.

Judge Frankel describes his initial proposal for revision of the attorney-client privilege and the obligation of confidentiality as the product of "timorous conservatism,"<sup>7</sup> a proposal "of relatively modest dimension,"<sup>8</sup> and a "modest and limited procedural idea."<sup>9</sup> One

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4. *Id.* at 53.

5. Still later, Judge Frankel asks, "Why, then, shouldn't all parties, and their lawyers, owe a duty to disclose 'evidence favorable to' their adversaries in civil cases?" *Id.* (emphasis added).

6. See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

7. *The Search for Truth Continued* at 63.

8. *Id.* at 51.

wonders what bolder proposal might have been forthcoming had Judge Frankel been willing to let go. Essentially, his proposal would withdraw altogether both the attorney-client privilege and the obligation of confidentiality from parties involved in civil litigation.<sup>10</sup>

Judge Frankel's proposal certainly is not "modest" because it is limited to "material" information; information not material to an attorney's representation always has been unprivileged.<sup>11</sup> Nor can the proposal fairly be regarded as "timorous" because it is limited to information favorable to an opposing party; ordinarily, evidence favorable to an opponent is the only kind of evidence that a litigant is interested in concealing. Rather, Judge Frankel appears to regard his proposal as of "modest dimension" because it is limited to civil litigation. He emphasizes the word "litigation," noting that his proposal would be inapplicable to the process of "negotiating . . . [or] settling claims before formal litigation has begun."<sup>12</sup> He also suggests that a lawyer ought to tell a client, "I'll keep your secrets until

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9. *Id.* at 52.

10. At least this statement is an accurate characterization of Judge Frankel's proposal as initially presented. Once Frankel adds that clients, too, should be required to disclose everything they know that is relevant, his proposal might be reconciled with a very narrow concept of the attorney-client privilege and the obligation of confidentiality — one that would see these doctrines as designed merely to preserve a client's lawful power to withhold information despite the client's sharing of this information with a lawyer.

When a litigant shares information with a nonlawyer, he ordinarily runs both a risk that this person will disclose the information voluntarily and a risk that, even if the information would have been privileged in the litigant's hands, his confidant will be required to disclose the information in response to a subpoena. Sharing information with a lawyer is different in both respects. The ethical obligation of confidentiality promises that the lawyer will not share the information voluntarily, and the attorney-client privilege promises that the law will not require the lawyer to share this information so long as it would have been privileged in the client's own hands. See *Fisher v. United States*, 425 U.S. 391 (1976).

On occasion, Judge Frankel has challenged this core concept of confidentiality — for example, by arguing that a lawyer should be required to disclose statements by a client that reveal where the bodies of murder victims are buried although the privilege against self-incrimination would protect the client from this required disclosure. M. FRANKEL, *PARTISAN JUSTICE* 65-66 (1980). Moreover, if lawyers were expected and required to testify against clients on the basis of confidential information when the clients themselves had no legal right to withhold the information, lawyers would become a frequent source of evidence against clients in perjury prosecutions, contempt-of-court proceedings, civil lawsuits and the like. Under this regime, clients might well come to view their lawyers more as law enforcement officers than as confidants.

11. See 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 2292, 2294 (McNaughton rev. ed. 1961). Of course, in determining whether a client's disclosures to his lawyer are within the privilege, the concept of materiality is construed very broadly. Some information might be "material" enough to qualify for the privilege under customary standards but not "material" enough that even Judge Frankel's expansive proposal would require its disclosure. Judge Frankel might retain the privilege for this "in between" category of information.

12. *The Search for Truth Continued* at 63.

or unless we have to go to court."<sup>13</sup>

In earlier writings, Judge Frankel has treated nondisclosure in pretrial negotiations more harshly,<sup>14</sup> and the Coen Lecture's separation of trial and settlement proceedings has a ring of limitation for the sake of limitation. No coherent ethical regime would permit lawyers to play adversary poker on Saturday night, proclaiming the truth unimportant so long as these lawyers were busily bluffing their opponents into settling.— and then, if the opponents managed to hold out until Sunday morning, require the lawyers to blush, lay down their cards, enter the Temple of Justice, and make full confession. In addition, delaying discovery until trial had begun or was about to begin often would make it difficult to use the information disclosed or would require the court to grant wasteful and cumbersome continuances. One senses that Judge Frankel himself might not insist too vigorously on the "timorous," if not downright schizophrenic, limitation of his proposal to civil "litigation."

Recognition of the far from modest character of Judge Frankel's proposal leads to familiar territory; as indicated, the issue is whether civil litigants should have the benefit of any attorney-client privilege or obligation of confidentiality.<sup>15</sup> Rather than retrace the standard arguments on this issue that Judge Frankel and I and many other writers have canvassed, the following pages address a few specific contentions of the Coen Lecture.

Judge Frankel views the disclosure of a client's confidences as only marginally or technically different from the *Brady*<sup>16</sup>-mandated disclosure of information adverse to the government by a government prosecutor.<sup>17</sup> This view apparently proceeds from Frankel's confounding of attorney and client. The Coen Lecture suggests that any distinction between government and private counsel would reflect the view that the public "is either too unknown or too unimportant to warrant 'partisan' devotion."<sup>18</sup> Of course the public warrants devotion (although devotion to the entire public may by definition be nonpartisan); but the distinction between government and private

13. *Id.* at 58.

14. See M. FRANKEL, *PARTISAN JUSTICE* 92-93 (1980).

15. Most clients undoubtedly could understand the restriction of the attorney-client privilege and the obligation of confidentiality that the Coen Lecture proposes. It was one of Judge Frankel's earlier proposals that I thought might cause some confusion. See *The Preservation of a Client's Confidences*, *supra* note 1, at 353 n.10.

16. *Brady v. Maryland*, 373 U.S. 83 (1963).

17. *The Search for Truth Continued* at 54.

18. *Id.*

counsel does not turn on this point. The distinction rests more simply on the fact that a lawyer "whose clients are the public" cannot consult them. The Code of Professional Responsibility declares that a prosecutor "may make decisions normally made by an individual client."<sup>19</sup> In light of this necessity, a public prosecutor does not confront the range of ethical conundrums that arise in three-party situations in which one of the parties has assumed an obligation of service to another. Acting on behalf of a grand and disembodied client, a prosecutor can choose the "highest" course and serve "nonpartisan justice" without the slightest sense of conflicting loyalties.

Judge Frankel argues that this view is unrealistic because, to some extent, a prosecutor may regard the alleged victim of a crime as his client. As an empirical observation concerning the behavior of prosecutors, his contention (unfortunately) is accurate. From a normative perspective, however, the relationship of an alleged victim to a public prosecutor is very different from the relationship of a civil litigant to his lawyer.

It would be outrageous for a prosecutor whom all of us have hired to attempt to convict a defendant on the basis of incomplete evidence because he wished to preserve a victim's confidences. Moreover, if a prosecutor were expressly to promise confidentiality to the alleged victim of a crime, the promise plainly would constitute an act of disloyalty to the prosecutor's true "client," the public. A victim-prosecutor privilege therefore would not stand on anything like the same ethical footing as an attorney-client privilege. The victim of a crime not only is "not literally a client" of the prosecutor, as Judge Frankel would have it<sup>20</sup>; he is not a client at all. The prosecutor's salary comes as much from the defendant as from the alleged victim, and the prosecutor owes the same obligation to both — the promotion of fair and accurate factfinding on the basis of all the evidence.

Any mention of the source of a lawyer's income (and of the fact that nongovernmental lawyers usually are paid to serve interests less broad than those that Judge Frankel would have them serve) seems to raise Judge Frankel's hackles:

[A civil litigant has] no more compelling claim upon the lawyer beyond the commercial bond of the retainer.<sup>21</sup>

[I]n our value scheme loyalty to the customer is a more binding tie than loyalty to what should be equally close "friends"

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19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979).

20. *The Search for Truth Continued* at 54.

21. *Id.* at 55.

who have not retained us. Loyalty to clients is good for lawyers in the crass sense of serving our convenience, our ease, and our cash flow.<sup>22</sup>

Concentrating, then, on the contrast between public and private lawyers, it is not wholly unfair, but in the nature of a tautology, to say that the distinguishing feature appears to be commercial . . . . [W]e may usefully face the fact: it is primarily for the benefit of the paying customer that we have preferred loyalty to clients over loyalty to the truth, to the courts, and to the public interest.<sup>23</sup>

The litigating lawyer is retained to win, not to lose . . . . In this relatively crass respect, and in response to more primitive impulses, we are apt to become speedily and deeply identified with the client's cause . . . . Our clients will be aghast to find us making disclosures adverse to their interests. What, after all, do they pay us for?<sup>24</sup>

It is not greed for money and "more primitive impulses" that lead virtuous lawyers to identify with their clients' causes and to respect their clients' confidences. A lawyer's ethical obligations are the same when he provides his services *pro bono* as when he has been retained, and a relationship of confidence between lawyers and both paying and nonpaying clients is justified, not by filthy lucre and "the greater ease and good of lawyers,"<sup>25</sup> but by what this relationship offers clients and what it contributes to our sense of justice.

Judge Frankel advocates nothing less than a change in the habitual "value scheme" of lawyers. Lawyers should learn to be as loyal to "equally close 'friends' who have not retained [them]"<sup>26</sup> as they are to their clients. Once lawyers became as loyal to opposing parties and to the public as they were to their clients, however, their clients would no longer have lawyers. The clients would have only judges — a whole series of them. They would become supplicants at virtually every moment of their contact with the legal system and would have little reason to regard their lawyers differently from other parts of this system. Our habitual "value scheme" suggests, by contrast, that people with legal problems should be entitled to the services of lawyers — people "who understand the system and whose

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22. *Id.*

23. *Id.* at 56.

24. *Id.* at 60.

25. *Id.* at 62.

26. *Id.* at 55.

function within the system is to be on their side."<sup>27</sup> This classic ideal of legal representation not only gives dignity and purpose to the legal profession but also enhances the sense of litigants and the rest of us that the system is fair.

The Coen Lecture makes clear not only that Judge Frankel challenges this view but also that he regards it mostly as pap:

As for the romance, in contexts like this our image tends to be of the heroic, selfless lawyer standing between a hostile world and a helpless, dependent client. That approximates only the occasional situation in the real world. Far more often the beneficiaries of the privilege are corporate clients and the rich — people who can afford lawyers to confide in. This is not to say that disclosure of the truth is a process for scourging the rich. It is to say that our gropings toward sound policy are difficult enough without strewing fantasies along the way to distort our vision.<sup>28</sup>

It would be fantastic to contend that clients involved in civil litigation are always or usually poor, but it is not fantastic to contend that most of them, whether rich or poor,<sup>29</sup> need help. They "do not understand the . . . legal system in which they are enmeshed, [and their] sense of fairness (as well as ours) is enhanced when they need not fend for themselves . . ."<sup>30</sup> Some find this romance and fantasy worthy of lifetimes spent in the practice of law.

From my perspective, the critical issue in assessing the attorney-client privilege and the obligation of confidentiality is not at all empirical. It is whether a client should be entitled to "rely on his attorney without question or doubt"<sup>31</sup> and whether he should "know as well as he is likely ever to know the future that giving the truth to his attorney will not hurt him."<sup>32</sup> Forsaking more consequential justifications for the attorney-client privilege and the duty of confidentiality, I would favor these venerable legal and ethical institutions

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27. *The Preservation of a Client's Confidences*, *supra* note 1, at 352. See also Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976) ("When I say the lawyer is his client's legal friend, I mean the lawyer makes his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law.").

28. *The Search for Truth Continued* at 62.

29. And whether they are individuals or corporations or other organizational entities composed of individuals. See Fried, *supra* note 27, at 1075-76.

30. *The Preservation of a Client's Confidences*, *supra* note 1, at 351.

31. *Id.* at 352.

32. *Id.*

even if it could be demonstrated that most clients would tell their lawyers the truth without them. Nevertheless, I did raise what Judge Frankel calls a "pseudo-empirical" issue in responding to his claim that the attorney-client privilege poses a significant barrier to the search for truth. My argument was merely that the claim had not been proven. A lawyer cannot reveal information that he does not have. To the extent that clients responded to a limitation of the attorney-client privilege by withholding information from their lawyers, the search for truth would not be advanced.<sup>33</sup>

Even this moderate, essentially agnostic contention has provoked Judge Frankel's ire. From his perspective, any suggestion that clients might not reveal embarrassing facts to their lawyers (when the lawyers would reveal these facts to the world) reflects an "occupational tendency . . . to view the Genus Client with disrespect bordering on contempt."<sup>34</sup> Judge Frankel admonishes us not to assume "that our attempts, as officers of the court, to promote truth-telling, will surely be futile"<sup>35</sup> or "that clients will accept our advice neither for its prudence nor for its virtue."<sup>36</sup>

Perhaps the Genus Client should be viewed with reverence bordering on that accorded saints, but placing this Genus at any point on a taxonomy of virtue would not resolve the central issue. To the extent that clients wish to "let the sun shine in," nothing in the current law of evidentiary privileges or in the Code of Professional Responsibility inhibits them from doing so. Moreover, nothing in our current law inhibits lawyers from advising clients to consider the more virtuous course of full disclosure.<sup>37</sup> The critical issue is how

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33. *Id.* at 350-51.

34. *The Search for Truth Continued* at 57.

35. *Id.* at 63.

36. *Id.*

37. Many lawyers — so many that this criticism might almost be directed to the profession as a whole — do seem to assume that clients wish only to advance their personal, selfish interests. It is apparently routine, for example, to advise clients never to volunteer information. Professor Charles Fried has noted the immorality of this approach:

[I]t is no part of my argument to hold that a lawyer must assume that the client . . . has no desire to fulfill his moral obligations, and is asking only what is the minimum that he must do to stay within the law. On the contrary, to assume this about anyone is itself a form of immorality because it is a form of disrespect between persons.

Fried, *supra* note 27, at 1088. See also Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1087 (1979) ("The values or ends the lawyer chooses are likely to be . . . the readily assumed, the safe, the self-evident: more money, freedom from incarceration or procedural delay. Yet for many clients, such goods are neither what they want nor what they need.").

lawyers should respond to a "subspecies" of client that proves less than saintly and less than totally forthcoming (whether this "subspecies" is rare or common). Perhaps it will come as a surprise that I join Judge Frankel in the view that, under certain circumstances, lawyers should assume a limited role in leading the members of this group to virtue. I merely contend that this role should not include the disclosure of their confidences.

How can the search for truth be expanded with "the privilege retained"? Judge Frankel seems a bit baffled that someone might cheer his statement of the problem but reject his proposed solution: "One of the most basic disagreements between Albert Alschuler and myself is his position that '[l]awyers' simply are not appropriate figures to correct the defects of our adversary system. If not lawyers, who?"<sup>38</sup>

The passage from which Judge Frankel quoted endorsed the suggestion of Professor William T. Pizzi that "[r]ather than modify the ethical obligations of lawyers in the manner Judge Frankel suggests . . . we [ought to] modify our adversary trial procedures, most notably by giving trial judges a greater affirmative responsibility for truth-seeking."<sup>39</sup> The answer to the question, "If not lawyers, who?", is judges, legislators, and rule-makers.

Reform of our adversarial trial procedures might be either grand or limited. In a forthcoming article, I pursue one of the more ambitious suggestions — the development of a "mixed" system of adversarial and nonadversarial procedures that would "permit partisan advocates to counteract the prejudices and limitations of judicial fact-gatherers while it encouraged the emergence of truth, not simply from the clash of two distinct perspectives, but from the interplay of three."<sup>40</sup>

This system would borrow from the courtroom procedures of continental Europe,<sup>41</sup> but it would seek a more adversarial presentation than is customary on the continent. The key to its blending of Paris and Peoria would be the use of a simplified pretrial "dossier" compiled in an adversarial fashion. Counsel for both sides would submit to the court lists of witnesses whom they thought should be

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38. *The Search for Truth Continued* at 65 n.32 (citation omitted).

39. *The Preservation of a Client's Confidences*, *supra* note 1, at 354 (referring to Pizzi, *Judge Frankel and the Adversary System*, 52 U. COLO. L. REV. 357 (1981)).

40. A. Alschuler, *Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. — (1983).

41. See Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443 (1958).

heard along with a brief summary of each witness's anticipated testimony. Equipped with this limited "dossier," the trial judge would both control the order of proof at trial and conduct the initial examination of witnesses. In light of his limited information and his need to remain impartial, the judge's examination of witnesses ordinarily would be cursory; he would invite narrative testimony, ask obvious questions, and intervene when the testimony strayed from relevant issues. A more detailed probing of each witness's testimony would remain the task of counsel. This procedure could promote a more dignified treatment of witnesses as well as completeness, efficiency, and coherency in the trial process.

A more limited procedural suggestion is Judge Frankel's proposal for expanded civil discovery — the proposal that *litigants* be obliged to disclose relevant evidence to their opponents even in the absence of a request. The difficulties presented by this proposal are not ethical difficulties. The "higher" course for a litigant almost always would be to make full disclosure to his opponent. Nevertheless, the proposal raises troublesome issues of administration and enforcement.

Surely Judge Frankel's proposal would require some minor modification and refinement. For example, as a litigant in a child-custody dispute in which all my faults and limitations as a parent were relevant, I am not sure that I would have enough years left to divulge "all material evidence favorable to the other side." More seriously, my friends in corporate litigation departments suggest that the level of compliance with current discovery obligations is low. Their horror stories describe misconduct not only by litigants but by members of respected law firms who one might have thought would have had sufficient intelligence and wealth to reject the risks involved even if they were lacking in integrity. At least to a cynic, imposing an obligation to volunteer damaging information might seem a gesture of hope reminiscent of federal liquor prohibition. In any event, troublesome inequalities would be certain to result from the imposition of a potentially onerous obligation in a system relying largely on self-enforcement to produce compliance. The virtuous sometimes can accept the fact that the wicked prosper, but they much prefer a social contract that gives the wicked something to worry about.

These objections are not necessarily fatal. I have suggested in another context that we have followed too often Justice Holmes' advice to view the law only from the perspective of a "bad man" who

wishes to evade it. The "good person of the law" also merits notice.<sup>42</sup> To some extent the enactment of Judge Frankel's "discovery" proposal would increase the level of truth-telling, and as Judge Frankel argues there is no reason in principle why discovery should be primarily a lawyer's "art" or why a party's obligation to disclose obviously relevant evidence should turn on the opposing party's request.

Percy Foreman once observed, "I have no use for the adversary system. I have spent as much as five weeks at trial knowing that if the other side had a certain piece of evidence I'd be sunk — and knowing that if they didn't have it, I'd win."<sup>43</sup> Assuming that Foreman's client possessed the relevant information himself (and that the case was a civil proceeding in which the privilege against self-incrimination was not involved<sup>44</sup>) perhaps the client should have been expected to give this information to his opponent so that the outcome of the trial could have reflected more than bluffing and gamesmanship.

These, at least, are the terms on which the issue should be faced: How much virtue — how much disclosure — can we fairly demand in view of the difficulties of enforcement, the temptations

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42. Alschuler, *The Changing, Plea Bargaining Debate*, 69 CAL. L. REV. 652, 713 (1981).

43. Interview with Percy Foreman, in Houston, Texas (Feb. 21, 1968).

44. Judge Frankel sometimes seems insensitive to the constitutional basis for nondisclosure that the privilege against self-incrimination provides. For example, he indicates that he might favor a regime in which, at a criminal trial, the defense attorney would be required to "disclose [his client's] prior inconsistent statement (whether by eliciting it from the defendant on the stand or in some other fashion) . . . ." *The Search for Truth Continued* at 55. "But," he adds, "the mantle of confidentiality prevents this, and an altered rule for criminal defense counsel is beyond the scope of this article." *Id.*

It probably is not just the "mantle of confidentiality" that currently prevents a criminal defense attorney from betraying his client in this fashion, for a criminal defendant almost certainly could not be required to abandon his privilege against self-incrimination in order to exercise his right to counsel. One wonders whether Judge Frankel would at least require the defense attorney, as an "officer of the court," to warn his client, "Anything that you tell me may be used against you, and you have the right to remain silent whenever I ask you about the facts." One also wonders whether the client might have a right to the presence of counsel during any interview with his counsel.

Judge Frankel declares that if an alleged rape victim were to seek damages from the person whom she maintained had assaulted her, he would require the civil defendant and his lawyer to disclose material evidence. *Id.* Nevertheless, the privilege against self-incrimination "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him . . ." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Perhaps Judge Frankel's analysis is premised on the assumption that the defendant already would have been acquitted (or convicted and sentenced) for the rape or else would have been afforded immunity from prosecution.

not to comply, and the inequalities that evasion would produce? Once this issue is resolved, the primary obligation of disclosure ought to be placed on a party who can make this disclosure without any conflict of loyalty and without betraying a confidence — the litigant himself.

What, however, if the litigant defaults on his obligation? If his lawyer knows of the default, should the lawyer remain uninvolved? Should the lawyer regard his client's violation of the law as merely the client's concern? Of course the lawyer should not, and the legal profession has never endorsed such an extreme form of professional detachment. A lawyer's ethical obligation in this situation should be no different from his current obligation when he discovers that a client has failed to comply with a discovery statute or court order and the client refuses to remedy the violation. The lawyer must withdraw.<sup>45</sup> The situation is not one in which the withdrawal effectively would communicate confidential information,<sup>46</sup> and a client who refuses to observe basic legal requirements has no legitimate claim to the lawyer's services.<sup>47</sup>

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45. See, e.g., ABA Comm. on Professional Ethics, Informal Op. 1057 (1969) (attorney must advise his client not to suppress evidence and must withdraw if the client disregards this advice); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1271 (1973) (attorney need not disclose the existence of recriminatory defenses when he files a client's divorce action, but he may not knowingly countenance factual misrepresentations by his client in the discovery process).

46. In other words, it is unlike the situation in which a lawyer files a mid-trial motion to withdraw "for ethical reasons" and in which the lawyer's motion itself may indicate that his client proposes to testify in a manner inconsistent with earlier disclosures to the lawyer. Many explanations for a lawyer's withdrawal prior to trial would seem plausible, and an outside observer could not know which of the many possible reasons for termination of the attorney-client relationship had been decisive in fact.

47. The obligation of confidentiality should not always require a lawyer to behave in the same favorable, affirmative way toward a client that he would have behaved had the client's damaging confidences not been shared. For example, it may be only past confidential disclosures concerning historic facts that cause a lawyer to realize that his client currently is destroying evidence, disobeying discovery orders, and soliciting perjurious testimony. In this situation, the lawyer should be able — at a minimum — to decline further representation so long as, in doing so, he does not reveal the confidences that prompt his withdrawal. The client might protest, "If I hadn't told you the truth, you would have continued to represent me without ethical qualms. You might even have helped me persuade my witnesses to testify, for you would not have known that their testimony was false. You promised that my truthful disclosures would not hurt me." This statement uses the word "hurt" to refer to the client's disappointed expectations of affirmative service. The lawyer can fairly respond "I will keep my promise. I will not use your disclosures to hurt you. But I certainly will decline to help you."

I do not contend that any continuing law violation should disable a client from receiving a lawyer's services. For example, a client's open violation of an assertedly unjust law for reasons of conscience might be treated differently from his covert violation of a discovery order to advance his financial interests.

In light of this analysis, the difference between Judge Frankel's position and mine may seem minor. The disagreement concerns how a lawyer should respond to a client's refusal to make a required disclosure — by withholding further services or by making the disclosure and revealing his client's confidences. Either course (or the threat of it) might lead (or coerce) the client to virtue and further the search for truth. Although the difference between Judge Frankel's position and mine may seem thin in practice, it is a significant difference of principle.

Judge Frankel sometimes seems to confound action and inaction and to characterize a lawyer's choice as whether to obscure the truth or to reveal confidences with no stopping point in between. For example, Judge Frankel concludes his description of what "we now tell . . . clients" by saying, "I'll not reveal the sins you confess. I'll help you to conceal them."<sup>48</sup> This statement, however, which Frankel characterizes as a "promise of complicity," is not what we tell clients now unless we wish to run the risk of being disciplined and perhaps prosecuted. The line between not revealing sins and helping to conceal them sometimes may be difficult to draw, but it is the line between preserving a client's confidences, which is required, and obstructing justice, which is forbidden.<sup>49</sup> Judge Frankel also defends his proposal by saying that lawyers should be capable of "simultaneously serving clients and not lying to courts."<sup>50</sup> Indeed they should; the legal profession long has accepted that view, and the Code of Professional Responsibility imposes a clear obligation not to lie to courts.<sup>51</sup> What Judge Frankel apparently means by lying, however, is merely the preservation of a client's confidences.

Consequentialists tend to be impatient with lines between action and inaction. "What is this," Justice Frankfurter once wrote, "but a return to Year Book distinctions between feasant and nonfeasant . . . ?"<sup>52</sup> Inaction, after all, may not change the world and may not yield the "bottom line" we seek. For example, when a lawyer responds to a client's violation of legal requirements by withdrawing

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48. *The Search for Truth Continued* at 58.

49. See, e.g., *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967); *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); *People v. Belge*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377 (1976); MODEL PENAL CODE § 242.1 (Proposed Official Draft 1962); COLO. REV. STAT. § 18-8-610 (Repl. Vol. 1978); M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 6 (1975).

50. *The Search for Truth Continued* at 63.

51. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1979).

52. *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting).

his services, the client, a bit more educated, may hire another lawyer. He may not reveal the critical facts to the second lawyer or may lie to him, and the second lawyer, unaware of the client's default, may provide the legal service that the first lawyer declined to provide. In the end, we may find that the first lawyer's withdrawal did not further the search for truth. To accomplish that end, the lawyer would have had to blow the whistle.

Our law has found need for distinctions between action and inaction since before the time of the Year Books, however, and Judge Frankel offers one nonconsequentialist reason for these distinctions. In response to the argument that a restriction of the attorney-client privilege and obligation of confidentiality might lead some clients to withhold their confidences, he says, "If, contrary to my own hopes and beliefs, our obligation to disclose evidence would achieve no net advance in accurate fact-finding, the decline in our role as accomplices would remain a boon."<sup>53</sup> Later he adds, "Let the client make the calculation, take the benefit and confront the risk."<sup>54</sup> Noncomplicity, however, does not demand whistle-blowing. It can be accomplished by withdrawal. Contrary to Judge Frankel's suggestion, lawyers need not choose between becoming accomplices to their clients' wrongdoing and converting the clients' decisions to seek help into unwitting acts of self-destruction.

In light of the passionate disputation contained in this article, the praise for Judge Frankel's work on the adversary system that appears at the outset of the article may seem a hollow courtesy. It is not. Frankel's study ranges widely and considers such diverse topics as police interrogation, evidentiary rules, discovery abuses, the use of videotape technology, mediation, the financing of legal services, and plea bargaining. On almost the entire range of topics that Judge Frankel addresses, including of course the excesses of today's adversarial approach to truth-seeking, I am in enthusiastic agreement. Nevertheless, it is not in the nature of law review articles to say only, "Amen," and so, at the beginning of this exchange, I focused on one of the relatively rare passages in Frankel's book *Partisan Justice*<sup>55</sup> that failed to capture my assent.

Indeed, the dust jacket of Frankel's book declares, "This is a book in the tradition of Jeremy Bentham . . . a profound and eloquent work by one of the most profound and eloquent legal thinkers

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53. *The Search for Truth Continued* at 63.

54. *Id.* at 62.

55. M. FRANKEL, *supra* note 14.

of our time." The words are accurately attributed to one of Frankel's admiring disciples at the University of Colorado — me. Bentham, like Judge Frankel, is in many ways a hero of our profession,<sup>56</sup> and Bentham focused on many of the same procedural problems as Frankel — for example, the hearsay rule, the guilty plea, expansive concepts of the privilege against self-incrimination, and the attorney-client privilege.

In one significant respect, however, Bentham and Frankel seem different. Although Bentham's great influence on our law took time, a significant number of Judge Frankel's proposals have led almost instantaneously to major legal reforms.<sup>57</sup> Indeed, I can think of no duplicate of Judge Frankel's extraordinary accomplishments as a reformer in the annals of legal scholarship. I hope that this awesome record will be enhanced by the adoption of almost every major recommendation of *Partisan Justice* — but that Judge Frankel's proposal for restricting the attorney-client privilege will find only as much support in the next 150 years as Jeremy Bentham's has in the last.

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56. Of course the word "hero" should not be used lightly. For one reason why Judge Frankel qualifies, see A. DERSHOWITZ, *THE BEST DEFENSE* 117-52 (1982).

57. For example, within the past six years, at least twenty states have enacted major sentencing reforms. Tonry, *Real Offense Sentencing: The Model Sentencing and Correction Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1552 (1981). It might be a mistake to label any one individual the father of the sentencing reform movement of the 1970's, but if knowledgeable people were forced to nominate one name and only one, most of them would not find the task difficult. In essence, the movement began with the publication of a collective work by the American Friends Service Committee, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971), and Judge Frankel's *CRIMINAL SENTENCES* (1972).

Similarly, several states recently have enacted substantial reforms of their grand jury procedures. I have not traced the genesis of these reforms in detail, but their contents bear a striking similarity to proposals that Judge Frankel and Gary Naftalis advanced not very long ago in *THE GRAND JURY: AN INSTITUTION ON TRIAL* (1975). See, e.g., COLO. REV. STAT. § 16-5-204 (Repl. Vol. 1978) (statute enacted in 1977).

Finally, Judge Frankel's views on the ethical obligations of lawyers already have had a substantial influence on the Kutak Commission's proposals for revision of the Code of Professional Responsibility — proposals that have captured the profession's deep interest and that the American Bar Association's House of Delegates will consider again in February, 1983. See *MODEL RULES OF PROFESSIONAL CONDUCT* (Discussion Draft 1980).

