Refusal to Discipline Deceitful Illinois Prosecutor - In re Friedman

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REFUSAL TO DISCIPLINE DECEITFUL ILLINOIS PROSECUTOR—IN RE FRIEDMAN

The American Bar Association Code of Professional Responsibility1 (Code) is often applied by the Illinois Supreme Court as a standard of professional conduct.2 Among the Code's provisions are prohibitions against deceit in the courtroom and the creation and use of false evidence.3 Nevertheless, in In re Friedman, the supreme court discharged a disciplinary action against a prosecutor, Morton Friedman, who admitted allowing and encouraging false testimony in court.4

The purpose of this Casenote is threefold. First, the Note will review the court's fragmented reasoning, in which the court only indirectly addressed the ethical question of the case. It will then demonstrate that Friedman's conduct was unethical and that the supreme court should not have refused to censure him because of the justification of "good motive." Finally, the Note will examine the impact of the decision on future attorney disciplinary actions.


2. Disciplinary rules are standards of conduct from which attorneys may not deviate without being sanctioned. These disciplinary rules have often been cited in Illinois cases as grounds for attorney disciplinary action. See, e.g., In re Spencer, 68 Ill. 2d 496, 370 N.E.2d 210 (1977) (DR 5-105(C)'s rule regarding conflict of interest applied as grounds for censure); In re Taylor, 66 Ill. 2d 567, 363 N.E.2d 845 (1977) (DR 6-101(A)(3)'s a rule on neglecting a client's affairs applied as grounds for one year suspension).

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rules against deceit include the following sections:

DR 102(A)(4)—A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 7-102(A)(4)—In his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence.

DR 7-102(A)(6)—In his representation of a client, a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

DR 7-109(B)—A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

4. 76 Ill. 2d 393, 392 N.E.2d 1333 (1979). See note 3 supra for the text of the four Disciplinary Rules Friedman was charged with breaking. Friedman was also charged with conduct tending to bring the legal profession into disrepute.

The facts of the case were not disputed; Friedman admitted the conduct, but argued it was a necessary prosecutorial tactic that in no way violated ethical standards. Id.
The question of whether it can ever be ethical for an attorney to lie or allow false statements in court has long been an unresolved and perplexing problem. In recent years, Monroe Freedman, Professor of Law at Hofstra University Law School, has been the leading advocate of the proposition that the need for truthfulness can be outweighed by other factors, such as protecting client confidentiality. Most commentators, however, have disagreed strongly with Freedman’s views.

Although few courts have directly addressed this issue, the California Supreme Court forbids deception by a member of the bar under any circumstances, even outside of the courtroom. In support of this position, California courts have considered irrelevant the amount of harm actually caused by the attorney’s deceit. This approach was recently adopted by


Other professions have similar dilemmas about the need for honesty. In journalism, for example, the Pulitzer Prize Board refused to give the 1979 prize for local investigative reporting to the Chicago Sun-Times because the newspaper ran a tavern under a false name to uncover local corruption. One editor on the Pulitzer Board said reporters should never misrepresent themselves under any circumstances. See Debate on Exposés Held Up a Pulitzer, N.Y. Times, April 18, 1979, § B, at 4. See generally notes 75-77 and accompanying text infra.


Lawry asserts that the judicial system is corrupted whenever a lawyer lies in court. Id. at 654-95. Although he strongly disagrees with Freedman’s ideas, Lawry compliments Freedman’s book as having an “indispensable place in the literature of professional responsibility, and it is, at present, the port for all departures.” Id. at 653. Lawry argues that even if total truthfulness cannot always be expected, it should always be a goal: “The fact that the system may result in a failure to gain the whole truth does not mean that the system can or does countenance lying.” Id. at 657.

For an argument that lawyers should never falter in honesty, even outside the courtroom, see Rubin, A Causerie on Lawyers’ Ethics in Negotiation, 35 La. L. Rev. 577, 583-90 (1975). Rubin, a federal judge, also noted the scarcity of cases involving attorney dishonesty. Id. at 587. See generally Frankel, The Search for Truth—An Utopial View, 30 The Record of the Assoc. of the Bar of the City of N.Y. 21 (1975).


8. See, e.g., Mosejian v. State Bar, 8 Cal. 3d 60, 500 P.2d 1115, 103 Cal. Rptr. 915 (1972) (attorney reprimanded for falsely impugning under oath the sexual morality of his aunt); Reznik v. State Bar, 1 Cal. 3d 198, 460 P.2d 969, 81 Cal. Rptr. 769 (1969) (attorney suspended from the practice of law for three years after altering cancelled check in an unsuccessful effort to deceive a court); McKinney v. State Bar, 62 Cal. 2d 194, 397 P.2d 425, 41 Cal. Rptr. 665 (1964).
the District of Columbia Court of Appeals, in disciplining an attorney because he used deceitful tactics in a labor dispute. Furthermore, in 1978, the New York Court of Appeals stated that a prosecutor could not ethically encourage a witness to lie under oath solely for the purpose of obtaining a perjury conviction against the witness. The New York court held that bad prosecutorial motive can be a successful defense to the perjury charge. In addition, several federal courts have condemned blatantly deceitful tactics as a reckless affront to the judiciary. The fact that several jurisdictions have held attorneys to strict standards of honesty shows that truthfulness can be considered of primary importance to the proper functioning of the court system.

ATTORNEY DISCIPLINE IN ILLINOIS

The Illinois Supreme Court has ultimate authority over the Illinois system of attorney discipline. Supreme Court Rules empower the Illinois Attorney Registration and Disciplinary Commission to act as the supreme court’s agent in prosecuting disciplinary cases. Procedurally, after the commis-
sion's informal investigation of suspected misconduct, the commission's administrator sends the case to the inquiry board. The inquiry board evaluates the evidence and decides whether a formal complaint should be filed with the hearing board. All hearing board decisions against the attorney proceed next to the review board. The attorney can avoid the possibility of a public sanction by accepting a reprimand at the hearing board level. The review board may dismiss the charges, reprimand the attorney, or recommend that the Illinois Supreme Court censure, suspend, or disbar the respondent. If the attorney wants to appeal the review board's determination, an exception must be filed with the supreme court within 21 days after service of the report. The court, at its discretion, may consider the case.

The commission has considerable discretion in deciding the types of attorney conduct to prosecute: it has authority to investigate and bring disciplinary charges against any attorney whose conduct tends to defeat the administration of justice or bring the courts or the legal profession into disrepute. The exact meaning of this standard of conduct is not always clear, however, because of the supreme court's refusal to formally adopt the Code or to adhere strictly to stare decisis. Instead, Illinois courts de-
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cide each case on its own facts in an ad hoc fashion, based on the assumption that every attorney discipline case is unique.

THE FACTS OF IN RE FRIEDMAN

On May 12, 1976, the Illinois Attorney Registration and Disciplinary Commission brought disciplinary charges against Morton Friedman for his conduct while chief of the criminal division of the Cook County State's Attorney's Office. Friedman was charged with conduct tending to bring the legal profession into disrepute and with violating four Disciplinary Rules of the Code. Specifically, Friedman was charged with knowingly using false evidence, creating false evidence, secreting a witness, and acting in a manner involving dishonesty, fraud, deceit, or misrepresentation. The facts, as stipulated by the parties, revealed that during two court proceedings, Friedman knowingly allowed and encouraged police officers to perjure themselves.

The complaint against Friedman contained two counts. The facts that gave rise to Count I began in 1973, when Charles Graber was arrested by Officer Jerry Maculitis and charged with driving under the influence of alcohol. Maculitis met with Friedman after the officer believed he had been offered a bribe by Lee Howard, Graber's attorney. Friedman directed the officer to follow Howard's instructions even if they required him to commit perjury. Following instructions, the officer falsely told the court that the "breathalyzer" operator, whose testimony was needed, was not present. In fact, the witness was in the courtroom waiting to testify. After the charges against Graber were dismissed, Howard paid Maculitis the money he had promised. The judge was then advised of what happened. Later, Howard was suspended from the practice of law for two years.
A similar situation gave rise to Count II. Juanita Guevera was arrested by Officer Jose Martinez for the aggravated battery of Awilda Torres. After meeting with Guevera's attorney, Paul Powell, Officer Martinez told Friedman that Powell would pay him to arrest Torres and use the threat of prosecution to persuade her to drop the charges against Guevera. Friedman told Martinez that he should give the appearance of cooperating with Powell. Friedman also said that if Martinez was called as a witness at the preliminary hearing, he should tell the court that Torres did not wish to appear. Freman Martinez then testified falsely under oath that he had spoken with Torres and her mother, and found that they did not wish to prosecute. Torres and her mother had, in fact, arrived at the hearing willing to testify, but were escorted to the State's Attorney's Office and kept waiting, after being told of the investigation of Powell. After the hearing, Powell made the $250 payment to Martinez. The court was informed of the ploy to gather evidence against Powell and the charges against Guevera were reinstated. Powell was subsequently convicted of bribery.

After the charges of deceit were brought against Friedman by the Attorney Registration and Disciplinary Commission, the case then proceeded to the hearing board which found that the Code had not been violated. The conduct was not unethical because of the lack of intent to permanently deceive the court system. The review board, however, rejected these con-
THE COURT'S REASONING

In In re Friedman, the Illinois Supreme Court refused to discipline the attorney despite the fact that he admitted allowing and encouraging false testimony in court. Although four of the six justices who heard the case condemned the use of deceit, two of the four, Chief Justice Goldenhersh and Justice Kluczynski, found other factors controlling. These justices, in delivering the court's decision, noted that no court had ever before decided if it was ethical for a prosecutor to engage in conduct violative of the Code for the purpose of developing evidence to be used in a subsequent prosecution.

The court then reviewed the two contentions made by respondent. First, the respondent argued that the court-tolerated deceit in narcotics cases illustrates that the Code does not immunize the courtroom from deceptive investigative tactics. The respondent also argued that his lofty motive negated any technical violation of Code provisions and that any intent to subvert the judicial process instead originated with the corrupt attorneys.

33. 76 Ill. 2d at 393, 392 N.E.2d at 1333. The review board made this determination by a five-to-three vote on Feb. 28, 1978. Id.

34. The facts of the case were not disputed, see note 4 supra.

35. 76 Ill. 2d at 392-99, 392 N.E.2d at 1333-36. Chief Justice Goldenhersh delivered the decision of the court, joined by Justice Kluczynski. These justices denounced the deceit yet voted not to censure Friedman. The two concurring justices found Friedman's conduct ethical. Id. at 399-405, 392 N.E.2d at 1336-39. The justices writing the two dissents found Friedman's conduct deserving of censure. Id. at 406-13, 392 N.E.2d at 1339-43.

36. Id. at 395, 392 N.E.2d at 1334.

37. See United States v. Russell, 411 U.S. 423, 435-36 (1973); Sorrels v. United States, 287 U.S. 435, 442 (1932). Courts have often allowed the use of deceitful tactics in narcotics investigations. The entrapment defense is defined very narrowly by the United States Supreme Court and can be used successfully only when the government's deception actually implants the criminal design in the defendant's mind. Id.

Nevertheless, this kind of investigative tactic has been heavily criticized for allowing governmental participation in crimes as a substitute for skillful investigation. Dix, Undercover Investigations and Police Rulemaking, 53 TEX. L. REV. 203 (1975); Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs, 60 YALE L.J. 1091 (1951); Goldstein, For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain, 84 YALE L.J. 683 (1975); Lackland, United States v. Russell: The Defense of Entrapment as Merely a Question of Intent, 5 COLUM. HUMAN RIGHTS L. REV. 523 (1973).

Illinois, by statute and through case law, has expanded the entrapment defense beyond the Supreme Court's Russell decision to offer more protection against extreme police practices. ILL. REV. STAT. ch. 38, § 7 (1977); People v. Dollen, 53 Ill. 2d 280, 290 N.E.2d 879 (1972). See also 23 DEPAUL L. REV. 570 (1973). By statute, the legislature had made entrapment an affirmative defense, giving the state the burden of proving the absence of entrapment beyond a reasonable doubt since some evidence of entrapment is introduced. ILL. REV. STAT. ch. 38, §§ 3, 7 (1977); People v. Jensen, 37 Ill. App. 3d 1010, 1015, 347 N.E.2d 371, 376 (1st Dist. 1976).

38. The good motive argument was found controlling by the original hearing board, See note 32 and accompanying text supra.
ney disciplinary commission, on the other hand, contended that although deceit is permissible in drug investigations, it may not be employed where evidence is being gathered for subsequent prosecution of another matter. The commission also argued that motive should only be considered in determining the appropriate sanction and not in deciding whether there has been professional misconduct.

In finding that respondent's conduct violated accepted ethical guidelines, the court noted that American Bar Association Standards require prosecutors to know and follow standards of professional conduct defined in the codes and canons of the legal profession. The court also noted that ABA Standards expressly prohibit the use of false evidence, as well as the Code barring deceit in the courtroom. Therefore, the justices delivering the court's decision concluded that the ends do not justify the means. No violation of the integrity of the courtroom can be condoned, no matter what its motivation.

After constructing this careful argument delineating that Friedman's conduct was, in fact, unethical, Chief Justice Goldenhersh and Justice Kluczynski then held that he should not be disciplined, listing four reasons without further discussion. The court reasoned that Friedman acted "from a sincere, if misguided, desire to bring corrupt attorneys to justice." In addition, other reasons listed included the absence of precedent or settled opinion on this exact issue, the belief among some attorneys that such deceit is an acceptable tactic, and the evidence that Friedman had served the public diligently and with integrity in the past.

39. Governmental deceit in any investigation, even narcotics investigations, should be very carefully limited. See note 37 supra. See generally notes 75-77 and accompanying text infra for the proposition that no deceit is ever fully justifiable.

40. 76 Ill. 2d at 396, 392 N.E.2d at 1335.

41. Id. citing ABA STANDARDS, THE PROSECUTION FUNCTION § 1.1(d) (1971).

42. Id. citing ABA STANDARDS, THE PROSECUTION FUNCTION § 5.6(a) (1971).

43. See notes 2, 3, and accompanying text supra.

44. 76 Ill. 2d at 397, 392 N.E.2d at 1335.

45. Id. at 399, 392 N.E.2d at 1336.

46. Id. Even if there had been clear case precedent on this issue, it might not have been ample guidance for Friedman because the Illinois Supreme Court does not strictly follow stare decisis in attorney discipline cases. See notes 21-24 and accompanying text supra. See also notes 87-89 and accompanying text infra.

On the other hand, the justices themselves pointed out that the Code of Professional Responsibility has clear provisions prohibiting deceit in the courtroom. 76 Ill. 2d at 396-98, 392 N.E.2d at 1335-36. See notes 41-44 and accompanying text supra.

47. 76 Ill. 2d at 398 99, 392 N.E.2d at 1336. The court cited In re Luster, 12 Ill. 2d 25, 145 N.E.2d 75 (1957), as authority for not censuring Friedman. In Luster, however, there was reliance on an actual unpublished court decision and not reliance, as here, on an "apparently considerable belief" demonstrated only by statements from well-known attorneys made after respondent was charged with misconduct. Id. See note 50 infra.

48. See notes 92-93 and accompanying text infra.
Justice Underwood's concurrence, joined by Justice Ryan, found Friedman's conduct ethical because his actions were necessary under the circumstances and free from any intent to permanently deceive the courts. These justices noted that a number of respected attorneys submitted statements on Friedman's behalf, arguing that his conduct involved no professional impropriety. The concurring justices found that there were no alternative prosecutorial tactics available to Friedman and specifically rejected alternatives such as charging the suspect defense attorneys with solicitation of perjury or attempted bribery. Characterizing these alternatives as "naive," the concurring justices reasoned that prosecutions based upon one police officer's testimony of an ambiguously phrased offer will rarely succeed against a lawyer's vigorous denial. In addition, the concurring justices applied the criminal code's necessity defense, asserting that some misrepresentation to the judge is required in order to secure the evidence of pay-

49. 76 Ill. 2d at 399-405, 392 N.E.2d at 1336 (Underwood, J., concurring). The justices noted that they concurred only in the decision and not in the rationale so that the complaint against Friedman may be discharged in accordance with the quorum requirement of the Illinois Constitution. The Illinois Constitution requires a four vote quorum for the supreme court to decide a case. ILL. CONST. art. VI, § 3 (1970). If the court had not been able to reach some kind of a decision, Friedman would have been censured. The Illinois court follows United States Supreme Court practices when there is no quorum, affirming the decision below without giving it precedential value. Perlman v. First Nat'l Bank of Chicago, 60 Ill. 2d 529, 331 N.E.2d 65 (1975). See generally Neil v. Biggers, 409 U.S. 188 (1972).

50. The following eight attorneys submitted affidavits stating that Friedman's conduct was ethical because he had a good motive: Professor Monroe Freedman of Hofstra Law School; Cook County Circuit Judge Wayne W. Olson; Gino L. DiVito, Deputy State's Attorney, Criminal Prosecution Bureau; David Dorsen, former Assistant Chief Counsel of the Senate Watergate Committee; James M. Schreier, Chief, Felony Trial Division, Cook County State's Attorney's Office; James B. Haddad, Professor of Law, Northwestern University; Nicholas J. Motherway, Phillip H. Corboy and Associates; and James R. Kavanaugh, Cook County State's Attorney's Office. Respondent's Brief at la-32a.

These attorneys, with the exception of Freedman and Dorsen, also submitted personal character references. In addition, fifteen other attorneys and eight non-lawyers submitted character references. Id. These statements are relied upon by the concurring justices as extensive authority for the proposition that deceit can be used as a proper investigative tactic. 76 Ill. 2d at 399, 392 N.E.2d at 1336. The concurring justices also note that six of the 11 members of the two panels below considered Friedman's conduct ethical. Id. (Underwood, J., concurring).

51. Id. at 404, 392 N.E.2d at 1338.

52. Id. For further discussion on alternatives available to Friedman, see notes 78-85 and accompanying text infra.

53. ILL. REV. STAT. ch. 38, § 7-13 (1977), provides for a necessity defense as follows:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct. For further analysis of the Illinois statute, see Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 U.C.L.A. L. REV. 266, 283 (1975); see also Robertson, Involuntary Euthanasia of Defective Newborns: A Legal Analysis, 27 STANFORD L. REV. 213, 239 (1975).
ment that is a "practical necessity" to obtain the conviction of a lawyer suspected of corruption. 54 Concluding that deceit in the courtroom might sometimes be a necessary investigative technique, the two concurring justices found that a requirement of "intent to permanently deceive" should be read into the Code's provisions prohibiting deceit. 55

Justice Clark and Justice Moran each separately dissented, agreeing with the majority's reasoning but rejecting its decision. The two dissenters also strongly rejected the reasoning of the concurring justices. 56 Justice Clark found that an attorney does not have the power to determine if there is a good reason for deceiving a judge, even temporarily. 57 He insisted that Friedman should have employed alternative tactics despite their limitations, rather than sacrifice the integrity of the courtroom. 58 Justice Moran

54. 76 Ill. 2d at 405, 392 N.E.2d at 1339. The concurring justices cited In re Howard, 69 Ill. 2d 343, 372 N. E. 2d 371 (1978), to show the difficulty in obtaining convictions in bribery cases, even where money has been paid. Howard was acquitted of criminal bribery charges despite the fact that money had changed hands. Ironically, this is one of the cases where Friedman's innovative methods were employed to gather evidence. See note 28 and accompanying text supra. In re Howard makes painfully clear the fact that convictions are not always obtained more easily just because deceitful tactics are used. Furthermore, the purpose of the judicial system is not to achieve convictions but to achieve justice. See note 69 and accompanying text infra.

55. 76 Ill. 2d at 405, 392 N.E.2d at 1339. Monroe Freedman's affidavit is cited as authority for the argument that the Code of Professional Responsibility should require an intent to permanently deceive. The concurring justices cited Freedman's quotation from his book: "Motive is, of course, a primary consideration in making judgments regarding the ethical quality of conduct." Id. at 400, 392 N.E.2d at 1446, quoting FREEDMAN, supra note 5, at 83. An examination of the text cited, however, shows that in the same paragraph Freedman explained why prosecutors must be held to the highest of ethical standards: "We are concerned here with the attorney as public official, wielding enormous governmental powers, and responsible for assuring not only that justice be done but that it appear to be done." FREEDMAN, supra note 5, at 83. This qualification on the importance of good motive suggests that Professor Freedman understands the harm a well-meaning prosecutor can do. See notes 68-70 and accompanying text infra. See generally Freedman, The Professional Responsibility of the Prosecuting Attorney, 55 Geo. L. J. 1030 (1967).

As for the finding of the concurring justices that deceit by attorneys might sometimes be allowable, they make no attempt to set forth when this temporary deceit would be an acceptable tactic and when it would not. One advantage of a blanket rule prohibiting all deceit by attorneys, or prohibiting all deceit by attorneys in court, would be that such a rule would not require constant judicial interpretation of the question of when deceit would or would not be tolerable. See notes 5-12 and accompanying text supra.

56. 76 Ill. 2d at 406-13, 392 N.E.2d at 1339-43 (Clark, J., dissenting; Moran, J., dissenting).

57. Id. at 411, 392 N.E.2d at 1342.

58. Id. The alternative Justice Clark found most practical was that Friedman could have advised the trial judges or some other judicial officer of his plan before allowing the untruthful testimony. Justice Clark also rejected the argument that Disciplinary Rule 7-110(B) of the Code of Professional Responsibility precludes such a conference. DR 7-110(B) states:

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.
characterized the concurring opinion's approach as "intolerably dangerous" in that it suggested, under the guise of necessity, that the ends can justify the means. He also asserted that truth is essential to the court system's successful operation and that "one need not be trained in the law to know that it is flatly unacceptable to prevaricate to or mislead the court or to be instrumental in encouraging others to do so."  

CRITICISM AND ALTERNATIVES

The court did not discipline Friedman largely because a number of well-known attorneys insisted that his good intentions justified his conduct. There are, however, at least four reasons why good motive should not have been considered a controlling factor. First, regardless of motive, the role of the judge was usurped. In addition, individuals' rights might be threatened in the future by prosecutors who will also claim good intentions. Third, motive is almost impossible to determine accurately. Finally, good motive cannot be used to justify deceit when non-deceitful tactics are provided by statute.

An attorney who deceives a court, even for good reasons, has overstepped long recognized bounds of authority and has disrespectfully trampled on the court's integrity. The fact that truthfulness is vital to the function of the judicial system is clearly demonstrated not only by the Disciplinary

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
(4) As otherwise authorized by law.

Justice Clark argued that this rule is inapplicable because this kind of suituation does not involve the merits of the case. Secondly, even if this rule is applicable it allows communication "as otherwise authorized by law." Finally, Justice Clark asserted that even if there was a reason why Friedman could not talk to the trial judge, he should have spoken with the Chief Judge of the division or some other court officer instead of proceeding in sole reliance on his own belief that his action was proper. See note 85 and accompanying text infra for three reasons why this seemingly practical solution should be rejected.

59. 76 Ill. 2d at 412, 392 N.E.2d at 1342. See note 85 and accompanying text supra.
60. Id.
61. See notes 47, 50, and accompanying text supra.
62. United States v. Nixon, 418 U.S. 683, 703-09 (1974) (legitimate judicial need for information outweighs the need for absolute executive privilege); United States v. United States District Court, 407 U.S. 297, 314-18 (1972) (judicial approval of searches is required even in domestic security cases; broad police investigative powers must be tempered with objective judicial screening to protect the privacy rights of individuals); Marbury v. Madison, 5 U.S. 137, 176 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").
63. Friedman's conduct can be compared roughly to a trespass action. The fact that no harm was immediately apparent does not mean that a valid interest was not infringed upon. See Dougherty v. Stepp, 18 N.C. 370 (1835) (tort trespass action allowed on principle that damage is inferred by law whenever there is unauthorized entry onto the land of another).
Rules against deceit, but also by state statutes against perjury and by the oath that witnesses must take before testifying. Moreover, allowing a motive defense might result in additional encroachments on the autonomy of the judiciary by other zealous prosecutors. For this reason, any attorney who deceives a judge for his own purposes, no matter how laudatory, should be seen as showing a dangerous and arrogant disrespect for the judiciary. This disregard warrants discipline in itself, regardless of the fact that no harm to the parties may be immediately apparent.

Beyond invasion of the judicial role, a second reason for disregarding motive as a controlling factor in *Friedman* is that the public must be protected from well-meaning government officials who use their power unwisely without actually breaking the letter of the law. Even if it can be assumed momentarily that Friedman was expertly able to manipulate the judicial system without apparent harm, the next prosecutor determined to win a conviction might not be able to use deceit so masterfully. The integrity of the courtroom, however, is too important to the proper functioning of the adversary system to entrust it to one of the adversary parties for safekeeping.

A third obvious problem with motive is that it is difficult to ascertain accurately. In fact, the various opinions in *In re Friedman* interpret Fried-

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64. See note 3 supra.
68. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting):

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

69. See Felkenes, *The Prosecutor: A Look at Reality*, 7 S.W.U. L. Rev. 98, 110-12 (1975). Imitation of superiors and peer group pressure are two factors that help to lead many prosecutors into a dangerous "conviction psychology," where defendants are presumed guilty because an innocent person would not be introduced into the criminal justice process. Consequently, some long-time prosecutors see the judicial system as a means for obtaining convictions, not justice. *Id.*
70. Encouraging deceit by a witness is not a proper prosecutorial tactic. Although the motive of the prosecutor has seldom been an issue at trial, the New York Court of Appeals has held that overtly bad prosecutorial motive can be a defense in a criminal action. People v. Tyler, 46 N.Y.2d 251, 259, 385 N.E.2d 1224, 1228, 413 N.Y.S.2d 295, 299 (1978). See note 10 and accompanying text supra.
man's intentions differently. Justice Clark characterized Friedman's motive as arrogant and self-righteous. The concurring opinion portrayed him as a tough, upstanding prosecutor. The decision of the court, however, referred to him as "sincere, if misguided." Rather than allowing an attorney discipline decision to rest on an adjudication of the sincerity or arrogance of the attorney, it is more logical, and perhaps more just, to focus on the conduct as is done in other types of attorney discipline cases.

A fourth reason for rejecting a good motive defense is that any justification of deceit undercuts the public's already-shaken confidence in American institutions. Over the past several decades, lying as a socially acceptable alternative in problem solving has become increasingly prevalent.

71. 76 Ill. 2d at 407-08, 392 N.E.2d at 1340 (Clark, J., dissenting). Justice Clark stated "[T]hat no prior case has addressed the precise form of deception practiced here is hardly exculpatory: If anything, the absence of such authority indicates that prosecutors ordinarily do not consider it within their power to determine whether to deceive judges." Id. 72. Id. at 405, 392 N.E.2d at 1339 (Underwood, J., concurring). The concurring justices characterize Friedman's motivation and conduct in this way: "In short, it is undisputed that respondent was a conscientious prosecutor dedicated to improving the administration of criminal justice. . . . At no time did respondent intend to permanently deceive anyone, and the necessary, temporary deception practiced upon the court was corrected immediately after it had served its purpose." Id. 73. Id. at 399, 392 N.E.2d at 1336. 74. In three recent bribery cases, the supreme court rejected arguments that the respondent-attorneys were only paying witnesses money to obtain the truth. In re Porcelli, No. 51772 (Ill. Nov. 21, 1979) (attorney found not guilty of criminal bribery charges suspended from the practice of law for one year); In re Kien, 69 Ill. 2d at 361-62, 273 N.E.2d at 379 (18 month suspension ordered); In re Howard, 69 Ill. 2d at 350, 372 N.E.2d at 374 (two year suspension ordered). See note 28 and accompanying text supra. 75. In 1975 and 1976, Cambridge Survey Research found that 69 percent of the respondents to a poll agreed that "over the last ten years, this country's leaders have consistently lied to the people." S. BOK, LYING, MORAL CHOICE IN PUBLIC AND PRIVATE LIFE xviii (1978) [hereinafter cited as S. BOK]. In addition, a Harris poll found that between 1966 and 1976, confidence in medicine dropped from 73 percent to 42 percent, confidence in major companies from 55 percent to 16 percent, and confidence in advertising agencies dropped from 21 percent to 7 percent. Id. See the text accompanying note 77 infra for information on public confidence in law firms. 76. S. BOK, supra note 73, at xvi-xxii Bok, who teaches ethics in medicine at Harvard and Massachusetts Institute of Technology, asserts that the thesis of her book that lying is never fully justifiable and that well-meaning lies disguise and fuel other wrongs. Id. at 242-49. Analyzing scores of different kinds of lies, all supposedly justified by good motives, Bok concludes that all lies have a detrimental impact on public confidence. Id. See note 75 supra. In addition to lying for clients, id. at 146-164, Bok also rejects justification for placebos, and white lies in letters of recommendation. Id. at 57-72. Possibly because of her medical ethics background, she is also quick to argue against deceptive social science research and lies to the sick and dying. Id. at 182-202, 220-22.
avalanche of untruthfulness has been cited as a reason for modern skepticism about institutions that were once highly respected. For example, in 1976, only 12 percent of the American public expressed confidence in law firms. In 1973, 24 percent expressed such confidence.\(^7\)

The deceit in this case is especially unwarranted in that non-deceitful alternatives were available to Friedman. Although concurring Justices Underwood and Ryan found that no realistic alternatives were available,\(^7\) alternative tactics suggested by the other justices included prosecution for attempted bribery,\(^7\) prosecution for solicitation,\(^8\) an attorney disciplinary action,\(^8\) or an effort to obtain advance judicial approval of the plan from the trial judge or the chief judge.\(^8\) The concurring justices, however, considered advising the trial judge improper.\(^8\) While seeking some type of judicial approval would allow the decision to be made by an objective third party,\(^8\) it is still objectionable. A contrived trial would not only waste the court's time, but also create an appearance of impropriety.\(^8\) Nevertheless,

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\(^7\) S. Bok, supra note 75, at xvii. One possible reason for this decline in confidence in law firms might be that the 1973 poll was taken before the public realized that the Watergate Affair and the events surrounding President Nixon's resignation showed a far-reaching pattern of corruption devised and carried out by many top government attorneys.

\(^7\) 76 Ill. 2d at 404-05, 392 N.E.2d at 1338 (Underwood, J., concurring). See notes 51-54 and accompanying text supra.


Justice Clark pointed out that attorneys can be convicted of conspiring to bribe without money actually changing hands. United States v. Jacobs, 431 F.2d 754 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971). 76 Ill. 2d at 408, 392 N.E.2d at 1340 (Clark, J., dissenting).

\(^8\) Chief Justice Goldenhersh and Justice Kluczynski noted that Friedman could have charged the attorneys with solicitation of perjury pursuant to Ill. Rev. Stat. ch. 38, §§ 8-1, 32-2 (1977). 76 Ill. 2d at 398, 392 N.E.2d at 1336.

\(^8\) Justice Clark's dissent also cites cases where attorneys disciplinary actions were successfully maintained after attorneys avoided criminal prosecution. 76 Ill. 2d at 408, 392 N.E.2d at 1340 (Clark, J., dissenting), citing In re Goldstein, 411 Ill. 360, 104 N.E.2d 227 (1952), accord, Maryland State Bar Ass'n v. Frank, 272 Md. 528, 325 A.2d 718 (1974).

\(^8\) See note 58 and accompanying text supra.

\(^8\) Justice Underwood stated in his concurrence that deceiving the judge is preferable to involving the judge in the deceit by giving the bench advance notice of the scheme. 76 Ill. 2d at 405, 392 N.E.2d at 1339 (Underwood, J., concurring).

\(^8\) United States v. United States Dist. Court, 407 U.S. 297, 314-18 (1972); Johnson v. United States, 333 U.S. 10, 14 (1948) (a decision resulting in an invasion of individual privacy should be made by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.")

\(^8\) In addition to wasting the court's time and creating an appearance of impropriety, there is a strong argument to be made that the integrity of the entire system suffers whenever lies are heard in court. See Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 Utah L. Rev. 653.

Moreover, there is a philosophical argument that society suffers when lies are told; therefore, no lie is really justifiable. See notes 75-77 and accompanying text supra. Contra, F R E D M A N, supra note 5, at 27-41.
the state could have prevented the bribing of witnesses and avoided the use of deceit as an investigative method by employing any of the three alternatives provided by statute: attorney discipline, prosecution on attempt charges, or prosecution for solicitation.

**IMPACT**

Ironically, the prospective rule that *In re Friedman* formulates is contradictory to the court’s decision. Although the court decided not to sanction Friedman, the decision will deter deceit because four justices did voice disapproval of the tactic.86 Nevertheless, censure would have been the most effective way to ensure that prosecutors will not employ deceitful tactics in Illinois courtrooms.

From a broader perspective, *In re Friedman* is an important case because of the court’s acceptance of the good motive defense, illustrating two ways that subjectivity is built into the Illinois attorney discipline system. First, there is no clear standard of conduct for attorneys. The most precedential weight any supreme court discipline decision can ever have is as persuasive authority because there is no strict stare decisis in Illinois attorney discipline cases.87 As a result, the Illinois practitioner is left with only a vague, non-binding common law of ethics for guidance.88 One justice recently criticized this vague standard stating that “our continued adherence to a case-by-case ‘totality of the circumstances’ approach will leave our standards opaque and our sanctions unpredictable. Such unpredictability will require every case to be brought before us for review.”89

In the absence of comprehensive, controlling case law, the Code’s frequent application as a standard makes it an important guide for the Illinois attorney. Since the Code’s prohibitions against false testimony are clear and intent to permanently deceive is not required by its language,90 the court should have followed the Code’s ample guidance.91

Second, subjectivity in the Illinois attorney discipline system is also encouraged by the overly broad use of mitigating evidence. Although mitigating evidence of good character or community involvement is regularly

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86. Chief Justice Goldenhersh and Justice Kluczynski both rejected Friedman’s investigative tactics, despite the fact that they voted not to censure the respondent. 76 Ill. 2d at 398-99, 392 N.E.2d at 1336. The dissenters, Justice Clark and Justice Moran, each found the prosecutorial deceit repugnant and voted for censure. *Id.* at 406-13, 392 N.E.2d at 1339-43 (Clark, J., and Moran, J., dissenting).


88. See notes 20-24 and accompanying text supra.

89. *In re Kien*, 69 Ill. 2d at 365-66, 372 N.E.2d at 381 (Clark, J., dissenting).

90. ABA Code of Professional Responsibility DR7-102(A)(4), DR7-102(A)(6), DR7-109(B), and DR1-102(A)(4).

91. See note 47 supra for an explanation of why *In re Luster* is not appropriate persuasive authority for not disciplining Friedman.
examined in determining the punishment in attorney discipline cases,92 this kind of evidence is irrelevant because the public should be able to expect good conduct as well as community involvement from every attorney.93 In In re Friedman, the affidavits and character references from judges, prosecutors, the Governor of Illinois, a law school dean, and others highly praised Friedman. Some references even expressed approval of the tactics Friedman employed.94 Since the supreme court's willingness to accept the defense of good motive results largely from the fact that a number of well-known attorneys supported Friedman,95 In re Friedman lends credibility to the position that broad mitigating evidence is sometimes misapplied. In the future, such evidence should be carefully applied so as only to mitigate punishment and should not be applied as a defense to substantive charges.96

CONCLUSION

The disciplinary charges against the respondent in In re Friedman should not have been discharged. Good motive is not an acceptable justification for deceiving the judiciary and using the court system as an investigative tool. Allowing a good motive defense is harmful not only because it invites invasion of the judicial function and possible abuses of the rights of private citizens, but also because motive is impossible to ascertain accurately. Furthermore, if deceit may ever be justified, it is an inappropriate practice under statutes providing several means for limiting corruption through more traditional law enforcement methods. Employment of a good motive justification to avoid censuring a prominent attorney suggests an embarrassing degree of subjectivity in an attorney discipline system, allowing broad judicial discretion in the application of already vague standards.

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92. Although evidence of good character or reputation is no defense to specific misconduct charges, it is an element often considered in mitigation of discipline. See, e.g., In re Kien, 69 Ill. 2d 355, 372 N.E.2d 376 (1977) (18 month suspension ordered in bribery case); In re Howard, 60 Ill. 2d 343, 372 N.E.2d 371 (1977) (two year suspension ordered in bribery case); and In re Costigan, 63 Ill. 2d 230, 347 N.E.2d 129 (1976) (two year suspension for forging clients' names to secure a loan for paying personal debts).
93. In re Kien, 69 Ill. 2d at 365-66, 372 N.E.2d at 381 (Clark, J., dissenting). For a more harsh opinion on why broad use of mitigating evidence is undesirable, see also S. Tisher, L. Bernabei and M. Green, Bringing The Bar to Justice 97 (1977). ("When sanctions are imposed disciplinary boards often search out mitigating circumstances to cushion the blow").
94. 76 Ill. 2d at 398-401, 392 N.E.2d at 1336-37.
95. Id.
96. Swett, Illinois Attorney Discipline, 26 Depaul L. Rev. 325, 344 (1977). "Failure to keep the issues clearly defined makes it treacherously easy for the disciplinary body to make its decision on its opinion of the responding attorney's character rather than on the merits of the case." Id. at 355.