



*American Board of Criminal Lawyers*  
**THE ROUNDTABLE**

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■  
**UNDERSTANDING  
LAWYERS' ETHICS**

S E C O N D   E D I T I O N



Monroe H. Freedman  
Abbe Smith



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## Monroe H. Freedman, scholar of legal ethics and civil liberties, dies at 86

(Gerald Martineau/The Washington Post)

By Matt Schudel February 28

Monroe H. Freedman, a law professor who was often credited with establishing the academic field of legal ethics, and whose controversial views once led a future chief justice to call for his disbarment, died Feb. 26 at his home in New York City. He was 86. The cause was chronic lymphocytic lymphoma, said a granddaughter, Rebeca Izquierdo Lodhi.

Mr. Freedman became a nationally renowned expert on civil liberties while serving as a law professor at George Washington University from 1958 to 1973 and later at Hofstra University in Hempstead, N.Y. He became even better known for his contributions to the emerging field of ethics, in which he addressed the sometimes conflicting responsibilities of a lawyer toward clients and toward the court.

"He was a towering figure in the legal academy and especially in legal ethics," Georgetown University law professor Abbe Smith, who taught alongside Mr. Freedman and published books with him, said in an interview. "He was universally regarded as the founder of modern legal ethics as an academic field."

Mr. Freedman's landmark *Michigan Law Review* 1966 article, "The Three Hardest Questions," which remains a mainstay of the study of legal ethics to this day, outlined three central obligations that every defense lawyer is bound to uphold: understanding all the facts of a case; preserving the confidentiality of a client; and being candid and forthcoming to the court. There are times, however, when these legal principles can be in conflict, producing what Mr. Freedman called a "trilemma."

The trust between a lawyer and client, he argued, is a fundamental cornerstone of the legal system and is essential to discovering the truth. But what is the lawyer's responsibility if a client says he will not testify honestly on the witness stand?

Which legal obligation is more important — confidentiality or candor? Mr. Freedman suggested that a defense lawyer's primary duty is to be his client's best advocate. The judicial system, after all, rests on the presumption that defendants are innocent unless the prosecution can prove otherwise. A defense attorney's first responsibility, in other words, is to maintain the confidence of his client's private discussions, not to declare the client guilty.

Mr. Freedman's views provoked considerable debate, and he was sometimes accused of encouraging defendants to commit perjury. When he was removed from an ethics panel at George Washington University in 1966, he said the move was engineered by Warren E. Burger, then a federal appeals court judge in Washington. Burger, who became chief justice of the United States in 1969, went so far as to call for Mr. Freedman to be disbarred.

"What Monroe was writing was widely misunderstood to be in favor of perjury," Smith said. "I think he should be known as one of the founders of client-centered lawyering. That's what our adversarial system is about — about giving the client his day in court."

Monroe Henry Freedman was born April 10, 1928, in Mount Vernon, N.Y. His father was a businessman.

After serving in the Navy, Mr. Freedman received three degrees from Harvard University: a bachelor's degree in 1951, a law degree in 1954 and a master's degree in law in 1956.

While teaching at GWU's law school in the early 1960s, Mr. Freedman chaired the American Civil Liberties Union of the Nation's Capital, advised civil rights groups and was an early champion of women's rights. He was the volunteer counsel to the Mattachine Society, one of the country's first gay-rights organizations.

In 1973, Mr. Freedman became the law school dean at Hofstra, only to resign four years later in a dispute with the university's leadership. He remained on the faculty, however, and lectured widely throughout the country. He was the first executive director of the U.S. Holocaust Memorial Council, from 1980 to 1982.

From 2007 to 2012, he was a visiting professor at Georgetown University, where he and Smith taught a popular course in legal ethics. They published two books together, including "How Can You Represent Those People?" (2013).

Mr. Freedman's wife since 1950, economist Audrey Willock Freedman, died in 1998. A son, Caleb Freedman, died in 1998; a daughter, Sarah Freedman-Izquierdo, died in 2014.

Survivors include two children, Alice Korngold and Judah Freedman, both of New York; a brother; a sister; seven grandchildren; and three great-grandchildren.



## Herald Price Fahringer, Esq.

(November 6, 1927 to February 12, 2015)

by: Thomas F. Liotti, Esq.\*



New York, New York. **Herald Price Fahringer**, 87, died February 12, 2015 in New York City following a prolonged bout with cancer. Fahringer was a consummate appellate advocate and trial attorney who had made his niche as a First Amendment, Constitutional scholar. He argued fifteen cases in the Supreme Court of the United States losing only twice. Many of his cases involved the representation of alleged pornographers such as Larry Flynt. Other clients included Buddy Rich; Jean Harris; Claus Von Bulow; Edwin Wilson; Al Goldstein and countless organized crime figures. He tried cases in 27 states and argued appeals in 9 Circuit Courts; in the high courts of eight states; all 4 Judicial Departments in New York and the New York Court of Appeals where some of his cases are still pending. His successes enabled him to be labeled a "lawyer's lawyer" and compared with Clarence Darrow, among others.

Fahringer was raised in Williamsport, PA, a coal mining town in western Pennsylvania; he graduated from Penn State University where he also received an M.A. and was a member of the Boxing Team. He graduated from the University of Buffalo Law School and served in the United States Army in Korea. In the early part of his legal career he was a partner at the venerated Buffalo law firm of Lipsitz, Green, Fahringer, Roll, Salisbury and Cambria, soon becoming Of Counsel to that firm and moving his office to New York City where he later became a law partner with his long time Associate, Erica T. Dubno. Together they set the new standard for appellate practice in State and Federal Courts. Fahringer argued more than four hundred appeals, many achieving landmark status.

He was raised as a Baptist and throughout his life never smoked, drank, cursed or even attended a cocktail party. His life was totally about the law. He was married for a year and divorced. He spent thirty five years with his companion Margaret Noyes who passed away in 2007. He appeared on virtually every national television news program and was featured in numerous newspaper articles such as those in The New York Times and the National Law Journal. Fahringer published more than fifty legal articles and lectured on the law to law schools and bar associations throughout the nation. He was a Fellow in the American Board of Criminal Lawyers (ABCL); a Life Member of the National Association of Criminal Defense Lawyers (NACDL); the New York State Association of Criminal Defense Lawyers (NYSACDL) and other national and international legal groups. He also occasionally advocated as a magician, literally. It seemed to fit in neatly with the miracles he performed in his law cases.

Fahringer received numerous awards acclaiming his prowess as an outstanding criminal defense lawyer. One of these was the Edward R. Finch Award from the American Bar Association, for the best Law Day speech in the nation in 1997.

Their will no doubt be many who will want to comment on the extraordinary life of Mr. Fahringer. When I learned of his death, I was heartbroken. He was my dearest friend, mentor and represented a model of what a lawyer should be. I have a photo of us together when he received the Marshall Award from the NYSACDL. It is accompanied by a poem which he wrote describing our work together on a case. He used a metaphor of Mr. Inside and Mr. Outside, comparing our work to the famous football players from West Point. It showed his passion. It was exceptional just like everything else that he did. If the law is about public service and making history for the better, then Herald set a new mark which most of us mortals will find impossible to surpass. But thanks to Herald, we will be inspired to try.

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\* Thomas F. Liotti is a Past President of the New York State Association of Criminal Defense Lawyers and the former Chair of the NYSBA Criminal Justice Section.



## Inside the grand jury room with a longtime Cleveland defense lawyer: Jerry Gold (opinion)



Longtime criminal defense lawyer Jerry Gold, seated center in October 2013 during the sentencing hearing in Cuyahoga County Common Pleas Court of a client, Andre Matthews, left, a former pastor at St. Helena Byzantine Romanian Catholic Church. Gold recently saw a different side of the justice system when he served as a Cuyahoga County grand jury foreman. (Marvin Fong, The Plain Dealer, File, 2013)

I have been a defense attorney for more than 60 years. I tried my first criminal case in 1954, served as a public defender from 1960-65, and private defense counsel where I tried or pleaded hundreds of cases. As defense counsel, I saw firsthand how the criminal justice system worked -- the inequities of rich versus poor. The poor were frequently overcharged and overpunished, and law enforcement ran roughshod over their individual rights. This was the first time in Cuyahoga County that a criminal lawyer of my experience would head a grand jury.

Approximately 130 persons are subpoenaed to be grand jurors. This particular term ran for 4½ months. Ohio grand juries consist of 13 persons and a foreman; only nine can vote on a given case and only those nine can discuss the case. Seven votes are needed to indict. If there are not seven votes to indict, a no-bill is returned. This ends the criminal prosecution unless the prosecutor presents it again to the grand jury or to one of the other two sitting grand juries.

...

The prosecutor passed around the morning docket with names of the defendants and the offenses and indictment counts that the prosecutors wanted to be returned. The cases began: A detective testified about a case he or she had investigated. Hearsay is the name of the game. Good hearsay will get an indictment. For example, a detective testified from the police station on the remote TV in the jury room. She said that officers in the 5th District stopped a car driven by a male for a traffic violation. The driver could produce no driver's license and a computer check showed he had a suspended license. A search of the car revealed three cellphones, 2.2 grams of heroin, \$975 in cash, and a loaded automatic handgun. The prosecutor had a list of charges they expected to be voted in, as well as items to be forfeited. At this point, I expected the prosecutor would leave and we would vote, but this was not the case. The practice is that you hear all of the morning cases and then vote. This requires both a good memory and copious note-taking.

During my tenure, we heard about 50 cases a day. Some took two minutes. For example, four males in a car search equaled four indictments. The only witness was a cop and a lab report. Other cases took days. We saw some excellent police work, often using modern scientific tools. In one such case, a young woman was grabbed off the street at night downtown, robbed and raped. The police traced her cellphone to a bar, where the detectives obtained surveillance photos of the perp throwing her purse into the snow. He was arrested and identified within hours of the crime.

In another case, a homicide detective was called to a "body in the street." While police were securing the crime scene, a bystander yelled, "There goes the killer!" The detective followed the perp for many blocks in his car and then on foot until he caught him, arrested him and found the gun used in the crime. Those officers testified in person, as did all the homicide detectives.

Not all police officers or eyewitnesses could clearly state probable cause. At the conclusion of witnesses' testimony, the prosecutor routinely asked for questions. At first, the room was usually silent; new jurors didn't know what to ask. I, however, jumped in with questions. Eventually, the others learned to do the same. Prosecutors and police "courted" the jurors. The prosecutors even shared our coffee and doughnuts.

To be sure, prosecutors have the main stage in the grand jury, like teachers in the classroom. Most jurors want the "teacher" to like them and listen to his requests for charges; some even wanted to add their own. This familial relationship biases grand juries toward law enforcement.

Not every grand jury will have someone like me -- a defense attorney -- to ask important questions. I believe that grand jurors should have a course about what is expected of them. This education should not be by the prosecutor, but should be established by the court. Grand jurors should see an arraignment, a plea bargain and a sentencing. There also should be some legal education similar to the judge's instructions to a petit jury. Trial juries learn more about a criminal case in one trial than a grand jury does in 4½ months.

Now, the only education the jury gets is 10 minutes by the judge and the rest by the prosecutor. A grand jury handbook is used by the federal courts and by many states. The purpose of a grand jury is to insulate the individual from the power of law enforcement. An indictment alone can ruin a family, lose a job, get a probation or parole violation even without a conviction. Voting no-bills lets law enforcement know that we won't indict without real proof.

I hope that my service and that of my fellow jurors did some good. No-billing a little more than 70 cases does not seem high in comparison to the 1,500 indictments handed up while I was foreman of the grand jury.

I loved the time that I served. It was like walking down memory lane, seeing police, lawyers and judges I hadn't seen for years. But I felt we served a greater purpose: We want the police to protect us and get the bad guys, but a grand jury can help assure that no one gets indicted without scrutiny.

Jerry Gold has been a defense lawyer in Cleveland since 1954.

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**Just Because You Did It  
Doesn't Mean You're Guilty.**

**YOUR NAME HERE**



## WHITE COLLAR CRIMINAL DEFENSE AWARD FROM NACDL AND STETSON LAW TO BE PRESENTED TO ATTORNEY HANK ASBILL

On March 14, 2015, Hank Asbill, an acclaimed white collar defense attorney based in the Washington D.C. office of Jones Day, will be presented the 2015 White Collar Criminal Defense Award at the NACDL White Collar Criminal Defense College at Stetson University College of Law in Gulfport, Florida. NACDL and Stetson Law co-present the award annually to individuals who have made a profound impact on the field of white collar criminal defense advocacy. Former NACDL President Cynthia Orr will deliver keynote remarks at the College on March 12.

(Reported by Ian Friedman)

Earl Gray just won a clean sweep on an 8 count murder I on an 15 year old cold case. Three hour deliberation after losing every pre trial motion in front of a tough judge. He is 3 to 1 to win the fire with the prosecutor which will start in about five minutes.

Joseph Friedberg (2/24/15)



### RIGHT TO COUNSEL AWARD

This award is given to an individual for a significant body of work, and is often triggered by an extraordinary case that is typical of that attorney's career. This is typically a reflection of a lifetime of service to defendants and the criminal justice community. Past award recipients are attorneys who not only made a career of providing the highest quality legal representation, but who are also members who generously support CDAM's mission to provide high quality continuing legal education.

2015 Honorees  
• James L. Feinberg

## DeVan-You've Come a Long Way Baby! Congrats on Huge Victory

It was November 1974 and the Ohio Supreme Court had just set DeVan & Hennenberg loose on the public. We went to the Cuyahoga County Arraignment room hoping to get our first case. All the heavy hitters were there. Gold, Willis, Summers, Giuliani, Carson, Jurek, Potts, Marek, White et al. were lined up to arraign their paying clients and pick up a court appointment.

Judge Seamus Kilbane was on the bench, (this was the same courtroom where the 4<sup>th</sup> Amendment was invented subsequent to Dollree Mapp's arraignment), and as always the proceeding started out by pledging the f(l)ag. Seamus had a bit of a lisp. The shackled hands and feet and shackled together defendants did their best, but as the first arms went up to cross their hearts, the resulting domino effect brought a chuckle from the crowd.

One by one the defendants were arraigned and the hitters each got a case. Approximately two hours later, there were two lonely shackled defendants left and two fresh faced lawyers, DeVan & Hennenberg, sitting in the jury box, thinking that our moment was near at hand. After Seamus again inquired about the defendants' indigency, he looked at us, shook his head, and told the defendant that a lawyer would come to see him in the jail.

Uh Oh, two of us and one defendant left, well Seamus again looked at us, shook his head, and DeVan and Hennenberg left the courtroom bent but not broken. We went to lunch and commiserated; would we ever get our first case? Well, it's forty years later and Mark you just turned around Apanovitch, sentenced to die in 1985, in one of this town's most notorious murder cases. You've come a long way baby and congratulations.

Mike Hennenberg



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February 23, 2015

Stephen Lacheen  
Lacheen Wittels  
1301-1429 Walnut Street  
Philadelphia, PA  
19102

Dear Stephen:


Re: ABCL

Thank you for inviting me to submit a brief introductory note for those members who did not vote on my nomination or who can't believe a country as pristine as Canada needs defense counsel to mop up social problems.

I joined the ABCL in October 2014. I have been unable to attend a meeting because of trial obligations but I hope to see you in Santa Fe. In the interim I have been on your list serv and I'm pleased to see that my new colleagues are concerned equally with capital case acquittals and eating arrangements at quarterly meetings.

One thing about Canada that may interest members is that our constitutional bill of rights is only 32 years old. For the first 25 or so years defence counsel enjoyed some civil liberties sunshine from our Supreme Court. In the last few years the Court has increasingly been sympathetic to government claims. Recently they concluded that John Roberts was too liberal in the Riley-Wurle smartphone search cases, siding with law enforcement arguments. We are still ahead of you on gay marriage and capital punishment.

Yours truly,

  
Frank Addario



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"I assure you this grand jury investigation won't be just another whitewash."



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### Future Meetings

June 5-7, 2015: LaJolla, CA

October 9-11, 2015: Sante Fe, NM

### 2016 Meetings

Havana, Cuba; Rome, Italy; Austin, Texas

*The RoundTable*

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