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The Ethics of Evidence

J. Alexander Tanford[†]

Abstract

Professor J. Alexander Tanford offers a unique perspective on the ethics of evidence, illustrated by examples of his own personal experiences as well as excerpts from film and literature. This Article is a must read for any litigator as it addresses the issue of where the line is to be drawn regarding evidence in the courtroom.

I. Introduction

In my first trial as a twenty-six-year-old assistant district attorney in Manhattan, I prosecuted a nefarious criminal charged with commercial burglary—breaking into a warehouse at night. It is rare that anyone is caught for such a crime, but in this case, a passing police officer happened to see the perpetrator climbing out of a broken store front window with two fur coats in his hands while the burglar alarm blared. Commercial burglary is not a serious crime in New York, so the defendant had been out on bail for two years when the case went to trial. However, despite the passage of time and the defense attorney's best efforts to make this hoodlum presentable, my witnesses calmly and confidently identified the young man sitting next to his attorney as the "perp."

All was going well, until the close of the People's case. The defense attorney stood up and moved for a directed verdict on the ground that no witness had identified the defendant as the burglar. I was confused. Had two witnesses not identified him from the stand? The defense attorney smiled. My witnesses had identified a fellow public defender from the Legal Aid office who was the person sitting at counsel table. The actual defendant was sitting in the middle of the audience. I had been duped! The judge looked at me and offered some kindly advice that I dismiss the case, because even if he denied the motion, the jury would never convict after the misidentification.

A few years later, as I began to teach and write about evidence and trial practice, I realized that the defense attorney had deliberately created false

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evidence. He had not suborned perjury, of course. Suborning perjury is wrong. He had merely set the stage for inevitable false testimony because he knew that my witnesses would assume that whoever was sitting at counsel table was the defendant, and would therefore identify the wrong man. His conduct had caused a miscarriage of justice, allowing a criminal who had been caught red-handed to go free to prey again upon the unsuspecting warehouses of New York. Surely this passive involvement in creating false evidence was just as unethical as active subornation of perjury. I started including a hypothetical in my classes based on this experience.

Recently, there has been substantial publicity about DNA tests showing that many people who were convicted for crimes were actually innocent, despite the fact that they had been confidently identified by eyewitnesses.¹ This has caused me to revisit that small New York courtroom from twenty-five years ago and wonder about my own role. In trial after trial as an assistant district attorney, I asked countless witnesses to "look around the courtroom" and see if they could identify the person who attacked, robbed, raped or sold drugs to them. Regardless of how much defense attorneys tried to alter their clients' appearances,² my witnesses unhesitatingly pointed them out. Was it because they really remembered the faces of the perpetrators, or were they just pointing out whoever was sitting at counsel table? I, too, had undoubtedly participated in the creation of false evidence, although it was so commonplace that I never thought about it at the time. Could such routine courtroom testimony actually be unethical?

Although the presentation of false, misleading or unreliable evidence would seem to be a core concern of those who worry about our litigation system, the ethics of evidence has been written about infrequently. In the small body of literature that does exist, the focus tends to be limited to the relatively easy problem of whether the Model Rules of Professional Conduct³ (or their predecessor, the Model Code of Professional Responsi-

¹ See, e.g., JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

² My favorite defendant was a fifty-year-old prostitute whose attorney dressed her in a brown tweed suit, brought her into court with her hair in a bun with a pencil through it, and had her testify that she was a librarian.

³ MODEL RULES OF PROF'L CONDUCT (1983).

bility⁴) prohibit an attorney from creating or using perjured and other kinds of false evidence.⁵ The ethics of dubious evidence is rarely addressed.⁶ By treating ethics as an issue only of what the rules say about the knowing use of false evidence, the literature ignores the more complex and common ethical issues concerning the use of evidence that is misleading, incomplete, or unreliable. This Article attempts to fill some of that gap.

II. Ethics As Principles Rather Than Rules

Most writings on the ethics of evidence approach the issue as an analysis of rules.⁷ They parse the text of the Model Rules, engage in

⁴ MODEL CODE OF PROF'L RESPONSIBILITY (1969).

⁵ E.g., John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 334 (1989) (asserting that the presentation of half-truths and the distortion of memory in pretrial witness preparation seriously undermines the important truth-seeking goals of the adversary system); Robert C. Horgan, *Making Black and White Out of Gray: An Attorney's Duty to Investigate Suspected Client Fraud*, 29 NEW ENG. L. REV. 795, 857 (1995) (stating that an attorney should not turn a blind eye to client fraud or knowingly make a false statement of material fact or law to the tribunal); Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth*, 28 NEW ENG. L. REV. 881, 907 (1994) (asserting that a criminal defense lawyer should exercise every option possible when he knows of intended client perjury before infringing on a client's fundamental constitutional rights); Angela Dawson Terry, *What's A Lawyer to Do? The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct*, 21 AM. J. TRIAL ADVOC. 357, 359 (1997) (advising that a lawyer should always be candid when dealing with the client, including not making a false statement of material fact or law to the court); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 25 (1995) (stating that a lawyer can be disciplined by the bar for counseling or assisting a witness to testify falsely or for knowingly offering testimony that the lawyer knows is false); Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001, 1010 (1998) (stating that the primary danger of coaching is that the lawyer may so change a witness's presentation that the resulting testimony is false or conveys an incorrect impression).

⁶ The one notable exception is Monroe Freedman's wonderful piece of devil's advocacy, in which he analyzed whether it was ethical to discredit a witness whom one believes is telling the truth. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474 (1966).

⁷ See Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 744 (1998) (noting that lawyers are taught and socialized to sharply distinguish "rules" from "morality," and think of ethics as just another set of rules).

statutory interpretation, and pose questions of ethics solely in terms of whether an attorney is likely to be successfully disciplined.⁸ Given the relative failure of the bar to police itself and the extreme unlikelihood that an attorney will be disciplined,⁹ this seems a poor way of approaching an issue of ethics.

Ethics are not rules, of course. They are moral principles that guide our lives as attorneys. The decisions we have to make in litigation are too variable and complex to be reduced to rules.¹⁰ The Model Rules may be the "law for lawyers," clearly defining the circumstances under which we can be found guilty of improper conduct and disbarred,¹¹ but they are not coextensive with the concept of legal ethics.¹² If we are to live as ethical litigators, we must make decisions concerning evidence based on more than the Model Rules—we must (and do) rely on our experience, judgment, tradition, moral ideals, and character¹³ guided by moral principles that are supposed to push us in the direction of good lawyering.¹⁴

⁸ See Liskov, *supra* note 5, at 884 (stating that, "under Model Rule 3.3(c), a lawyer may present questionable evidence without fear of disciplinary action"); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.23 (3d ed. 2001) (stating that, even where a violation requires proof of "knowledge," the circumstances may be such that a disciplinary authority will infer that a lawyer *must* have known; the lawyer will be legally chargeable as if actual knowledge had been proved); Wydick, *supra* note 5, at 22-23 (noting that unethical witness coaching subjects a lawyer "to professional discipline and, under specified circumstances, the lawyer is also subject to criminal punishment for subornation of perjury").

⁹ See Applegate, *supra* note 5, at 279 (noting that one rarely comes across a discipline case or a criminal case involving unethical witness coaching; chances of being reported are low).

¹⁰ See Zacharias & Martin, *supra* note 5, at 1016-17 (stating that "deciding how to conduct trial work within ethical boundaries established" by rules and codes is easy; "the hard part is remembering that identifying ethical practice goes far beyond that task"); cf. RESTATEMENT (THIRD) OF THE LAW (2000) (reducing legal ethics to 135 rules).

¹¹ Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563, 581 (1996).

¹² See HENRY DRINKER, *LEGAL ETHICS* 2 (1953) (quoting Lord Moulton as saying that "[t]rue civilization is measured by the extent of [o]bedience to the [u]nenforceable").

¹³ See Lawry, *supra* note 11, at 581-83 (noting that the adversarial nature of the courts, as well as the rules of procedure, protect constitutional rights).

¹⁴ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24-25 (1977) (noting the difference between legal principles and legal rules).

The problem with thinking of ethics as rules arises most clearly when the Model Rules do not explicitly prohibit a proposed course of questionable conduct. In one memorable case in my early years, I prosecuted a fifty-year-old prostitute for robbery after she hit one of her johns over the head with a lamp and stole his wallet. Before trial, the defense attorney had helped her get a part-time job at the New York Public Library as part of a drug-rehabilitation program. At trial, she showed up wearing a brown tweed suit, with her graying hair in a bun, took the stand and testified that she was a librarian. The jury looked at me like I was insane for accusing this nice old lady of being a prostitute. There is no ethical rule governing misleading clothing, nor getting a client a last-minute job, nor telling them to wash the dye out of their hair and look their age. In the absence of broader ethical principles, lawyers are drawn to the position that anything that might increase their chances of winning that is not expressly prohibited, is permitted—even required.

The problem is wonderfully illustrated by Zacharias and Martin in this anecdote:

A standard probation condition imposed upon conviction for alcohol-related crimes in California requires the recipient to participate in Alcoholics Anonymous. The difficulty engendered by this condition is that Alcoholics Anonymous meetings are (as the name implies) anonymous. Alcoholics Anonymous provides a sign-in sheet that probationers can complete in order to indicate their attendance. This list, however, only indicates the individual's initial presence; it does not reflect whether the person signing the list actually attended the full meeting. Many California probationers were believed to exploit this loophole by presenting sign-in sheets to the court as evidence of their attendance even when they had not, in fact, obtained the benefits of their required participation. Various California judges, upon learning of this problem, devised a solution: they began to "quiz" probationers when they appeared before the court to establish the completion of the terms of their probation. Judges typically asked the defendant "What step are you on?," a question that any true participant in Alcoholics Anonymous would easily be able to answer. This simple judicial inquiry often resulted in a bewildered look on the part of the probationer and a resulting order for the continuation of probation. California public defenders . . . [met to discuss] whether they should "prepare" their clients for the judge's anticipated questions by "reminding" them of the various steps of the Alcoholics Anonymous program. Public defenders who looked exclusively at the rules seemed inexorably to come to the conclusion that they were not only allowed to so

coach their clients, but perhaps were even ethically required to do so. The terms of the California Rules of Professional Conduct do not flatly prohibit informing a client of the usual questions and of what permissible answers might entail.¹⁵

Conceptualizing the ethics of evidence as merely an exercise in the interpretation of rules also stifles discussion of the hard questions. False evidence is an easy issue. Questions about the propriety of misleading, incomplete and unreliable evidence are harder. If we limit ourselves to rule-thinking, we may end up saying vaguely to ourselves that "[t]here is no Model Rules provision that expressly proscribes trickery"¹⁶ other than the rule against knowing use of false evidence¹⁷ then proceeding no further.

Rule analysis in the wrong hands can also produce very strange results. For example:

Model Rule 1.2(e) only applies where the lawyer "knows" of the client perjury. If a lawyer has only a belief of perjury, he or she lacks actual knowledge. Thus, Model Rule 1.2(e) does not apply to situations in which the lawyer has only a "reasonable belief" that the client's proposed testimony will be perjurious. Similarly, the mandatory disclosure provisions of ABA Formal Opinion 353 would be inapplicable absent knowledge by the attorney that the client's proposed testimony is perjurious. . . . Although Model Rule 3.3(c) provides a lawyer with discretion to refuse to offer evidence which he or she reasonably believes to be false, closer analysis reveals that refusal is not a viable option. Other provisions in the Model Rules make it an ethical violation for a lawyer to refuse to offer this evidence. . . . Rule 1.2(a)'s command that a lawyer comply with a client's decision to testify must logically supersede Model Rule 3.3(c). Model Rule 1.2(a) uses mandatory language ("shall") in stating the lawyer's obligation to honor the client's decision to testify. On the other hand, Model Rule 3.3(c) uses discretionary language ("may") in providing that a lawyer may decline to offer suspected perjury. Thus, when the suspected proposed perjurious testimony is that of

¹⁵ Zacharias & Martin, *supra* note 5, at 1012-13.

¹⁶ *But cf.* People v. Fein, 263 N.Y.S.2d 629, 639, 24 A.D.2d 32, 42 (App. Div. 1965) (stating "that the defendant is entitled to a fair trial without trickery").

¹⁷ WILLIAM H. FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK 393-94 (1996).

the client, the lawyer has no discretion to refuse to offer it. . . . [A] lawyer may *never* act under Model Rule 3.3(c).¹⁸

We can do a better job of thinking about the ethics of evidence.

III. The Focus on False Evidence Is Too Limited

Because commentators approach the ethics of evidence as a question of rules, they usually frame the discussion in terms of one clear rule: an attorney may not create, use or rely on evidence the attorney knows to be false. The Model Rules explicitly prohibit knowingly using false evidence. Rule 3.3 states that “[a] lawyer shall not knowingly [m]ake a false statement of material fact or law to a tribunal [or] offer evidence that the lawyer knows to be false.”¹⁹ What is there to talk about—exceptions to the rule? That is indeed the unlikely direction in which the literature runs. Are there exceptions that permit a lawyer to use false evidence ethically?

Mostly, the literature is full of epistemological essays on when a lawyer “knows” that evidence is false.²⁰ Is a little knowledge enough, or must the lawyer know falsity beyond a reasonable doubt? Can lawyers, like ostriches, hide their heads in the sand to avoid knowing something?²¹ To the extent that the literature touches on evidence that is not false, but merely misleading or unreliable, it simply points out that such evidence is not *known* to be false, so using it will not violate Rule 3.3. Lawyers are free to subvert justice to their hearts’ content as long as they can tell the disciplinary commission with a straight face that they did not actually “know” the evidence was false. So far so good, if somewhat banal.

¹⁸ Liskov, *supra* note 5, at 885-86 (emphasis added).

¹⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

²⁰ *E.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 51-57 (1975) (discussing what it means for a lawyer to “know” in both criminal and civil litigation).

²¹ *See* Office of Disciplinary Counsel v. Price, 557 Pa. 166, 174, 732 A.2d 599, 604 (1999) (stating that counsel cannot deliberately close his eyes to avoid actual knowledge that he is misrepresenting facts).

But now a problem arises. The false-evidence rule addresses when a lawyer cannot use evidence, or when the lawyer might be sanctioned, but does not give any positive guidance for the ethical use of evidence.²² The false-evidence rule literature assumes a dichotomous ethical universe in which whatever is not expressly prohibited must be permitted. Obviously, no rule says this, and it is a somewhat uncomfortable result to reach. Therefore, the discussions generally articulate an implicit rule requiring all non-false evidence to be presented, which they derive from the principle of zealous representation.²³

At times the discussion takes on a distinctly Orwellian tone, in which “knowing” and “false evidence” are given so narrow a meaning that nothing is known to be false, and zealous advocacy is given so broad a meaning that everything dishonest and deceitful is made mandatory.²⁴ Typical examples of such discussions can be found in a pair of student notes. In the first, the author poses the question, “What does an attorney really ‘know’” about her client’s intent to give false testimony, and then answers it as follows:

[T]he question is a hard one, and requires that the attorney use “extreme caution” in answering. The reason is that suspicion of fraud is usually raised by the receipt of conflicting information, either from the client or in tandem from another party. This conflict alone does not appear to constitute “knowing,” because “mere suspicion” is not enough to establish a possible client fraud; nor is “(a) mere inconsistency in the client’s story (sufficient) in and of itself to support the conclusion” that he will commit a fraud on the tribunal. So what constitutes “knowing”? Although one court stated that an attorney should know, based upon her professional experience, if the client’s representations are false, not all courts have not taken such a liberal view.

²² MODEL RULES OF PROF’L CONDUCT R. 3.3.

²³ The principle appears in the preamble to the Model Rules as “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” MODEL RULES OF PROF’L CONDUCT R. pmb1. It does not, however, appear in the Restatement, which merely requires an attorney to “proceed in a manner reasonably calculated to advance a client’s lawful objectives.” RESTATEMENT (THIRD) OF THE LAW § 16 (2000).

²⁴ E.g., Bruce A. Green, “*The Whole Truth?*”: *How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699, 706 (1992) (discussing that only the rules against subornation limit lawyers’ activities; ethical duties of zealous representation may oblige a lawyer to use other techniques to promote the client’s cause).

For example, in *United States v. Long*, the Court of Appeals for the Eighth Circuit said only "a clear expression of intent," evidenced by "a client's announced plans" to commit fraud will constitute the level of knowledge required before an attorney may reveal a client confidence. The Second Circuit went even further in *Doe v. Federal Grievance Committee* . . . [and] insisted upon a "clearly established" or "actual knowledge" standard, which is met "when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal." Indeed, an attorney who, relying on suspicions or inconsistencies, prematurely jumps to the conclusion that her client is going to commit a fraud and discloses such to the tribunal may be liable for breaching her ethical duty to maintain her client's confidences and secrets. . . . When an attorney unnecessarily discloses the confidences of (her) client, (s)he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation. . . . [A]sking the attorney to assemble and weigh the facts so that she may "know" if her client is committing a fraud is asking her to play judge and jury, a role that clearly does not belong to her. . . . [I]f the attorney does not "know for sure" that the evidence is false, she should present it; and, as long as the client does not admit that his story is false, even though "(one) know(s) in (one's) heart of hearts" that it is false, the attorney should "suspend judgment" and do the best she can.²⁵

The second author asks "When does a lawyer 'know' evidence is false?" and comes up with this answer:

[I]f the lawyer lacks knowledge of client perjury, he or she *must* present the evidence. The problem lies in attempting to draw the line between "belief" and "knowledge." ABA Formal Opinion 353 requires that knowledge be established by a "clearly stated intention to commit perjury." . . . In *Whiteside v. Scurr*, the court stated that "it will be a rare case in which this factual requirement is met. Counsel must remember they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury." [Imagine a] hypothetical robbery client. As the date for trial drew

²⁵ Horgan, *supra* note 5, at 826-30 (citations & footnotes omitted) (discussing what an attorney really "knows" about a client's intent to perjure) (citing *State v. Zwillman*, 112 N.J. Super. 6, 16, 270 A.2d 284, 289 (Super. Ct. App. Div. 1970); *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988)) (quoting *Doe v. Federal Grievance Comm.*, 847 F.2d 57, 62, 63 (2d Cir. 1988)); *see also* *State v. Skjonsby*, 417 N.W.2d 818, 825-26 (N.D. 1987) (discussing what constitutes ineffective assistance of counsel); *Commonwealth v. Wolfe*, 301 Pa. Super. 187, 197 n.7, 447 A.2d 305, 310 n.7 (Super. Ct. 1982) ("[I]t is crucial . . . that the lawyer know for sure that actual perjury is involved; he must not merely suspect it.").

near, the client changed his story from having been in the vicinity of the crime to having been twenty miles away at home. Based on this alone, does the lawyer have a firm factual basis of perjury? The client may have initially thought that the truth would not have been believed by the lawyer . . . [so] the client's change of story probably does not give the lawyer a firm factual basis for this conclusion. "A lawyer's certainty that a change in the client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked."²⁶

The abstractness and lack of reality of the discussion can be attributed partly to the inexperience of the student authors, who have not yet discovered that criminal clients are not often noble and innocent creatures; but that explains only part of it. It is not just students who make this argument.²⁷

The other contributing factor is the tendency to focus on the false evidence rule. By looking solely at this one rule, evidence either falls into a small corner of unethical evidence that is actually and knowingly false, or it must be ethical. Despite the fact that among the approximately ninety-five percent of evidence that is not actually false we can find inadmissible, unreliable and misleading evidence, half-truths, and testimony distorted by coaching, we have failed to seriously ask whether there are any relevant ethical principles that guide attorneys' decisions to use evidence in the first place.

To the extent that the literature has addressed a lawyer's affirmative obligations, it has generally assumed that there is no ethical principle relating specifically to evidence. The authors then fall back on the lawyer's general duties of client loyalty and zealous representation within

²⁶ Liskov, *supra* note 5, at 894-98 (emphasis added) (footnotes omitted) (citing *Whiteside v. Scurr*, 744 F.2d 1323, 1328 (8th Cir. 1984), *rev'd*, *Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that the right to counsel is not violated when an attorney refuses to cooperate in presenting perjured testimony at trial)).

²⁷ See, e.g., Freedman, *supra* note 6, at 1479-80 (discussing that, if a client cannot be dissuaded from committing perjury, the lawyer should go ahead and elicit the false testimony because of a duty to zealously represent the client); Green, *supra* note 24, at 706 (stating that only the rules against subornation limit a lawyers' activities; the ethical duties of zealous representation may oblige a lawyer to do anything else to promote the client's cause).

the bounds of law.²⁸ The problem is that neither of these principles says anything about using misleading, unreliable or incomplete evidence. Arguments that a lawyer is required to mislead a jury out of loyalty to a client, or that deliberate evidentiary deception constitutes zealous advocacy within the bounds of law, are unpersuasive.²⁹ One should be able to be loyal to a client, a zealous advocate, and an ethical attorney without defrauding the jury. Is there really no ethical principle guiding a lawyer's decisions to use evidence?

A fair reading of the Model Rules cannot possibly produce the conclusion that the overriding ethical principle of evidence is "anything goes." A lawyer is not given *carte blanche* to ask trick questions, present unreliable or misleading evidence, or make any argument, however deceitful, in the name of client loyalty and zealous advocacy. As one court stated just before suspending an attorney: "Attorneys must 'possess a certain set of traits—honesty and truthfulness, trustworthiness and reliability, and a professional commitment to the judicial process and the administration of justice.'"³⁰

The Model Rules themselves place clear limits on this principle. They do *not* demand unrestrained zealous advocacy designed to win at all costs, but zealous advocacy *within the bounds of law*.³¹ Within that even more limited duty, there are perfectly clear ethical limits set by Rule 8.4(c): "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."³² This duty is further constrained by Model Rule 3.3(c), which says a lawyer should

²⁸ *E.g.*, L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 947 (1980) (stating that loyalty to the client, regardless of other constraints, is the all-encompassing duty).

²⁹ *See In re Anonymous*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) ("[A]ttorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities. . . . Claiming that any such improper behavior was merely 'zealous advocacy' will not justify [it].").

³⁰ *In re Forrest*, 158 N.J. 428, 437, 730 A.2d 340, 345 (1999).

³¹ MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1981) (stating that "[a] lawyer should represent a client zealously within the bounds of the law"); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. (1983) (stating that "[t]he law, both procedural and substantive, establishes the limits within which an advocate may proceed").

³² MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

"refuse to offer evidence that the lawyer reasonably believes is false."³³ Ethical Considerations promulgated under the superseded Model Code of Professional Conduct reminded lawyers they were supposed to avoid bringing about unjust results³⁴ or inflicting needless harm on others.³⁵ Lawyers owe a duty to the system of justice to utilize procedures that command public confidence and respect.³⁶ Model Rule 3.4(e) provides: "A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."³⁷

Taken together, these statements reflect an ethic quite different from the amoral proposition that an advocate's primary duty is to win the case for the client, constrained only by the prohibition against using knowingly false evidence. They direct an advocate to act in good faith, to abide by rules of evidence and procedure, to avoid conduct that will deceive a jury, and to limit the use of evidence to that which the advocate reasonably believes is accurate. A lawyer is not obliged or even permitted to mislead the jury with unreliable and incomplete evidence, but must have a good-faith basis for that evidence before presenting it in the first place.

IV. The Good-Faith Principle

The good-faith principle goes beyond prohibiting the use of false evidence, and guides an advocate's conduct with respect to dubious evidence which the lawyer does not know for certain is false. The lawyer may only use or refer to evidence if the lawyer has a good-faith basis to believe that it represents the best recollection of a witness, and can be presented in accordance with the rules of evidence and procedure.³⁸ This is a two-part standard under which an advocate must have both a *factual* and a *legal* basis for alluding to, asking about, offering, or relying on

³³ *Id.* R. 3.3(c).

³⁴ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1969).

³⁵ *Id.* EC 7-10.

³⁶ *Id.* EC 7-20.

³⁷ MODEL RULES OF PROF'L CONDUCT R. 3.4(e).

³⁸ *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2.

particular evidence. To have a good-faith factual basis, the attorney must have both a subjective belief that the evidence represents the true recollection of a witness, and objective support for that belief such as a deposition, statement, report, or interview notes. To have a legal basis, the attorney must have a reasonable legal argument that it is admissible under the rules of evidence and procedure.

A. Factual Basis

An attorney must have a factual basis for alluding to, offering, or relying on evidence at trial.³⁹ That factual basis may not be wishful thinking. There are two requirements for a factual basis—an attorney's subjective belief, and objective evidence to support that belief.⁴⁰ The attorney's investigation and discovery must show a likelihood that a witness exists who believes the evidence to be true, and who could and would be called to testify to its truthfulness.⁴¹ Under this principle, an ethical advocate will not mention dubious evidence in an opening statement,⁴² will not attempt to present evidence believed to be inaccurate,⁴³ will not ask a leading question that includes an unsupported factual suggestion,⁴⁴ and will not incorporate into closing argument "surprise" misstatements and overstatements by witnesses that make the

³⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (1983) (stating that a lawyer in trial may not "allude to any matter that . . . will not be supported by admissible evidence"); RESTATEMENT (THIRD) OF THE LAW § 107 (2000) (identical language).

⁴⁰ See MODEL RULES OF PROF'L CONDUCT R. 3.4(e).

⁴¹ See, e.g., *Duncan v. State*, 776 So. 2d 287, 288 (Fla. Dist. Ct. App. 2000) (holding that the trial court erred by allowing impeachment testimony when the attorney did not have good faith and did not later prove).

⁴² See, e.g., *State v. Torres*, 328 N.J. Super. 77, 88-89, 744 A.2d 699, 706 (Super. Ct. 2000) (stating that the prosecutor should not seek "tactical advantage in placing before the jury allegations that he knew he could not prove"); *Lillard v. State*, 994 S.W.2d 747, 750-51 (Tex. Ct. App. 1999) (noting "[t]he prosecutor should not mention matters in his opening statement which would be inadmissible as evidence").

⁴³ See, e.g., *State v. Galloway*, 145 N.C. App. 555, 559, 551 S.E.2d 525, 529-30 (Ct. App. 2001).

⁴⁴ See *Reno v. State*, 514 N.E.2d 614, 616-17 (Ind. 1987) (ruling that the insinuation that a witness was "stoned out of her mind" was improper unless the attorney had a good-faith basis).

case seem more favorable than it is.⁴⁵ By requiring both a subjective and objective factual basis, we avoid the superficial argument that, because lawyers can never really "know" whether evidence is true or false, there are no ethical impediments to introducing dubious evidence regardless of objective indications of its unreliability.⁴⁶

First, an attorney must have a subjective belief that proposed evidence reflects the genuine recollection of a witness and is not a fabrication.⁴⁷ This is not the same thing as whether the attorney personally believes the evidence is true. I once defended a man who was caught shoplifting food who claimed to be a field operative for the CIA on a training mission to see if he could survive in a strange city for a month with no money and no identification. He wanted me to inform the judge that a conviction would jeopardize his security clearance. He stuck to this story despite my skepticism. I called the CIA to explain the situation and ask if they could verify his claim, but of course they denied any knowledge of this guy. Did I personally believe his story? No. Did I believe that my client genuinely thought he was in the CIA? Yes, although I also thought he was crazy.

Second, an attorney must have an objective basis for his decision to allude to evidence in opening statement or attempt to elicit it from a witness.⁴⁸ Wishful thinking, intuition and impressions based on demeanor are not adequate to justify using or alluding to evidence.⁴⁹ The attorney must be able to point to documents, statements, records, or depositions that indicate that an identifiable witness exists who has stated in the past that a particular fact is true, could be called to testify, and has been

⁴⁵ See, e.g., *People v. Olivero*, 710 N.Y.S.2d 29, 30, 31, 272 A.D.2d 174, 175-76 (App. Div. 2000) (holding that "[t]he prosecutor's summation marks were prejudicial because she stressed that it was 'important' and 'significant' that [the defendant]'s signature was on the stipulations"); *People v. Kopczick*, 312 Ill. App. 3d 843, 850-51, 728 N.E.2d 107, 113-14, 245 Ill. Dec. 376, 382 (App. Ct. 2000) (holding nonevidential comments may be corrected by jury instruction and the verdict will not be set aside unless resulting in substantial prejudice).

⁴⁶ *Zacharias & Martin*, *supra* note 5, at 1009.

⁴⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1983).

⁴⁸ See, e.g., *Reno v. State*, 514 N.E.2d 614, 616-17 (Ind. 1987).

⁴⁹ FORTUNE ET AL., *supra* note 17, at 402-04.

reasonably consistent in his assertions.⁵⁰ Unrecorded statements from a client made during interviews satisfy the objective basis test, even though they may be unrecorded and confidential. The requirement of an objective basis is not for the purpose of proving to a court or disciplinary committee that one was acting in good faith, but is required for an advocate's own ethical judgment. Thus, confidential information gained from the client or through the attorney's work-product can supply that objective basis. Once a witness has in fact testified to something, the trial testimony itself supplies the objective, although not the subjective, basis for relying on the evidence in closing argument.

Third, the attorney must have a basis for believing the witness will actually show up in court and testify to his recollections.⁵¹ It is not enough that the client is certain his friends will show up, or that the opponent has put someone's name on a witness list. The attorney must be satisfied that the witness will actually testify. Serving a subpoena on a witness or obtaining the witness's firm promise to attend is usually adequate,⁵² although there may be circumstances where mere service of a subpoena is not enough.⁵³ In the movie *Suspect*, the public defender has a private investigator track down a homeless man with no fixed address whom she believes can supply her client with an alibi.⁵⁴ The witness stabs the investigator, throws away the subpoena, and disappears

⁵⁰ See, e.g., *Thomas v. United States*, 772 A.2d 818, 823 (D.C. 2001) (involving a prosecutor who based cross-examination questions about a defendant's criminal record on a Pretrial Services Agency report); *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001) (finding it good faith to ask about a conviction, even though it had been dismissed, because the prosecutor had documentation showing the existence of the conviction); *Alexander v. State*, 270 Ga. 346, 349-50, 509 S.E.2d 56, 60 (1998) (ruling that, when the prosecution fails to produce evidence to support the opening statement, the prosecutor has the burden of establishing a basis for the opening statement to avoid a mistrial).

⁵¹ See, e.g., *People v. Austin*, 605 N.Y.S.2d 103, 104, 199 A.D.2d 325, 325 (App. Div. 1993) (finding that the prosecutor was not acting in bad faith when he served a subpoena on the defendant's wife).

⁵² *Id.*

⁵³ See *State v. Torres*, 328 N.J. Super. 77, 95, 744 A.2d 699, 708 (Super. Ct. App. Div. 2000) (arguing that a hearing should have been held on whether an accomplice would assert the Fifth Amendment privilege).

⁵⁴ *SUSPECT* (TriStar 1987).

into the night. The judge correctly cautions the attorney not to mention this missing witness to the jury because in all likelihood he will never be found and mentioning him would contaminate the trial process.⁵⁵

B. Legal Basis

The admissibility of evidence is controlled by rules of evidence and procedure. It is therefore obvious that an attorney must also have a legal basis for asking a question or offering evidence.⁵⁶ She must have a reasonable belief that the evidence is admissible.

A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.⁵⁷

For example, it would violate this principle to ask a witness if he has been convicted of drunk driving (even if true) because the rules of evidence limit impeachment to felonies and crimes of dishonesty.⁵⁸ It would also violate this principle to ask a question alluding to inadmissible evidence and then "withdraw" it if the other side objects.⁵⁹ As one court found, it is improper for an attorney to ask a question "which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong."⁶⁰

⁵⁵ *Id.*

⁵⁶ See, e.g., *Flowers v. State*, 773 So. 2d 309, 326 (Miss. 2000) (holding that cross-examination questions must have an evidentiary basis).

⁵⁷ AMERICAN COLLEGE OF TRIAL LAWYERS CODE OF TRIAL CONDUCT R. 19(g) (1972). Accord *State v. Smallwood*, 594 N.W.2d 144, 150 (Minn. 1999) (finding misconduct for a prosecutor to offer inadmissible evidence to the jury).

⁵⁸ See, e.g., FED. R. EVID. 609; see also *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 130, 116 Cal. Rptr. 713, 727 (Ct. App. 1974) (holding a lawyer in contempt for deliberately asking a question about an inadmissible misdemeanor conviction).

⁵⁹ See, e.g., *State v. Lawton*, 164 Vt. 179, 183-84, 667 A.2d 50, 55 (1995) (finding that the character acts introduced by the prosecutor were highly prejudicial and of no relevance to the facts).

⁶⁰ *People v. Wells*, 100 Cal. 459, 463, 34 P. 1078, 1079 (1893).

This is a principle guiding an attorney's decision to attempt to introduce evidence. The ethics of offering evidence depend on an attorney's legal analysis prior to the offer, not on what happens afterwards. It is unethical for an attorney to offer evidence she believes to be inadmissible on the chance that the opponent will not object or the judge will rule unexpectedly in her favor.⁶¹ However, it is not unethical to introduce evidence the attorney thinks is admissible just because an objection is later sustained.⁶² Lawyers and judges will frequently have legitimate disagreements on the admissibility of evidence.

This part of the good-faith principle similarly should have both a subjective and objective component. The attorney must be able to point to a rule of evidence that plausibly supports the item's admissibility, and also have a subjective belief that the evidence properly be admitted under that rule.

C. Duty to Investigate Factual and Legal Bases

The only way an attorney can develop a good-faith basis for evidence is to conduct an investigation into its reliability and admissibility. Indeed, without an investigation, the attorney would have no evidence to present. No competent attorney would dream of presenting a case to a jury without having investigated it or filing a pleading without legal research. The general professional duty to investigate the facts and law is obvious and fundamental to professional responsibility, and its application to the presentation of evidence would seem uncontroversial.

However, what should be a simple issue has been made complicated by the tendency to assume that the only two ethical considerations governing evidence are the prohibition against false evidence and the duty of zealous loyalty to the client.⁶³ When the duty to investigate is analyzed

⁶¹ See *Onstad v. Wright*, 54 S.W.3d 799, 807-08 (Tex. App. 2001) (concluding that the introduction of evidence known to be inadmissible is sanctionable even if the opponent does not object).

⁶² See, e.g., *Daniels v. United States*, 738 A.2d 240, 248 (D.C. 1999) (finding no prosecutorial misconduct because of the good-faith belief that the statement would be admissible).

⁶³ See Horgan, *supra* note 5, at 800 (noting the attorney's duty to investigate suspected client fraud is undefined so it may be ignored).

solely with reference to these two rules, strange results start appearing. Some commentators have actually come to the conclusion that, if an attorney believes an investigation would show that a client's proposed testimony was perjurious, the attorney should *not conduct the investigation*. In that way the attorney will be able later to deny actual knowledge of the falsity of the evidence and may ethically present it, all of which is justified as zealous loyalty to the client. Investigating the truth of evidence coming from one's client is the job of the jury, not the attorney.

Requiring the attorney to do the fact-finder's job "perverts the structure of our adversary system" because the attorney "who judges a client's truthfulness does so without the many safeguards inherent in our adversary system." The attorney would not have the insight of "fellow fact finders," so she may give a piece of evidence or a statement more credit—or less—than what it is due. On the other hand, a "jury's determination on credibility is always tempered by the requirement of proof beyond a reasonable doubt. A lawyer, finding facts on [her] own, is not necessarily guided by such a high standard." In our justice system, an attorney should have no duty to investigate her client unless "fraud or perjury has been converted into an undeniable conclusion" by information received other than through cross-examination or interrogation of one's own client. After all, under our system, an attorney is "the defendant's only advocate. [She] cannot also become his accuser. A conviction, under our system, must be at the hands of the jury, not the defendant's lawyer."⁶⁴

The argument is unpersuasive⁶⁵ and proceeds from the false premise that the only relevant ethic is that zealous representation requires the presentation of all evidence not known for sure to be false. There are other relevant ethical principles that can address the question of whether failure to investigate a client's suspicious testimony can somehow justify using the evidence. One such additional rule is that positions asserted before a court must be based on reasonable inquiry and research.⁶⁶ It is improper to present false evidence to a court when its falsity would have

⁶⁴ *Id.* at 842-45.

⁶⁵ See *Office of Disciplinary Counsel v. Price*, 557 Pa. 166, 175, 732 A.2d 599, 604 (1999) (affirming that counsel cannot deliberately close his eyes to avoid actual knowledge that he is misrepresenting the facts).

⁶⁶ See *Price*, 732 A.2d at 605-06 (holding it unethical to state as facts things of which counsel was ignorant because he had not investigated them).

become certain from minimal investigation regardless of the reason the lawyer failed to investigate.⁶⁷

A trial attorney's duty to investigate the case is not derived from the duties to refrain from using false evidence and provide zealous representation. It exists separately and on equal footing with the false evidence and zealous advocacy rules. Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁶⁸ The commentary explains: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem [and] also includes adequate preparation."⁶⁹ The A.B.A. Standards Relating to the Administration of Criminal Justice explain that effective representation at trial requires thorough investigation and preparation before trial, including locating and interviewing witnesses, obtaining independent laboratory analysis of forensic evidence, requesting discovery, talking to police who investigated the event, and investigating the client's background and version of the story.⁷⁰

The duty of *zealous* representation surely does not override the duty to provide *competent* representation. Competent representation includes both investigation and preparation.

[U]nless the lawyer is prepared in a given case, the client will suffer. Proper preparation or attention to the details of the matter, both to the law and facts, is mandatory. . . . [Adequate preparation] encompasses knowledge of the current law on the subject, ascertainment of the facts from the client, inde-

⁶⁷ See FED. R. CIV. P. 11(b)(3) (stating that, by signing a pleading, an attorney "is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the allegations and factual contentions have evidentiary support"); see also Horgan, *supra* note 5, at 834-35 (arguing that positions taken before a court must be based on reasonable inquiry) (citing *Bird v. Bird*, 509 N.E.2d 289, 292 (1987)).

⁶⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983); see also STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standard 4-4.1. (2d ed. 1980) (noting the duty of an attorney to thoroughly investigate all matters "relevant to guilt and degree of guilt or penalty").

⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5.

⁷⁰ STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE commentary to Standard 4-4.1.

pendent investigation, and employment of necessary discovery proceedings after a suit is started. . . . The attorney must . . . make an adequate investigation of the facts, both as they are favorable and unfavorable to the client.⁷¹

The failure to investigate alone has been held to be sanctionable⁷² and to constitute ineffective assistance of counsel.⁷³

There is room for disagreement about how much investigation is enough. Horgan suggests: "[S]ome courts have considered such factors as: the resources available to the attorney; the reliability of the information provided by the client or other counsel; the experience of the attorney; the attorney's access to the necessary facts; and any time constraints."⁷⁴ However, conducting no investigation at all into dubious evidence is clearly unacceptable.⁷⁵ These principles of legal ethics and professional responsibility do not vanish when the issue is either suspected client perjury or concerns about other aspects of the admissibility of evidence.

V. Are There Different Ethical Standards for Criminal Defense Attorneys?

A number of commentators suggest that a criminal defense attorney is held to a lower ethical standard than other attorneys.⁷⁶ Much of the

⁷¹ Lee Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88, 98, 108-09 (1977).

⁷² See, e.g., *Beasley v. United States*, 491 F.2d 687, 690-96 (6th Cir. 1974) (holding that the failure to interview any *res gestae* witnesses before trial was incompetent and ineffective because potentially exonerating defenses were not explored and developed).

⁷³ See *Shack v. State*, 231 N.E.2d 36, 44 (Ind. 1967) (stating that the attorney's failure to conduct adequate factual investigation, double-check client's story, or research the law constituted malpractice "as matter of law").

⁷⁴ Horgan, *supra* note 5, at 836-37; see also *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 605 (1st Cir. 1988) (recognizing a higher standard for an attorney associated with a major law firm with large resources).

⁷⁵ See STANDARDS RELATING TO THE DEFENSE FUNCTION commentary to § 3.2 (1971) (stating that, to deter a client from providing information that might "handicap the lawyer's freedom in calling witnesses or in otherwise making a defense, is 'most egregious' and is advocated only by unscrupulous lawyers").

⁷⁶ E.g., FREEDMAN, *supra* note 20, at 37; Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1145-47 (1988); Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 854-55 (1977).

discussion concerning whether a lawyer has a duty of zealous loyalty to a client that permits the ethical use of misleading, unreliable or false evidence focuses on the representation of criminal defendants. Prosecutors and civil lawyers are either ignored or distinguished from criminal defense attorneys. For example, Fortune, Underwood and Imwinkelried summarize the conflicting opinions about whether it is unethical for a lawyer to call witnesses for the purpose of creating a false impression as follows: "Perhaps the best that can be said is that a criminal defense lawyer may call the witnesses, a prosecutor may not, and civil lawyers should not."⁷⁷

The suggestion of a different standard for criminal defense attorneys is implausible. There is certainly no general ethical principle permitting attorneys to practice deception, fraud, and trickery in order to further the important social goal of returning violent criminals to the streets regardless of guilt. Nor does a criminal defense exemption exist in the Model Rules. The provisions concerning the duty to investigate,⁷⁸ confining one's zealotry to the bounds of law,⁷⁹ the prohibition against false evidence,⁸⁰ declining representation that would result in a violation of law or other fraud,⁸¹ exercising independent judgment that includes moral factors⁸² and acting in good faith⁸³ make no distinction between criminal and civil cases.⁸⁴

⁷⁷ FORTUNE ET AL., *supra* note 17, at 369.

⁷⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

⁷⁹ *Id.* preamble.

⁸⁰ *Id.* R. 3.3(a)(4). The commentary notes that there is a debate about whether a criminal defense lawyer is under a different obligation, but it does not endorse the view, instead stating that "[t]he general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of the client—applies to defense counsel in criminal cases." *Id.*

⁸¹ *Id.* R. 1.16.

⁸² *Id.* R. 2.1.

⁸³ MODEL RULES OF PROF'L CONDUCT R. 3.4(e).

⁸⁴ Model Rule 3.1 does make a distinction, permitting a criminal defense lawyer to plead not guilty despite knowledge that the client is guilty and require the state to prove guilt beyond a reasonable doubt. MODEL RULES OF PROF'L CONDUCT R. 3.1.

Then where does the claim come from? Selinger believes its proponents derive the claim of special rules for criminal defendants from the burden of proof.

The argument would be that [making the prosecution overcome false evidence] is just another legitimate way of putting the prosecution to its proof—of making sure that the prosecution is not getting into a dangerous-to-the-innocent habit of bringing criminal charges on weak evidence—which a defense lawyer is clearly permitted to do, under Model Rule 3.1, even on behalf of an admittedly guilty client.⁸⁵

The problem is that false evidence does no such thing. It does not simply put the prosecution to its proof. “[I]t is one thing to attack a weak government case by pointing out its weakness. It is another to attack a strong government case by confusing the jury with falsehoods.”⁸⁶

The claim of a special rule for criminal lawyers also is sometimes tied to the defendant’s constitutional right to the effective assistance of counsel. For example, Horgan argues that criminal defense attorneys are specially exempt from the rule requiring that attorneys disclose fraudulent evidence:

[T]rust between attorney and client . . . is the “cornerstone of the adversary system and effective assistance of counsel.” A client . . . is unlikely to divulge all the information necessary for his defense if he feels that the attorney would violate the attorney-client privilege and pass the information on. . . . If the client withholds information, the truth cannot be ascertained, nor can the attorney fulfill her duty of candor to the court. This creates a catch-22. A client can fall into one of three categories: (1) one about whom the attorney has no suspicions; (2) one whom the attorney suspects of fraud; or (3) one whom has admitted his fraudulent intent (or it has been conclusively proven). If nondisclosure is not afforded to a client in the third group, a client in second group would be reticent to come forward with exculpatory facts that, although true, cannot be substantiated because of the client’s fear that he may move into the third group and lose the protection of nondisclosure. If nondisclosure is not afforded to the second

⁸⁵ Carl M. Selinger, *The “Law” on Lawyer Efforts to Discredit Truthful Testimony*, 46 OKLA. L. REV. 99, 103-04 (1993).

⁸⁶ Harry Subin, *The Criminal Lawyer’s “Different Mission:” Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 148 (1987).

group, the same fear would hold true for a client in the first group. Therefore, nondisclosure can only serve its intended purpose if it is extended to all three groups.

An attorney trying to uncover suspected client fraud can do so "only if the client trusts the lawyer with information that might be embarrassing or incriminating." If the client knows the attorney has a duty of disclosure, that trust will never develop; therefore, the attorney may not gain the information necessary to uncover the fraud. Disclosure may also "prejudice the defendant in the very matter in which the lawyer is employed to defend him." Admittedly, it is hard to have sympathy for a client who is actually guilty of perpetrating a fraud on the court; but if the attorney's suspicions turn out to be wrong and the client is not guilty of fraud, the harm to the client may be irreparable. This is a risk too great to take.⁸⁷

Such commentators define effective assistance as helping a criminal defendant gain an acquittal, even if the accused committed the crime. Therefore, the lawyer must be allowed to do whatever is necessary to get his guilty client acquitted. This is a distortion of the right to counsel. Nothing in the language concerning effective assistance of counsel suggests that effectiveness is measured solely in terms of whether the defendant is acquitted, nor does a defendant have a right to an acquittal regardless of guilt. The argument of a special obligation for defense attorneys to assist their clients in presenting perjured testimony misperceives the professional advocate's function.

[D]efense counsel's paramount duty [to his client] must be met in conjunction with, rather than in opposition to, other professional obligations. Counsel does have an "obligation to defend with all his skill and energy, but he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession." The ethical strictures under which an attorney acts forbid him to tender evidence or make statements which he knows to be false as a matter of fact. His activities on behalf of his client are circumscribed by the principles and traditions of the profession and may not include advancing known false testimony in an effort to win his client's cause.

It is clear [in this case] that counsel felt, based on his trial preparation, that the eleventh-hour change in appellant's story would result in his client's

⁸⁷ Horgan, *supra* note 5, at 853-55; see also Liskov, *supra* note 5, at 891 (stating that an attorney with a mere belief or suspicion of client perjury may not refuse to offer this testimony because such a belief is "insufficient to overcome a client's constitutional rights to effective assistance of counsel").

testifying falsely. Confronted with such a realization, counsel's obligation to both his client and the court is to use "all honorable means to see that justice is done," rather than to go to any lengths in an effort to see that a defendant is acquitted.⁸⁸

VI. The Ethics of Evidence Under the Good-Faith Principle

In the following sections, this Article examines the ethics of evidence using the good-faith principle as the unifying theme, rather than focusing on the more limited false evidence rule. I am not discarding the rule against false evidence—it is obviously part of good faith not to offer false evidence; however, the false evidence rule alone does not address issues of misleading, unreliable, or incomplete (but not false) evidence. Using the good-faith principle avoids the use of dubious evidence that is not clearly prohibited by the false evidence rule. Note that, without the good-faith principle, the evidence would be otherwise permitted because no other ethical principle restricts a lawyer's use of it.

A. False Evidence

The problem of false evidence comprises three different issues. One is easy—May a lawyer intentionally create false evidence? No.⁸⁹ The second issue is also relatively easy—If a lawyer discovers that evidence is false, but did not personally fabricate it, may the lawyer present it anyway? The answer is again "No."⁹⁰ The third issue is only slightly more difficult—If the lawyer discovers too late that evidence is false, and

⁸⁸ *Thornton v. United States*, 357 A.2d 429, 437-38 (D.C. App. 1976) (citations omitted).

⁸⁹ GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW AND ETHICS OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 30.5, at 30-8 (Supp. 1994) (stating that, while actual knowledge leaves lawyers considerable room for doubt without the necessity of knowing, lawyers may not practice self deception or deliberately evade knowledge).

⁹⁰ MODEL RULES OF PROF'L CONDUCT R. 3.3. cmts. 10-11 (1983) (requiring the lawyer to reveal the false testimony to the tribunal); *see also* HAZARD & HODES, *supra* note 89, § 30.6 at 30-9 to 30-10 (The ABA position holds that the client's interest must be sacrificed to preserve the integrity of the system.).

the jury has already heard it, may the lawyer remain silent and allow the case to be decided upon the false evidence? The answer is again "No."⁹¹ All three issues have been the subject of numerous articles, and there is not much debate about the correct answers.

A weak argument has occasionally been made that, if a criminal client has fabricated false evidence, an ethical lawyer might be able to present it or allow it to go uncorrected.⁹² Presently, under both the good-faith principle and the false evidence rule, it is unethical to present or rely on such evidence known to be false.

1. The Intentional Creation of False Evidence

It is common knowledge that fabricating false evidence and the outright subornation of perjury is wrong, unethical, and illegal. The fact that a lawyer may not create false evidence and then offer it at trial is so ingrained within the legal profession that it seems at best an overkill to codify this rule. However, Model Rule 3.3 does: "A lawyer shall not knowingly [o]ffer evidence that the lawyer knows to be false."⁹³ Rule 3.4 repeats this admonition by mandating that "[a] lawyer shall not [f]alsify evidence, [or] counsel or assist a witness to testify falsely."⁹⁴ A lawyer's duty not to present false evidence has always been a clearly understood, fundamental principle.⁹⁵ To be explicit, the Model Rules forbid attorneys from personally fabricating evidence⁹⁶ or inducing another to do so.⁹⁷

⁹¹ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4).

⁹² *E.g.*, Freedman, *supra* note 6, at 1479-80.

⁹³ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4).

⁹⁴ *Id.* R. 3.4.

⁹⁵ RESTATEMENT (THIRD) OF THE LAW § 118 (2000) (stating that a lawyer may not falsify evidence); *see also* *Dodd v. Fla. Bar*, 118 So. 2d 17, 19 (Fla. 1960) (stating that no breach of professional ethics causes more harm to the administration of justice than an attorney using false testimony).

⁹⁶ *See In re Jones*, 5 Cal. 3d 390, 400, 487 P.2d 1016, 1022, 96 Cal. Rptr. 448, 454 (1971) (discussing the discipline of a lawyer who altered and antedated a document and offered it at trial).

⁹⁷ *Bar Ass'n of San Francisco v. Devall*, 59 Cal. App. 230, 234, 210 P. 279, 280 (1922) (suspending a lawyer who advised a friend of a decedent to change the will to reflect the decedent's true intentions).

Evidence fabrication on a grand scale is probably rare. Attorneys do not routinely hire actors to pretend to be eyewitnesses or to forge documents. However, evidence fabrication on a small scale is far more common. The scale does not matter. An Assistant United States Attorney in Florida was disciplined merely for listing a witness under a pseudonym in an effort to protect the witness from her ex-husband. The only false evidence was the witness's name. The Florida Supreme Court held that this was presenting false evidence and a violation of the attorney's professional duty.⁹⁸

Fabrication most commonly occurs during witness coaching, when an attorney asks a witness to change some aspect of his or her testimony to make it more persuasive.⁹⁹ Coaching that results in fabrication often sounds like this:

Lawyer: How did it feel?

Client: It hurt pretty bad.

Lawyer: We're not going to get a lot of money for that answer. Look, when I ask you that question at trial, I want you to say that it felt like your hand was stuck on a hot stove and you couldn't get it off, okay?

Client: Sure.

Wydict further breaks this kind of witness coaching down into two categories, or grades.¹⁰⁰ Grade One coaching occurs "when the lawyer knowingly and overtly induces a witness to testify to something the lawyer knows is false."¹⁰¹ Grade One coaching is, of course, unethical¹⁰² and may even constitute criminal subornation of perjury.¹⁰³

⁹⁸ Fla. Bar v. Cox, 794 So. 2d 1278, 1284 (Fla. 2001).

⁹⁹ See *In re Eldridge*, 82 N.Y. 161, 171 (N.Y. 1880) (holding that a lawyer's duty "is to extract the facts from the witness, not to pour them into him").

¹⁰⁰ Wydict, *supra* note 5, at 18-24.

¹⁰¹ *Id.* at 18.

¹⁰² Model Rule 3.4 states, in part, that a lawyer must not "counsel or assist a witness to testify falsely." MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (1983).

¹⁰³ Under the federal perjury statutes, a lawyer can be punished for suborning perjury if the following conditions are met: (a) the witness testified under oath or affirmation about a material matter, (b) the testimony was false, (c) the witness knew it was false,

Grade Two witness coaching is the same as Grade One, except that the lawyer . . . covertly induces a witness to testify to something the lawyer knows is false. "Covertly" is used to mean that the lawyer's inducement is masked. It is transmitted by implication. Grade Two witness coaching is no less harmful to the court's truth-seeking function than Grade One, nor less morally corrosive, nor less in breach of the lawyer disciplinary rules. . . .¹⁰⁴

One might assume that the practice of deliberately creating false evidence is so obviously unethical that it is universally condemned, but one would be wrong. In at least one context, respectable lawyers advise doing just that. The ABA Journal provides this advice: When hiring an expert consultant to evaluate a file and render an opinion, provide the expert only "enough information so that the expert will be well prepared," but withhold "materials that would open the door to . . . cross-examination."¹⁰⁵ In that way you will assure that only "helpful opinions are reached."¹⁰⁶ Similar advice appears in the ABA's publication *Litigation*: An attorney should not give an expert unfavorable facts or documents unless "you do not mind if the opposition does learn or see them."¹⁰⁷ Giving incomplete information to an expert to assure a favorable opinion is blatant participation in the creation of false evidence.

2. Discovering False Evidence Before Trial

Although it is rare for attorneys to personally create false evidence, it is far more common for them to be presented with false evidence created by others. A party to an action may fabricate favorable evidence to improve the chances of winning. Family and friends may provide false alibis. A battered woman may recant her statement that her boyfriend has beaten her. These situations also seem to be easy cases. It is unethical

(d) the lawyer induced the witness to give the testimony, (e) the lawyer knew it was false, and (f) the lawyer knew that the witness knew it was false. See *Boren v. United States*, 144 F. 801, 803 (9th Cir. 1906).

¹⁰⁴ Wydick, *supra* note 5, at 3.

¹⁰⁵ James E. Daniels, *Managing Litigation Experts*, 70 A.B.A. J. 64, 64-66 (1984).

¹⁰⁶ *Id.*

¹⁰⁷ Peter I. Ostroff, *Experts: A Few Fundamentals*, LITIG., Winter 1982, at 9.

for an attorney to present false evidence. Whether the attorney has personally created it is irrelevant. A "lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false"¹⁰⁸ regardless of the source of that evidence. Lawyers cannot present false and perjured evidence.

For some reason, however, some commentators seem to have a hard time with this basic ethical principle when it is a *client* who has created the false evidence and wants the lawyer to present it. A few have taken the lawyer-as-whore position, and argued that the lawyer must go along with a client's decision to commit perjury, and must present that false evidence at trial.¹⁰⁹ For example, Liskov argues that the general principle in Model Rule 1.2(a) that the "lawyer shall abide by a client's decision . . . whether the client will testify" extends to a client's decision to testify *falsely*, despite other language in Rule 1.2(d) forbidding the lawyer to "assist a client in conduct the lawyer knows is criminal or fraudulent."¹¹⁰

The best known proponent of this view is Monroe Freedman. He has argued that, if a client cannot be dissuaded from committing perjury, the lawyer should go ahead and elicit the false testimony and rely on it in closing argument. Freedman rests his argument on the lawyer's duty of loyalty to the client, but in the process reduces that duty from a professional one to that of co-conspirator and criminal accomplice.¹¹¹

It has also been suggested that the lawyer has an obligation to present false and perjured evidence because the client has a "right to testify."¹¹² Of course, there is no such right. The client, like every witness, only has the right to testify in ways consistent with the rules of evidence and procedure, and has no right to provide testimony in violation of those rules.¹¹³ Rules 601-03 restrict witnesses to testifying under oath, which

¹⁰⁸ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1983).

¹⁰⁹ See *id.* R. 1.2(a).

¹¹⁰ *Id.* R. 1.2(d); see Liskov, *supra* note 5, at 884-93 (discussing that the lawyer may present and argue the client's testimony to the jury and that the rule against false evidence is not mandatory).

¹¹¹ Freedman, *supra* note 6, at 1479-80; MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 119-21 (1990).

¹¹² See Liskov, *supra* note 5, at 887; Horgan, *supra* note 5, at 853.

¹¹³ The client must at least comply with those rules that are "firmly rooted" in the traditions of the trial system. See *Idaho v. Wright*, 497 U.S. 805, 814-15, 110 S. Ct. 3139, 3145-46, 111 L. Ed. 2d 638, 651-52 (1990).

requires that they tell the truth.¹¹⁴ The right to testify falsely does not exist.¹¹⁵

These attempts to justify a lawyer's limited use of false evidence when it has been created by the client are indefensible.¹¹⁶ There is no exception in the Model Rules for false evidence created by a client, and no suggestion that the lawyer must suddenly abandon her personal moral judgment. To the contrary, the ethical principles make it clear that an attorney is not simply the client's mouthpiece. The preamble to the Model Rules is explicit:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. . . . A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. . . . In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.¹¹⁷

The Supreme Court has also been explicit. The lawyer's role is that of a professional who agrees to fight for the client only within the bounds of the law and ethics.

Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Associa-

¹¹⁴ FED. R. EVID. 601-603.

¹¹⁵ *Harris v. New York*, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1, 4 (1971) (holding that the defendant is privileged to testify, "but that privilege cannot be construed to include the right to commit perjury").

¹¹⁶ *See, e.g., In re Edson*, 108 N.J. 464, 530 A.2d 1246 (1987) (disbarring an attorney who allowed the client to perjure himself at trial).

¹¹⁷ MODEL RULES OF PROF'L CONDUCT pmb. 6, 7, 8 (1983).

tion in 1908. . . . These principles have been carried through to contemporary codifications of an attorney's professional responsibility. . . . Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct . . . do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure. . . . [U]nder no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.¹¹⁸

If a client creates a phony receipt, the attorney may not offer it. If a witness offers to lie and create an alibi, the lawyer may not call that person. If a client is going to lie from one end of his testimony to the other, the lawyer must keep him off the stand. At least as an abstract proposition, these principles are ethically indisputable.¹¹⁹

But as with witness coaching, the problem arises when the issue is small fabrications rather than major ones. What if a client intends to testify truthfully most of the time, but will insert one or two pieces of false testimony here and there to strengthen the case? The attorney cannot overreact and refuse to present the truthful evidence in order to keep the false evidence out of the trial. Even if the attorney tries to dissuade the client from committing perjury, and carefully steers around the false evidence on direct examination, the attorney has no real control over whether the client blurts out the false testimony anyway, or the topic is raised on cross-examination. To analyze an attorney's ethical obligation under this circumstance requires that it be divided into two different issues. What must the attorney do before the fact, and what must the attorney do after the fact?

If an attorney learns of a client's or other witness's intent to commit partial perjury before trial, the lawyer's first duty is to try to dissuade that

¹¹⁸ Nix v. Whiteside, 475 U.S. 157, 166-71, 106 S. Ct. 988, 994-96, 89 L. Ed. 2d 123, 134-37 (1986).

¹¹⁹ See RESTATEMENT (THIRD) OF THE LAW § 120 (2000) (stating a lawyer may not assist a witness to testify falsely, offer false evidence, make a false statement of fact, or offer evidence as to an issue of fact known to be false, and may refuse to offer testimony or other evidence reasonably believed to be false).

person from giving the false testimony. "It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."¹²⁰ The attorney should point out that exaggerations and small lies are easily exposed on cross-examination and easily detected by the jury. False favorable testimony therefore will end up hurting rather than helping. In addition, perjury is a crime that can be separately prosecuted, or considered by the judge as an aggravating circumstance at time of sentencing.¹²¹

If the attorney cannot convince a client not to tell small lies, the attorney's second duty is to seek to withdraw from representation.¹²² Withdrawal would seem to be required under Model Rule 1.16(a)(1), because continued representation "will result in violation of the rules of professional conduct or other law," although it is not so universally recognized as dissuasion. Some commentators have criticized the withdrawal approach as serving no functional purpose because the new attorney will face the same issue.¹²³ In criminal cases, withdrawal might not work because most defendants are represented by public defenders or assigned counsel who will probably not be permitted to withdraw. Withdrawal also may implicate other ethical principles, for example, if the case is so close to trial that a lawyer cannot ethically withdraw without

¹²⁰ *Nix*, 475 U.S. at 169. Accord MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt., ¶¶ 5, 7, 11 (stating "upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered . . . [and] should seek to persuade the client to refrain from perjurious testimony [also]"); Liskov, *supra* note 5, at 884; Wolfram, *supra* note 76, at 846.

¹²¹ Liskov, *supra* note 5, at 900.

¹²² MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt., ¶¶ 5, 7, 11; ABA Committee on Professional Ethics and Grievances, Formal Op. 87-353 (1987). But see FREEDMAN, *supra* note 20, at 31-32 (arguing that it would be a betrayal of confidence to refuse to represent a client who insists on going forward with perjured testimony).

¹²³ See FREEDMAN, *supra* note 111, at 115; Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 526 (1988) (pointing out several possibilities should the attorney withdraw, including allowing the subsequent attorney to become an unknowing agent of perjury); see also Horgan, *supra* note 5, at 849-50 (criticizing the withdrawal of counsel because it may alert the judge to client fraud).

jeopardizing the client's case.¹²⁴ Withdrawal would also seem an inappropriate response if it is a witness, rather than the client, who plans to exaggerate.

If withdrawal is refused or inappropriate, the attorney should attempt to steer the direct examination around the false testimony.¹²⁵ This may not solve the problem, however. Despite the attorney's best efforts, the client may give the false testimony anyway—slipping it in on direct, or volunteering it during cross-examination.¹²⁶ In these situations, the attorney is not relieved of ethical obligation just because the attorney has not intentionally used false evidence. The false evidence is there in front of the jury, and the lawyer must do something about it.¹²⁷

B. Discovering False Evidence After the Fact

When I was an assistant district attorney in New York, I prosecuted a case in which the victim told police he had been robbed of two hundred dollars. Shortly before trial, he discovered the existence of the Victim's Compensation Fund. When I asked him at trial how much money had been taken from him, he smiled and said, "Two *thousand* dollars." Despite the good faith of an attorney, false testimony happens.¹²⁸

¹²⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (stating that withdrawal is not permitted if it will have a "material adverse effect" on the client); *Sanborn v. State*, 474 So. 2d 309, 314 (Fla. Dist. Ct. App. 1985) (refusing to let a defendant's fifth attorney withdraw, balancing "the need for the orderly administration of justice with the fact that an irreconcilable conflict exists between counsel and the accused").

¹²⁵ Some commentators have suggested a narrative approach, in which the attorney steers directly toward the false evidence but then lets the witness testify in narrative form when they get there. See Lefstein, *supra* note 123, at 542 (indicating that counsel should direct the witness to make a statement). However, the narrative approach is explicitly rejected by the Model Rules, MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 9, and *Nix*, 475 U.S. at 171 (stating that, "under no circumstances may a lawyer either actively or passively tolerate a client's giving false testimony").

¹²⁶ Alan Dershowitz, *Is Legal Ethics Asking the Right Questions?*, 1 J. INST. STUD. LEGAL ETH. 15, 20 (1996).

¹²⁷ See RESTATEMENT (THIRD) OF THE LAW § 120 (2000) (stating if a lawyer has offered false evidence, "the lawyer must take reasonable remedial measures").

¹²⁸ Another common situation is when an accomplice wrongly denies cutting a favorable deal with the state. See *Brown v. Wainwright*, 785 F.2d 1457, 1461 (11th Cir. 1986).

When an attorney discovers that false evidence has been presented to the court, the attorney is required to take remedial action even though it is not the attorney's fault. Model Rule 3.3 (a)(4) states: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."¹²⁹

Despite this clear statement in the Model Rules, some commentators have argued that a lawyer is *not* obligated to take remedial action if the false evidence came from the client. Several justifications are offered; none is persuasive. Horgan suggests that taking remedial action would violate the attorney-client privilege and have a chilling effect on the attorney-client relationship, so an attorney should do nothing.¹³⁰ The problem is that presenting false evidence is perjury, and the attorney-client privilege does not apply to crimes and frauds.¹³¹ Liskov argues that, even if there is no privilege, taking remedial action would violate the requirement in Model Rule 1.6 that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents."¹³² However, the commentary says that the rule does not apply when the client engages in conduct such as perjury that is criminal or fraudulent.¹³³ Freedman suggests that acting against a client's wishes violates the right to counsel.¹³⁴ The Supreme Court, however, has ruled to the contrary that

¹²⁹ See also *Smith v. Kemp*, 715 F.2d 1459, 1463 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983) ("The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony.").

¹³⁰ Horgan, *supra* note 5, at 838, 862 (indicating that the only requirement is to avoid relying on the evidence in closing argument).

¹³¹ JOHN W. STRONG, MCCORMICK ON EVIDENCE § 95 (5th ed. 1999); see also RESTATEMENT (THIRD) OF THE LAW § 82 (2000) (stating that the attorney-client privilege does not apply when a client uses the lawyer or his advice to engage in a crime or fraud).

¹³² Liskov, *supra* note 5, at 889; see also FREEDMAN, *supra* note 20, at 31 (noting that "the attorney's obligation in such a situation would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward").

¹³³ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 11 (1983); see also *id.* R. 1.2(d).

¹³⁴ See FREEDMAN, *supra* note 20, at 29-30 (stating, "[t]he client did not choose the lawyer," and "once the lawyer has thus persuaded the client of the obligation of confidentiality, that obligation must be respected scrupulously").

defendants who inform counsel of criminal acts they plan to do "have no 'right' to insist on counsel's assistance or silence."¹³⁵ The arguments are belied by the clear requirement that remedial action is mandatory.

Model Rule 3.3 does not say what form that remedial action must take, and there is some debate about it. The preferred remedies for false evidence discovered before trial—dissuasion and withdrawal—are technically available for after-the-fact discoveries, but may not be realistic. The lawyer could ask for a recess, woodshed the client, and seek to persuade him to withdraw the false evidence.¹³⁶ The only problem is that judges are not generally inclined to permit attorneys to interrupt their direct examinations in order to hold a quick coaching session with their clients on what to say next, although this would appear to be a "critical stage" of the proceedings at which the client has a right to counsel.¹³⁷ An attorney could also ask to withdraw in the middle of a trial, but it is inconceivable that a judge would permit it. It also would seem to violate Model Rule 1.16(b)'s prohibition against withdrawal under conditions that would have a "material adverse effect" on the client.

The presumptive remedy would seem to be disclosure. Model Rule 3.3(a)(2) requires that a lawyer must "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Perjury and presenting false evidence are criminal and fraudulent acts. Dissuasion and withdrawal are unlikely to be adequate, so the disclosure becomes "necessary." The commentary explains:

[T]he rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer

¹³⁵ *Nix v. Whiteside*, 475 U.S. 157, 174, 106 S. Ct. 988, 998, 89 L. Ed. 2d 123, 139 (1986).

¹³⁶ This is the preferred remedy in ABA Comm. on Ethics and Prof'l Resp. Formal Op. 87-353 (1987).

¹³⁷ See *Mudd v. United States*, 798 F.2d 1509, 1511 (D.C. Cir. 1986). Some federal courts have suggested that a criminal defendant's right to counsel at all "critical stages" of a trial would mean that a lawyer may consult with the client in the middle of the client's examination.

cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.¹³⁸

Although the commentary cautions that it “has been intensely debated” whether the requirement of remedial action applies in criminal cases,¹³⁹ it does not take the position that the requirement is in fact ethically debatable. To the contrary, the commentary rejects the suggestion “that the advocate be entirely excused from the duty to reveal the perjury if the perjury is that of the [criminal] client” because it would make the attorney a knowing instrument of perjury.¹⁴⁰ If dissuasion has not worked, “the advocate should make disclosure to the court.”¹⁴¹ The disclosure requirement is not optional; it is mandatory and applies in criminal cases as well as civil.¹⁴²

C. Inadmissible Evidence

One part of the good-faith basis principle is that an attorney must have a legal basis for offering evidence. The attorney must be able to point to a rule of evidence that plausibly supports the item’s admissibility, and also have a subjective belief that the evidence properly be admitted under that rule. To offer inadmissible evidence is therefore unethical.

The ethical prohibition against trying to slip in inadmissible evidence seems fairly clear under the Model Rules, though it is not stated explicitly. Model Rule 3.4(c) states that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal,” and the rules of a tribunal include its evidence rules. Offering inadmissible evidence would seem to be

¹³⁸ MODEL RULES OF PROF’L CONDUCT R. 3.3, cmt. 6.

¹³⁹ *E.g.*, Horgan, *supra* note 5, at 853 (stating that some scholars think disclosure undermines the trust between attorney and client, which is the “cornerstone of the adversary system and effective assistance of counsel”) (citing *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981)).

¹⁴⁰ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 9.

¹⁴¹ *Id.* cmt. 11.

¹⁴² *Id.* ¶ 12; *see also Nix*, 475 U.S. at 174 (stating that a rule which “would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct”). *Contra* RESTATEMENT (THIRD) OF THE LAW § 120 (2000).

knowingly disobeying court rules, as would asking an improper question and then withdrawing it if there is an objection.¹⁴³ Rule 3.4(e) states that a lawyer shall not “in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.” This means more than just that a lawyer may not mention inadmissible evidence in his opening statement. An attempt to offer it or get it before the jury would seem also to fall within the idea of an allusion to inadmissible evidence.¹⁴⁴

A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.¹⁴⁵

An argument can be made that it is not the attorney's duty in the adversary system to anticipate the opponent's objections and the judge's rulings. The argument goes like this: Judges are given broad discretion to rule on the admissibility of evidence,¹⁴⁶ so they might allow evidence the attorney thinks is inadmissible. Evidence not objected to is entitled to consideration by the jury,¹⁴⁷ and an attorney does not know if the opponent will object. Therefore, an attorney never “knows” for sure whether evidence will be ruled admissible or inadmissible. This view may be compatible with the approach that the attorney must do everything possible for a client except present false evidence, but it cannot be

¹⁴³ See *In re McDonald*, 609 N.W.2d 418, 426 (N.D. 2000) (stating that withdrawing improper evidence after a challenge does not cure an ethical violation).

¹⁴⁴ See, e.g., *FORTUNE ET AL.*, *supra* note 17, at 379-81 (noting that counsel may allude to inadmissible evidence by deliberately asking an improper question or commenting on the court's rulings).

¹⁴⁵ AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT § 18(g) (1972).

¹⁴⁶ E.g., *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 457 (Ind. 2001) (referring to the “presumptive correctness” of the trial court's decision to exclude evidence).

¹⁴⁷ E.g., *Mitchell v. State*, 619 N.E.2d 961, 963 (Ind. Ct. App. 1993) (allowing otherwise inadmissible evidence to be considered when offered without timely objection).

squared with the good-faith principle. The attorney is offering evidence without a good-faith basis regardless of whether the opponent is competent enough to object or the judge will rule correctly.¹⁴⁸

The one aspect of the inadmissible-evidence problem that has received some attention in the ethics literature is the *side show*. A side show is a non-evidentiary visual display staged for the jurors' benefit that is intended to have an influence on the jurors without ever finding its way into evidence. The examples of this problem are drawn mostly from the past, so it is not clear whether this is a genuine problem today. Fortune and Underwood collected the following examples:

a. In a personal injury case in which plaintiff lost a leg, plaintiff's lawyer left an L-shaped package wrapped in butcher paper on counsel table throughout trial.¹⁴⁹

b. In a case brought by a widower for the wrongful death of his wife, the defendant's lawyer arranged for an attractive young woman to pretend to be the plaintiff's new girlfriend, sit near him during trial, and occasionally lean over and ask him innocuous questions, and touch him gently.¹⁵⁰

c. Defense counsel arranged for a look-alike to don the defendant's clothes and sit in the defendant's place, while the real defendant sat in the back of the courtroom. This caused several eyewitnesses to misidentify the accused.¹⁵¹

d. In a criminal case in front of a predominantly African-American jury, the defense attorney arranged to have boxing champion Joe Louis walk into the courtroom in full view of the jury and shake his client's hand.¹⁵²

Such displays are not just clever courtroom advocacy, nor are they excusable because they do not rise to the level of presenting false evidence. They are unethical violations of the good-faith principle because the attorney has no legal basis for staging a side show. It is improper under rules of procedure and evidence.

¹⁴⁸ See *Onstad v. Wright*, 54 S.W.3d 799, 807-08 (Tex. App. 2001) (showing an attorney sanctioned for eliciting inadmissible evidence even though the opponent did not object).

¹⁴⁹ RICHARD UNDERWOOD & WILLIAM FORTUNE, TRIAL ETHICS 331-32 (1988).

¹⁵⁰ *Id.* at 332.

¹⁵¹ *Id.* at 333.

¹⁵² FORTUNE ET AL., *supra* note 17, at 382.

I am concerned not only with evidence that violates the substantive rules of evidence because it is irrelevant, unauthenticated, hearsay, and so forth, but also violations of the procedural rules for introducing evidence. Procedural rules govern the proper form of the questions and answers that make up the examinations. The best known is the rule against asking leading questions on direct examination,¹⁵³ but other rules preclude both repetitive interrogation¹⁵⁴ and questions that are argumentative,¹⁵⁵ assume facts not in evidence,¹⁵⁶ or misstate the evidence.¹⁵⁷

Despite these procedural rules, attorneys frequently ask improper questions or make improper rhetorical comments,¹⁵⁸ especially during cross-examination. For example, in the movie "Adam's Rib,"¹⁵⁹ Amanda Bonner defends a woman charged with the attempted murder of her husband and Beryl Caine. In one scene, she cross-examines Beryl Caine seeking to establish that she was having an affair with her client's husband:

Q: Were you wearing a black silk lace negligee?

A: Yes.

Q: Speak up, Miss Cain, we're all very interested in what you have to say.

A: Yes.

Q: What else? . . . Shoes? Slippers?

A: Yes.

¹⁵³ FED. R. EVID. 611(c).

¹⁵⁴ E.g., *Wielgus v. Lopez*, 525 N.E.2d 1272, 1274 (Ind. Ct. App. 1988) (limiting repetitious questioning as discretionary).

¹⁵⁵ E.g., *McDonald v. State*, 340 So. 2d 103 (Ala. Crim. App. 1976); Mark P. Denbeaux & D. Michael Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 438, 485 (1980).

¹⁵⁶ E.g., *Hopkinson v. Chicago Trans. Auth.*, 211 Ill. App. 3d 825, 844, 570 N.E.2d 716, 729 (App. Ct. 1991) (demonstrating that experts may assume facts not in evidence); *School City of Gary v. Claudio*, 413 N.E.2d 628, 634 (Ind. Ct. App. 1980) (sustaining an objection to a question that "assumed a fact not in evidence").

¹⁵⁷ E.g., *State v. Barcomb*, 136 Vt. 141, 385 A.2d 1089, 1089-90 (1978) (holding that it was error to allow the state's attorney to misquote evidence during questioning); *State v. Staten*, 271 N.C. 600, 606, 157 S.E.2d 225, 230 (1967) (holding that the lower court erred in "allowing the state to question its own witness in a manner that amounted to a leading misstatement of the witness' testimony").

¹⁵⁸ FORTUNE ET AL., *supra* note 17, at 398-401.

¹⁵⁹ Ruth Gordon & Carson Kanin, *Adam's Rib* (MGM 1949).

Q: Which?

A: Slippers.

Q: Stockings?

A: Yes.

Q: Think again.

A: No.

Q: Nothing else?

A: Yes!

Q: What?

A: A hair ribbon.

Q: Is this your usual costume for receiving casual callers?

Prosecutor: Objection.

Defense: Withdrawn. Uh, uh, Miss Cain, you said, uh, Mr. Attinger came to see you about—

A: —About another insurance policy. I said this already.

Q: Well, say it again.

A: Mr. Attinger came to collect on my policy and explain me another kind.

Q: You hold?

A: Straight life, 3,000.

Q: And he came to discuss?

A: Health and accident.

Q: Huh, he showed remarkable foresight in this, wouldn't you say?

....

Q: Miss Cain, a while ago you said, uh, um, [to court reporter] would you be kind enough to read me some of Miss Cain's testimony. Uh, she just fainted, I believe, for the first time.

Court reporter: "So I guess I must have started to conk out or something. Excuse me, to faint or something. So Mr. Attinger grabbed me—"

Q: Ah, that's it, thank you very much. You said Mr. Attinger grabbed you.

A: Yes.

Q: Had he ever grabbed you before?

A: No.

Q: Never, before?

A: No.

Q: You're aware that you're under oath, Miss Cain, and that any false answer makes you liable to perjury.

A: Yes.

Q: Mr. Attinger had never touched you before this time?

A: Sure.

Q: Ahh!

A: We used to shake hands quite a lot.

Defense: I see. Did you enjoy it?¹⁶⁰

¹⁶⁰ *Id.*

The intentional asking of improper questions for rhetorical purposes seems also to contravene the good-faith basis principle. The attorney lacks a reasonable belief that the question as asked is proper, and is therefore violating an established rule of the tribunal.¹⁶¹ Overly aggressive cross-examination that intimidates, browbeats or harasses a witness is also unethical.¹⁶²

Closely related to the rhetorical question is the rhetorical objection, also known as a "speaking objection." Under the customary rules of evidence, attorneys may state the legal basis for an objection within the hearing of the jury, but must make any extended argument outside the jury's hearing. This rule is routinely tested by attorneys who make "speaking objections" containing short arguments or summaries of evidence aimed at the jury. In most instances, speaking objections are clear, intentional violations of customary objection procedure, and therefore unethical. For example:

Q: What did you see next?

A: I saw a blue car drive by that looked like the defendant's car.

Defense: Objection, irrelevant and prejudicial. We've already established that the defendant was home with his mother, so it couldn't have been his car the witness saw.

However, all speaking objections are not clearly unethical. For example, an attorney might object to the opinion of a medical expert by saying:

"This opinion is unreliable because it is based solely on the self-serving complaints of the plaintiff, made after his lawyer told him he would need an expert to testify for him."

¹⁶¹ See FORTUNE ET AL., *supra* note 17, at 371-74.

¹⁶² This is reinforced by Model Rule 4.4, which prohibits using cross-examination to harass, embarrass, or degrade a witness. It requires that lawyers respect the rights of third persons, including witnesses being cross-examined, and refrain from using any means "that have no substantial purpose other than to embarrass" a witness. MODEL RULES OF PROF'L CONDUCT R. 4.4 (1983).

Does this objection violate the good-faith principle because it is deliberately argumentative, or is it merely a restatement of the requirement in Rule 703 of the Federal Rules of Evidence that the facts or data used by an expert must be shown to be reasonably reliable? Keeton suggests the following solution:

Using a frivolous objection as a vehicle for expressing some argument to the jury is a practice condemned both by rules of procedure and by professional standards. On the other hand, expressing serious objections in a manner calculated to appeal to the jury as well as the court is generally regarded as a proper practice, and clearly it is proper to give attention to phrasing objections in such a way as to avoid causing an affirmatively adverse reaction by jurors. [However, if the argumentative part of the objection is overemphasized,] your statement is subject to the same criticism as a frivolous objection used for making an argument. The distinction is primarily one of degree, and great differences of opinion exist regarding such practices.¹⁶³

D. Dubious Evidence

An attorney's use of false evidence is ethically prohibited under both the false evidence rule and the good-faith principle. However, with respect to evidence that is not provably false but is nevertheless of dubious reliability, the ethical standard makes a big difference. The ethics of using evidence which is inadmissible, misleading, unreliable or incomplete, is simply not addressed by the false evidence rule. This has resulted either in the problem being ignored in the ethics literature,¹⁶⁴ or in unconvincing arguments that attorneys must use dubious evidence to fulfill their duty of zealous representation because the evidence is not known for sure to be false.¹⁶⁵ Quite a different result is reached when one holds these practices up to the good-faith standard.

¹⁶³ ROBERT E. KEETON, TRIAL TACTICS AND METHODS 196 (2d ed. 1973).

¹⁶⁴ For example, the issue is not discussed in the *Restatement of Law*.

¹⁶⁵ Such arguments do not usually persuade courts reviewing ethical charges. See Fla. Bar v. Cox, 794 So. 2d 1278, 1284 (Fla. 2001) (quoting Oath of Admission to the Florida Bar that attorney may not "mislead the judge or jury by any artifice").

1. Misleading Evidence

The problem of misleading evidence is harder—it is neither false nor inadmissible. What happens if an attorney—by selective use of evidence, trickery, and half-truths—uses true evidence to create a false impression? This issue has been discussed at length in an analysis of Monroe Freedman's question, "Is it proper to discredit a witness whom you know to be telling the truth?"

Your client has been . . . accused of a robbery committed at 16th and P Streets at 11:00 p.m. He tells you [he was in the vicinity] at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 p.m., he was six blocks away. At the trial, [the prosecution calls] an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 p.m.¹⁶⁶

Can you attempt to destroy the witness's credibility through cross-examination designed to show that she is easily confused and has poor eyesight, to mislead the jury and create the false impression that she is mistaken in her identification?

The problem is not confined to cross-examination, of course. Misleading evidence that creates a false impression may be also be offered on direct examination. For example, extending Freedman's hypothetical, suppose the day of the crime was June 1, but the elderly witness mistakenly testifies the crime took place on June 2. The client has admitted to his attorney that he committed the crime on June 1, but has an airtight alibi for June 2. May an attorney, in addition to vigorously cross-examining the witness about her failing eyesight, present truthful testimony of the client's alibi on June 2? None of the evidence is false, but it misleads the jury and is almost certainly going to lead to an unjustified acquittal of the armed robber.¹⁶⁷

¹⁶⁶ Freedman, *supra* note 6, at 1474-75; see also Lawry, *supra* note 11; Schwartz, *supra* note 76; Selinger, *supra* note 85; Subin, *supra* note 86, at 125.

¹⁶⁷ See Mich. Ethics Op. CI-1164 (1987) (holding that "[a] criminal defense lawyer may present truthful alibi witness testimony, even though the lawyer knows the client has committed the crime charged").

Freedman thinks there is nothing unethical about presenting and relying on truthful but misleading evidence if it is genuinely beneficial to the client and increases his chances of acquittal.

[I]f you should refuse to cross-examine her because she is telling the truth, your client may well feel betrayed, since you knew of the witness's veracity only because your client confided in you, under your assurance that his truthfulness would not prejudice him. . . . [T]he same policy that supports the obligation of confidentiality precludes the attorney from prejudicing his client's interest in any other way because of knowledge gained in his professional capacity. [If] a lawyer fails to cross-examine only because his client . . . has been candid with him, [the lawyer is using those confidences against his client.] The client's confidences must "upon all occasions be inviolable," to avoid the "greater mischiefs" that would probably result if a client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance." Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."¹⁶⁸

Therefore, Freedman concludes, the attorney is obligated to attack the reliability or credibility of the victim and, by extension, offer the alibi testimony.

Yet, does not intentionally creating a false impression violate the good-faith basis principle? If the victim has correctly identified the defendant, counsel does not have a good-faith basis for insinuating that she is wrong because of poor eyesight, and it is difficult to imagine that poor eyesight is relevant to any other purpose. Poor eyesight is not a material issue in its own right. Proving that she has poor eyesight or other physical defect "just for the heck of it" violates both the part of the good-faith basis principle that requires a believe that evidence is relevant,¹⁶⁹ and the prohibition against using "means that have no substantial purpose other than to embarrass" a witness.¹⁷⁰

¹⁶⁸ Freedman, *supra* note 6, at 1474-75 (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 150, and *Greenough v. Gaskell*, 1 Myl. & K. 98, 103, 39 Eng. Rep. 618, 621 (Ch. 1833)).

¹⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (1983).

¹⁷⁰ *Id.* R. 4.4.

Francis Wellman's classic *The Art of Cross Examination* sets a higher ethical standard.¹⁷¹ The purpose of cross-examination is to "catch truth," not to make the false look true and the true, false:

The purpose of cross-examination should be to catch truth, ever an elusive fugitive. If the testimony of a witness is wholly false, cross-examination is the first step . . . in an effort to destroy that which is false. . . . If the testimony of a witness is false only in the sense that it exaggerates, distorts, garbles, or creates a wrong sense of proportion, then the function of cross-examination is to whittle down the story to its proper size and its proper relation to other facts. . . . [But if] the cross-examiner believes the story told to be true and not exaggerated . . . then what is indicated is not a "vigorous" cross-examination but a negotiation for adjustment during the luncheon hour. . . . No client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth.¹⁷²

The same is true for presenting the misleading alibi evidence. The attorney lacks a good-faith basis for believing that evidence of his client's alibi on June 2 is relevant to a crime that happened on the first. In the well known words of Lon Fuller, a lawyer "plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature."¹⁷³ Statements and evidence by an attorney designed to make the jury believe something which is not true is "a species of false statements of fact to a tribunal, which are condemned by Model Rule 3.3(a)(1)."¹⁷⁴ Indeed, when the attorney first hears the witness mistakenly give the day of the crime as June 2, the attorney has discovered that false evidence has been presented to the jury, and is

¹⁷¹ FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 216 (4th ed. 1936), quoted in Lawry, *supra* note 11, at 566.

¹⁷² *Id.*

¹⁷³ Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

¹⁷⁴ Selinger, *supra* note 85, at 101; Subin, *supra* note 86, at 135; see Fla. Bar v. Cox, 794 So. 2d 1278, 1284 (Fla. 2001) (stating that the Oath of Admission to the Florida Bar provides in part that an attorney "will never seek to mislead the judge or jury by any artifice").

required to take appropriate remedial action—disclose the falsity. The attorney may not ethically take advantage of unexpected favorable false evidence, even if the attorney had nothing to do with its creation.

2. Unreliable Evidence

Unreliable evidence poses more of a problem than either inadmissible or misleading evidence. Unreliable evidence is not actually false, it only *might* be false. Therefore, presenting unreliable evidence is not a violation of the false evidence rule. Neither is unreliability usually a ground for inadmissibility—reliability goes to weight, not admissibility.¹⁷⁵ Therefore, presenting unreliable evidence does not violate the legal-basis part of the good-faith principle. Lawyers encounter unreliable evidence all the time—a wife supplies her husband's alibi, an heir says the decedent promised her the house, or a CEO denies any knowledge of wrongdoing by junior executives. Lawyers also present that unreliable evidence all the time, although perhaps with some vague misgivings. Is it unethical to do so?

Two facets of the problem of a lawyer using favorable but unreliable evidence have been addressed sporadically, if superficially, in the literature. One thread deals with aggressive witness coaching that does not rise to the level of a deliberate attempt to get a witness to change his story, but probably does alter the evidence. Discussions of the ethical limits of witness coaching usually begin with the famous "lecture" from *Anatomy of a Murder*, and end with the conclusion that, since the lawyer has not actually suborned perjury and does not know for sure that the client's story is false, the lawyer may ethically use the evidence.¹⁷⁶ The second thread deals with compensation to witnesses, and whether it is

¹⁷⁵ E.g., *United States v. Lopez*, 271 F.3d 472, 477 n.2 (3d Cir. 2001) (refusing to find eyewitness identifications "inherently unreliable" and inadmissible in court); *Jackson v. Johnson*, 150 F.3d 520, 526 (5th Cir. 1998) (holding that the reliability and weight of a videotape were questions for the jury). The notable exception is expert and scientific evidence, which must be shown to be reliable before it is admissible. See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2794, 125 L. Ed. 2d 469, 480 (1993).

¹⁷⁶ E.g., Applegate, *supra* note 5, at 301-02; Freedman, *supra* note 6, at 1478-82. But see A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 926, 947-57 (criticizing a lawyer who suborned perjury).

ethical to compensate accomplices or experts in exchange for favorable evidence. These discussions usually end with the conclusion that, because it is not unlawful to compensate these two classes of witnesses, and the attorney does not know their testimony is false, it is also ethical.¹⁷⁷ Pivotal to both of these debates has been whether the attorney knows the evidence is false, so they have begged the main question: What is a lawyer's ethical responsibility concerning unreliable evidence?

a. Examples

(1) Witness coaching that falls just short of suborning perjury

The following example, from *Anatomy of a Murder*, illustrates an attorney's attempt to walk a fine line:

"As I told you," I began, "I've been thinking about your case during the noon hour. . . . [A]s things presently stand I must advise you that in my opinion you have not yet disclosed to me a *legal* defense to this charge of murder. . . . In fact, Lieutenant, for all the elaborate hemorrhage of words in the law books about the legal defenses to murder there are only about three basic defenses: one, that it didn't happen but was instead a suicide or accident or what not; two, that whether it happened or not you didn't do it, such as alibi, mistaken identity and so forth; and three, that even if it happened and you did it, your action was legally justified or excusable." I paused to see how my student was doing.

The Lieutenant grew thoughtful. "Where do I fit in that rosy picture?" he responded nicely.

"I can tell you better where you don't fit," I went on. "Since a whole barroom full of people saw you shoot down Barney Quill in apparent cold blood, you scarcely fit in the first two classes of defenses. I'm afraid we needn't waste time on those." I paused. "If you fit anywhere it's got to be in the third. So we'd better bear down on that."

"You mean," Lieutenant Manion said, "that my only possible defense in this case is to find some justification or excuse?"

My lecture was proceeding nicely according to schedule. "You're learning rapidly," I said, nodding approvingly. "Merely add *legal* justification or excuse and I'll mark you an A. . . .

¹⁷⁷ E.g., George C. Harris, *Testimony for Sale: the Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000).

He paused. "Tell me, tell me more about this justification or excuse business. Excuse me," he added, smiling faintly, "I mean *legal* justification or excuse."

"Well, take self-defense," I began. "That's the classic example of justifiable homicide. . . . Then there's the defense of habitation, defense of property, and the defense of relatives or friends. Now there are more ramifications to these defenses than a dog has fleas, but we won't explore them now. I've already told you at length why I don't think you can invoke the possible defense of your wife. When you shot Quill her need for defense had passed. It's as simple as that. . . . Then there's the tricky and dubious defense of intoxication. Personally I've never seen it succeed. . . . Then finally there's the defense of insanity." I paused and spoke abruptly, airily: "Well, that just about winds it up." I arose as though making ready to leave.

"Tell me more."

"There is no more." I slowly paced up and down the room.

"I mean about this insanity."

"Oh, insanity," I said, elaborately surprised. It was like luring a trained seal with a herring. "Well, insanity, where proven, is a complete defense to murder. It does not legally justify the killing, like self-defense, say, but rather excuses it. . . . If a man is insane, legally insane, the act of homicide may still be murder but the law excuses the perpetrator. . . ."

The Lecture was about over. The rest was up to the student. The Lieutenant looked out the window. He studied his Ming holder. I sat very still. Then he looked at me. "Maybe," he said, "maybe I was insane."

Thoughtfully: "Hm. . . . Why do you say that?"

"Well, I can't really say," he went on slowly, "I-I guess I blacked out. I can't remember a thing after I saw him standing behind the bar that night until I got back to my trailer."

"You mean—you mean you don't remember shooting him? You don't even remember driving home?"

"No."

"My, my," I said, blinking my eyes, contemplating the wonder of it all. "Maybe you've got something there."¹⁷⁸

¹⁷⁸ ROBERT TRAVER, *ANATOMY OF A MURDER* 35-47 (Gramercy Books 2000); see also Dershowitz, *supra* note 126, at 22. Dershowitz commented of lectures by prosecutors to police:

It's not that prosecutors tell the police witnesses to lie. It's that prosecutors give lectures at police academies, brief police witnesses, outline [for] them the parameters of the exceptions to the exclusionary rule, and then turn a blind eye to the amazing coincidence that virtually every search happens to fit into one of the exceptions to the exclusionary rule.

Dershowitz, *supra* note 126, at 22.

(2) Compensating lay witnesses

In *United States v. Wilson*, Robert Wilson created an offshore corporation supposedly for the purpose of trading in government securities as a tax shelter for individual investors.¹⁷⁹ The corporation never actually traded in securities, and Wilson was charged with tax fraud and related crimes. Joseph Tritt, a broker retained by Wilson, fabricated a paper trail purporting to represent actual trades.¹⁸⁰

Tritt and his wife, Katherine, reached a plea bargain with the Government. They received immunity from prosecution and a letter of agreement from the government that they would be eligible for the so-called "finder's fee"—substantial monetary rewards from the Government based on the recovery of unpaid taxes by the IRS from Wilson and his bogus corporation.¹⁸¹ If they "fully cooperated" and their testimony was substantially helpful in collecting back taxes, the Tritts' reward could be as high as \$11 million.¹⁸² After reaching the agreement, the Tritts testified at trial that they had held discussions with Wilson regarding the elaborate measures to be taken to simulate trading losses to match the tax losses desired by investors and had fully produced their phony notes and documents at Wilson's request.¹⁸³

(3) Hiring experts

The following dialog, from *The Verdict*, is a cross-examination of a plaintiff's expert in a medical malpractice case.

Q: Good morning doctor. Dr. Thompson, just so the jury knows, you never treated Deborah Ann Kay, is that correct?

A: Yes, that's correct. I was engaged to render an opinion.

Q: Engaged to render an opinion—for a price. That is correct, you are being paid to be here?

A: Just as you are sir.

¹⁷⁹ 904 F.2d 656, 657-59 (11th Cir. 1990).

¹⁸⁰ *Wilson*, 904 F.2d at 657.

¹⁸¹ *Id.* at 658.

¹⁸² *Id.*

¹⁸³ *Id.* at 657.

- Q: Are you board certified in Anesthesiology?
A: No, I'm not. It's quite common in New York State to practice. . . .
Q: Yes, I'm quite sure it is, but this is Massachusetts. Are you board certified in Internal Medicine?
A: No.
Q: Neurology?
A: No.
Q: Orthopedics?
A: No. I'm just an M.D. . . .
Q: How old are you doctor?
A: I'm seventy-four years old.
Q: Do you still practice a lot of medicine?
A: I'm on the staff of
Q: Yes, yes, I've heard that, but you do testify quite a bit against other physicians. Isn't that correct? You are available for that, so long as you're paid to be there?
A: Sir— yes.¹⁸⁴

b. Witness Coaching

(1) Legal Advice

Is it ethical to give a client legal advice with the knowledge that it will tempt the client to commit perjury? This dilemma is commonly illustrated by the scene in *Anatomy of a Murder* in which the attorney explains to his client that the case against him looks grim—numerous witnesses saw him shoot Barney Quill in cold blood. His only hope is an insanity defense. Only after the lecture does the attorney ask Manion what happened. Lo and behold, Manion cannot recall key events—he must have blacked out.¹⁸⁵

This problem has been debated at length in the ethics literature as a question of whether the lawyer is acting within the ordinary scope of zealous adversarial representation, or has created false testimony. Freedman argues that the lawyer has done nothing wrong. The lawyer has an obligation to explain the law to the client and to assume the client is telling the truth. The lawyer has no clear knowledge that this “conve-

¹⁸⁴ THE VERDICT (20th Century Fox 1982).

¹⁸⁵ TRAVER, *supra* note 178.

nient" evidence is actually false, so there is no ethical impediment to using this evidence.¹⁸⁶ The late Ken Pye disagreed with Freedman, and found the lawyer's conduct an indefensible attempt to fabricate testimony, amounting to deliberate suborning perjury. He argues that the attorney is intentionally creating false evidence and knows perfectly well that Manion is lying.¹⁸⁷ Many other commentators have joined this debate.¹⁸⁸ The debate seems endless and unresolvable, because it is impossible to say for certain whether a lawyer "knows" that a client's self-serving evidence is actually false.

But it is clear that the lawyer knows the evidence is unreliable. The lawyer has intentionally created the conditions that make it so. The lawyer has effectively told the client what would be the most effective lies to make up, and then left it to the client's conscience and self-interest whether to take the hint. When the client comes up with the perfect answers, they are highly dubious and undoubtedly more favorable than he might otherwise have answered if he had been interviewed before being given the lecture. The lawyer knows this, which is why he gave the lecture in the first place. The very act of manipulation defeats the lawyer's claim of a good-faith belief that the client's story is true. The creation of this evidence and its use at trial would therefore be an unethical violation of the good-faith principle. The lawyer lacks a good-faith basis to believe the evidence is true.

(2) Leading and Suggestive Questions

A second problem with witness coaching involves the use of leading and suggestive questions. A lawyer might use such questions intention-

¹⁸⁶ Freedman, *supra* note 6, at 1478-79. Freedman goes farther and suggests that explanations about the law are good because they may help a client understand what facts are important, and thus reduce the likelihood that the client will not reveal because of an erroneous belief they are irrelevant. *Id.* at 1479.

¹⁸⁷ Pye, *supra* note 176, at 926, 947-57.

¹⁸⁸ E.g., GEOFFREY HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 443-48 (2d ed. 1994); Wydick, *supra* note 5, at 25-37 (discussing the relationship between witness coaching debates and the movie, *Anatomy of a Murder*).

ally to try to produce "better" evidence from a witness or client than he would provide naturally, or may use them inadvertently.

The deliberate use of suggestive interviewing techniques, like giving "the lecture" in *Anatomy of a Murder*, obviously produces unreliable evidence. Engaging in the practice to shape the testimony to make it more favorable than it otherwise would have been makes the result unreliable and ethically unusable.

However, the evidence obtained from an interview may be unreliable because the lawyer inadvertently uses suggestive interviewing techniques. Wydick calls this "Grade Three" witness coaching,¹⁸⁹ where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story. Indeed, psychologists have shown that the very act of interviewing will produce distorted and inaccurate testimony.¹⁹⁰ Because interviewing is necessary and its distorting effect on memory inevitable, it obviously cannot be generally unethical to interview witnesses and then call those with favorable evidence at trial.¹⁹¹

This calls for a clarification of the good-faith basis principle. What constitutes a subjective belief that the testimony of a witness is "true?" Because all testimony is distorted somewhat by questioning, what would constitute "true" testimony? For purposes of applying the good-faith principle, we cannot hold an attorney who has properly interviewed witnesses to a higher standard of factual reliability than if the witness had not been interviewed without creating a bizarre disincentive for an attorney to conduct proper investigation that is at odds with the attorney's

¹⁸⁹ Wydick, *supra* note 5, at 37-41.

¹⁹⁰ E.g., Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAVIOR 585 (1974) (indicating subjects gave significantly higher estimates of the speed of a vehicle when asked how fast it was going when it "smashed" into another car than when asked about it "hitting" another car). The extensive empirical literature on the distorting effect of leading and suggestive questions is summarized in Applegate, *supra* note 5, at 330-34; ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2-2 (2d ed. 1992).

¹⁹¹ Wydick, *supra* note 5, at 41-52. Wydick suggests that lawyers adopt "non-suggestive" interviewing techniques recommended by psychologists to avoid inadvertent unreliable evidence, but it is not bad faith if an attorney does not do so. We are attorneys, not psychologists.

duty to investigate and prepare.¹⁹² Thus, an attorney will have a good-faith basis that a witness's testimony is reliable and "true" to the extent that it represents the witness's own recollection expressed to the best of the witness's ability. The attorney lacks a good-faith basis if the attorney's use of leading and suggestive questions alters either what the witness remembers, or significantly changes the way the witness would otherwise express it. The good-faith basis principle does not depend on an analysis of whether the evidence is "true" or "false" in some objective sense, but on whether the attorney has manipulated it.

(3) Aggressive Witness Preparation

In *The Verdict*, there is a wonderful scene in which eleven people from a defense firm prepare their client for trial by rehearsing his direct examination. The client is an anesthesiologist accused of medical malpractice.

Initially, the doctor's responses to his lawyer's direct examination questions are stiff, patronizing, and clinical. After forceful prompting, however, the doctor is convinced to talk in emotional, human terms that suggest his caring nature and superhuman efforts on his patient's behalf. His lawyers accomplish this transformation by pressing the doctor to adopt substitute terms and phraseology that they suggest and by applauding the witness when he shows his emotions.¹⁹³

The prep goes as follows:

- Q: What is your name please?
A: Dr. Robert Towler.
Q: You were Debra Ann Kay's doctor?
A: No, actually, she was referred to me. She was Dr. Hangman's patient
....
Q: Don't equivocate. Be positive. Whatever the truth is, just say it. You were her doctor?
A: Yes.
Q: Say it.

¹⁹² See subsection IV.C., *supra*, Duty to Investigate Factual and Legal Bases.

¹⁹³ Zacharias & Martin, *supra* note 5, at 1002-03.

- A: I was her doctor.
- Q: You were her anaesthesiologist at the delivery on May 12, 1976?
- A: Well I was one of a group of medical
- Q: Answer affirmatively and simply, please, and try to keep your answers down to three words. You were not part of a group, you were her anesthesiologist, isn't that so?
- A: Yes.
- Q: You were there to help Dr. Marks deliver the child.
- A: Yes.
- Q: Anything special about the case?
- A: Well, when she had been
- [Associate raises his hand]
- Q: When Debby, thank you. . . .
- A: Thank you. When Debby had been
- Q: Remember that, Dr. Towler. Who else was with you in the operating room.
- A: Miss Nevins, nurse anesthesiologist, Dr. Marks of course, Maureen Rooney
- Q: What did all these people do when her heart stopped?
- A: We went to code blue
- Q: Would you mind explaining to the jury what that means?
- A: It's a common medical expression. It's a crash program to restore her heartbeat. Dr. Marks cut an airway in her trachea so she could get oxygen, she and the baby.
- Q: Why wasn't she getting oxygen?
- A: Well many reasons really.
- Q: Tell me one.
- A: She had aspirated vomitus into her mask.
- Q: She threw up in her mask. Now cut the bullshit, please. Just say it. She threw up in her mask.
- A: She threw up in her mask
- Q: Therefore she wasn't getting oxygen and her heart stopped.
- A: That's right.
- Q: What did your team do then?
- A: Well
- Q: You brought 30 years of medical experience to bear, isn't that what you did?
- A: Yes
- Q: A patient riddled with complications, with questionable information on her medical charts.
- A: We did everything we could
- Q: To save her and to save the child.
- A: Yes.
- Q: You reached down into death.

A: My god, we tried to save her, you can't know

Q: Good, good.¹⁹⁴

Where does one draw the line concerning aggressive witness preparation? No competent attorney would dream of calling a witness, especially a client, without adequate preparation.¹⁹⁵

The lawyer must try to elicit all relevant facts and to help the client—who, typically, is not skilled at articulation—to marshal and to express his or her case as persuasively as possible. . . . That is done by asking questions and by explaining to the client how important the additional information may be to the case. . . . The process of preparing or coaching the witness, of course, goes far beyond the initial eliciting of facts. In the course of polishing the client's testimony, [some lawyers recommend] as many as fifty full rehearsals of direct and cross-examination. During those rehearsals, the testimony is developed in a variety of ways. The witness is vigorously cross-examined, and then the attorney points out where the witness has been "tripped" and how the testimony can be restructured to avoid that result. The attorney may also take the role of witness and be cross-examined by an associate. The attorney's "failures" in simulated testimony are then discussed, and the attorney then may conduct a mock cross-examination of the associate. In that way, new ideas are developed while all the time the client is looking on and listening. He probably is saying, "Let me try again." And you will then go through the whole process once more. By that time, as one might expect, the client "does far better". In fact, after many weeks of preparation, perhaps on the very eve of trial, the client may come up with a new fact that may perhaps make a difference between victory and defeat.¹⁹⁶

The best resolution would seem to be that if the prep changes the *substance* of a witness's testimony in ways that are more favorable than the witness's unprepped testimony would have been, the resulting testimony is unreliable as the witness's true recollection.¹⁹⁷ If the attorney is aware of the change, and especially if the attorney has deliberately caused it, the attorney cannot ethically present it. A lawyer must either

¹⁹⁴ David Mamet & Barry Reed, *The Verdict* (20th Cent. Fox 1982).

¹⁹⁵ See, e.g., J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 258-64 (2d ed. 1993) (discussing pretrial preparation and professional responsibilities of an attorney).

¹⁹⁶ FREEDMAN, *supra* note 20, at 59-76; see also Applegate, *supra* note 5, at 279.

¹⁹⁷ Wydick, *supra* note 5, at 39-40.

“prep” it back to the way it was (dissuade the witness from giving the enhanced version) or forgo proffering it. In the example from *The Verdict*, the defense lawyer cannot ethically present the doctor’s testimony that Debra Ann Kay was his patient and he was her doctor, because both pieces of evidence have come from the attorney and materially changed the witness’s natural testimony. On the other hand, where the prep merely refreshes the witness’s memory, makes him comfortable with the examination process, or changes the *form* of the testimony to maximize its effectiveness without changing its meaning, the attorney still has a good-faith basis for believing the final product is reliable and can ethically use it.¹⁹⁸ In the example from *The Verdict*, when the lawyer gets his client to call his patient by name, and to say “throw up” instead of “aspirated vomitus,” he has not changed the substance of the testimony and has conducted an ethical prep.

(4) Refreshing Recollection at Trial

Rules of evidence permit the use of leading questions, documents, reports, depositions and other devices to “refresh” the memory of a witness who, under the spotlight of courtroom interrogation, has forgotten something the witness once knew.¹⁹⁹ When does this procedure cross the

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., *United States v. Weller*, 238 F.3d 1215, 1221-22 (10th Cir. 2001); *Baker v. State*, 35 Md. App. 593, 598-99, 371 A.2d 699, 702-03 (Ct. Spec. App. 1977). The classic summary of the rule is from Judge Jerome Frank in *Fanelli v. United States Gypsum Co.*:

Common experience, the work of Proust and other keenly observant literary men, and recondite psychological research, all teach us that memory of things long past can be accurately restored in all sorts of ways. The creaking of a hinge, the whistling of a tune, the smell of seaweed, the sight of an old photograph, the taste of nutmeg, the touch of a piece of canvas, may bring vividly to the foreground [of] consciousness the recollection of events that happened years ago and which would otherwise have been forgotten. . . . The memory-prodder may itself lack meaning to other persons as a symbol of the past event, as everyone knows who has ever used a knot in his handkerchief as a reminder. Since the workings of the human memory still remain a major mystery after centuries of study, courts should hesitate before they glibly contrive dogmatic rules concerning the reliability of the ways of provoking it.

141 F.2d 216, 217 (2d Cir. 1944).

line from ethical assistance for a nervous witness to the unethical changing of a witness's natural testimony? Does it matter if the lawyer uses the witness's own pretrial statement to refresh, uses a statement prepared by another, or uses a leading question invented by the attorney? The problem is analogous to pre-trial preparation.²⁰⁰ As long as the result enables a witness to fully describe the witness's own recollection, it is ethical. For example, if the attorney uses the witness's own statement to refresh recollection, the attorney still has a good-faith basis for believing that the refreshed testimony is a reliable account of the witness's own knowledge. So, too, if the attorney asks a leading question that does no more than reflect what the witness told the lawyer earlier during interviewing, the result is not problematic. Both of these results assume that the attorney has an *objective* basis for the evidence—a statement or interview—against which to compare the refreshed trial testimony. Without the objective basis, the suggestiveness of refreshing memory makes the resulting testimony unreliable as the witness's own recall.

A slightly different problem is raised if the attorney uses a different witness's statement²⁰¹ or a suggestive leading question based on the attorney's overall knowledge of the case, to refresh memory. If the result is testimony on matters within the witness's personal knowledge and consistent with the witness's original statement or interview, the process is not problematic. But if the result is testimony that differs from the original statement, the attorney lacks a good-faith subjective belief that the altered testimony is reliable. If the witness gave no prior statement or interview, so that the attorney has no objective basis for knowing what the witness's natural testimony would have been, the inherent suggestiveness of refreshing memory with another's statement or the attorney's suggestive questions deprives the lawyer of a good-faith basis for

²⁰⁰ See *Baker v. State*, 35 Md. App. 593, 603 n.12, 371 A.2d 699, 705 n.12 (Ct. Spec. App. 1977) (Generally speaking, the process of refurbishing a witness's memory will take place as a part of astute counsel's trial preparation. It is only when memory, through courtroom fear or otherwise, unexpectedly bogs down on the witness stand—or when the witness whose memory needs refreshing is one other than counsel's own—that the courtroom becomes the arena for the refurbishing.).

²⁰¹ See, e.g., *United States v. Weller*, 238 F.3d 1215, 1221-22 (10th Cir. 2001) (denying a witness's attempt to use an appraisal report to "refresh" her recollection of the value of antiques).

believing that the refreshed testimony is the witness's own recollection, and the procedure is an unethical creation of unreliable evidence.

c. Witness Compensation

Lawyers routinely compensate witnesses in exchange for their testimony. Bribing witnesses would seem particularly sleazy, unethical, and likely to produce unreliable evidence. Indeed, several courts have held that outright cash payments to witnesses is wrong. The West Virginia Supreme Court held that it was unethical to pay a witness \$6,500 who refused to testify without being compensated.²⁰² The Illinois Supreme Court reached the same result, finding it unethical to pay law enforcement officials fifty dollars.²⁰³ In neither case was there any proof the money was intended to coerce false testimony. The court found the practice an ethical violation regardless of whether the witness was being paid for false or truthful testimony. Hazard and Hodes state that "it is well-established . . . that witnesses may not be paid a fee for telling the truth, for that is their duty in any event."²⁰⁴

The courts and commentators have had some difficulty coming up with an explanation of exactly why paying witnesses is unethical. They usually state somewhat vaguely that "[t]he payment of a sum of money to a witness to 'tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true."²⁰⁵ This is

²⁰² *Committee on Legal Ethics v. Sheatsley*, 192 W. Va. 272, 276-77, 452 S.E.2d 75, 80 (1994).

²⁰³ *In re Howard*, 69 Ill. 2d 343, 354, 372 N.E.2d 371, 376, 14 Ill. Dec. 360, 375 (1977).

²⁰⁴ 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 3.4:301, at 632 (Supp. 1998); see *Golden Door Jewelry Creations Inc. v. Lloyd's Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1526 (S.D. Fla 1994) ("Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so.").

²⁰⁵ *In re Robinson*, 136 N.Y.S. 548, 556 (1912); see also *Fla. Bar v. Jackson*, 490 So. 2d 935-36 (Fla. 1986) (holding that witness payments constitute "conduct that is prejudicial to the administration of justice").

usually expressed as a truism requiring no explanation.²⁰⁶ Such banal statements are ludicrous, of course. Paying for false testimony is obviously wrong and unethical. It is not so obvious though that compensating a witness for all the time, irritation, and stress of being a witness is so clearly subversive of the administration of justice. When I was an assistant district attorney in New York, I frequently had to abandon prosecutions because witnesses would not testify. Some were afraid, but others simply could not take the time from work and family to be commuting around New York City for various hearings, depositions, grand jury appearances and trials. I could have done *more* for the proper administration of justice if I had been allowed to pay them.

It is also sometimes suggested that payments to witnesses constitute bribery,²⁰⁷ and it is unethical for an attorney to violate a criminal law²⁰⁸ or "offer an inducement . . . that is prohibited by law."²⁰⁹ However, bribery generally requires as an element of corruption—the giving of something of value for false testimony or to influence the witness to change or alter testimony.²¹⁰ Payments to witnesses for their expenses, time and trouble, as an inducement for them to cooperate and tell the truth, do not constitute bribery as long as the payments are "reasonable."²¹¹

One reason the issue of witness payments has been elusive has been the focus in the literature on the false evidence rule. Paying a witness for truthful testimony in order to do everything possible for a client would seem almost *required* under the view that all zealous advocacy is ethical except presenting false evidence. And indeed, that argument has been

²⁰⁶ *In re Howard*, 372 N.E.2d at 375 ("The damage that would immediately accrue to our system of justice, should it be acceptable to pay for truthful testimony, is manifest."); *In re Kein*, 69 Ill. 2d 355, 361, 372 N.E.2d 377, 378, 14 Ill. Dec. 365, 379 (1977) (stating that the court "[did] not find persuasive respondent's argument that payment for 'truthful' testimony is less harmful to our judicial system than is payment for false testimony or fabrication of evidence").

²⁰⁷ Harris, *supra* note 177, at 9-12.

²⁰⁸ MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c) (1983).

²⁰⁹ *Id.* R. 3.4(b).

²¹⁰ *E.g.*, *Golden Door Jewelry Creation v. Lloyds Underwriters Non-Marine Ass'n.*, 865 F. Supp. 1516, 1524 (S.D. Fla. 1994).

²¹¹ *See* 18 U.S.C. § 201 (2001).

made to justify the two most common situations in which witnesses are generously compensated: prosecutors buying the testimony of accomplices with greatly reduced sentences, and tort lawyers hiring slews of "expert" consultants, both vaguely troubling practices.

The good-faith principle may be a better vehicle for analyzing the ethics of witness payments, because it does not distinguish between payments producing false testimony and perjury, and payments producing unreliable testimony. Paying money to a witness provides an inducement for the witness to give favorable testimony for the party providing the payments. Even if the testimony would have been favorable anyway, it induces exaggeration and an effort to make it even more favorable. This makes the testimony unreliable. All trial lawyers know this. The first thing we do when the other side pays its witnesses is to bring out that fact on cross-examination to impeach the witness's credibility. We argue in closing that the testimony was bought and paid for, is unreliable, and should be ignored. If we recognize that paid witnesses are unreliable when our opponent pays them, we must also recognize it when we pay our own witnesses. A lawyer who makes such payments can no longer have a good-faith belief that the resulting evidence will be accurate and unaltered.

This is probably the most violated rule of ethical evidence: civil practitioners routinely enter into "Mary Carter agreements," giving potential opposing parties lenient settlement terms in exchange for their testimony.²¹² Prosecutors routinely offer deals to accomplices exchanging lenient treatment for testimony against a co-defendant. The lenient treatment may be a grant of immunity, a recommendation for leniency, or even a cash reward.²¹³ The sine qua non of all such agreements is that

²¹² See *American Med. Int'l Inc. v. Nat'l Union Fire Ins. Co.*, 244 F.3d 715, 718 n.1 (9th Cir. 2001) (stating an arrangement between a plaintiff and a defendant whereby the exposure of liability of the settling defendant is limited, "usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the non-settling defendant or defendants" (quoting BLACK'S LAW DICTIONARY 974 (6th ed. 1990)). The term comes from the case of *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. App. 1967).

²¹³ See Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447, 462-67 (2000) (describing various common forms of leniency).

the testimony of the witness will be helpful to the lawyer's case.²¹⁴ Attorneys defend the practice as being necessary to obtain *truthful* testimony from a witness who would otherwise withhold it because of self-interest. However, if the truthfulness of the testimony does not permit an outright cash payment, it does not permit other valuable compensation. Evidence that a witness has made a favorable settlement is, like direct payment, admissible to impeach.²¹⁵ To the extent that any rewards are contingent upon the outcome of the trial, the inducement seems particularly strong.

As a general matter, an attorney would seem to lack a good-faith basis for using testimony that has been bought for two reasons. First, compensation makes favorable testimony unreliable. It is as likely to be the result of quid pro quo as it is to be the witness's genuine recollection. The attorney lacks a subjective good-faith belief in its accuracy. Second, the attorney will in most cases lack an objective factual basis for it. The potential defendant will usually have given initial statements to police or investigators denying any involvement in the event. Only after being compensated will the witness recant that initial statement and start to remember that the witness was indeed involved, but it was all a co-defendant's fault. Thus, the attorney is seeking to present evidence that is not supported by the witness's original written statement. Presenting such testimony is unethical.

I am aware that most courts hold this kind of testimony admissible.²¹⁶ However, "admissible" is not the same thing as "ethical." Courts acknowledge that compensated testimony is unreliable, but suggest that the danger of false testimony is adequately mitigated by disclosure, cross-examination, and cautionary jury instructions.²¹⁷ I am unpersuaded this

²¹⁴ Harris, *supra* note 177, at 18.

²¹⁵ E.g., FED. R. EVID. 408 (evidence of compromise agreements excluded except "when the evidence is offered [to prove] bias").

²¹⁶ E.g., *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *United States v. Singleton*, 165 F.3d 1297, 1300-01 (10th Cir. 1999) (en banc); *United States v. Cervantes-Panceho*, 826 F.2d 310, 313-15 (5th Cir. 1987) (holding that incriminating witness testimony is admissible and not a violation of the Fourth Amendment when the defendant relied on the witness to maintain confidence).

²¹⁷ Harris, *supra* note 177, at 20.

is relevant to a discussion of ethics. The unreliability of the evidence determines whether it is ethical to use this testimony. It is not. Whether evidence is admissible is only one part of the good-faith basis principle. To ethically use such evidence, the attorney must *also* have a good-faith belief that it is accurate. It is the latter which is lacking for testimony that has been bought.

d. Compensating Experts

The problem may be at its height in the area of expert witnesses who are given tens of thousands of dollars for favorable testimony. Perhaps caught up in adversarial zeal, many lawyers see nothing wrong with dangling a large fee in front of several potential experts to see which will come up with the most favorable report.²¹⁸ The Model Rules contain no acknowledgment that this is even a problem, or that unreliable bought-and-paid-for evidence is being elicited every day from expert consultants. Indeed, the Model Rules explicitly permit an expert to be paid for preparation and for testimony in court.²¹⁹ The only prohibition seems to be against contingent fees.²²⁰ An expert who is to be paid only upon a favorable verdict may be induced to give stronger or more positive testimony than he otherwise would give. For that reason, ethical rules have always prohibited such arrangements.²²¹

If an attorney paid \$10,000 to an ordinary witness to encourage him to testify, the attorney would be acting unethically without regard to whether the bribe actually produced false testimony. Yet there seems to be nothing ethically or legally wrong with paying large sums of money to experts to induce them to testify for your client. This distinction seems bizarre. Why is an "expert" any less susceptible to financial inducements? Three possible justifications can be rejected:

²¹⁸ See *id.* at 37.

²¹⁹ MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (1983); see RESTATEMENT (THIRD) OF THE LAW § 117 (2000) (stating that an expert may be paid a fee).

²²⁰ MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 3.

²²¹ RESTATEMENT (THIRD) OF THE LAW § 117 (2000) (stating that an expert fee must be "noncontingent"); see, e.g., Note, *The Contingent Compensation of Expert Witnesses*, 52 IND. L.J. 671 (1977); Note, *Contingent Fees for Expert Witnesses*, 86 YALE L.J. 1680 (1977).

1. *Experts are wealthier than ordinary witnesses and therefore less susceptible to bribery.* The problems with this argument are: (a) some experts are wealthy *because* they are professional witnesses, and (b) it is illegal to bribe a wealthy lay witness just as it is a poor one—the only difference may be the amount of money needed.

2. *Experts must be compensated for lost income that results from their taking time away from their regular jobs.* The problems with this argument are: (a) Many professional consultants do not have other jobs to be taken away from; (b) many experts are employed by universities or research institutes on yearly salary and therefore suffer no income loss by taking time off to testify; and (c) ordinary witnesses lose income when they testify at trial, but are compensated (if at all) only by statutory witness fees. That is, if a physician happened to witness a traffic accident, she might lose just as much time through interviews, depositions, hearings, preparation and testimony without being compensated.

3. *Many cases, especially personal injury and product liability torts, could not be successfully prosecuted without experts.* Most cases could not be successfully prosecuted or defended without lay witnesses, too, but we make them testify for free.

That leaves me baffled as to the ethical distinction between the two classes. No claim can be made that it advances justice in any way to have a half-dozen hired-gun experts on each side to battle things out.

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue.²²²

Current expert witness practice would seem merely to give an advantage to the side with greater resources and seriously disadvantage a party with a legitimate claim but limited funds.²²³ Nor is there any reason to think that because it is an adversarial system, a defendant has a “right” to an

²²² *Winas v. New York & E.R. Co.*, 62 U.S. 88, 101, 21 How. 88, 101, 16 L. Ed. 68, 71 (1858).

²²³ See Harris, *supra* note 177, at 37.

expert if the plaintiff has one. If a plaintiff has been injured and received medical care, we can subpoena the doctors who treated her and the medical records, and the jury can decide on compensation. If a plaintiff is not paying the doctor large sums, there is no reason to think the doctor will routinely commit perjury on behalf on plaintiffs, so the defendant will not have to bribe another doctor to give contrary evidence after "reviewing the file." The whole current system is absurd. If there is one area in which the evidence seems overwhelming that money corrupts witnesses and makes their testimony unreliable, it is the area of experts.

The practice may be common, but so is cheating on income taxes. Frequency is not the same thing as being ethical. Buying favorable evidence from a consultant and presenting that testimony in court is hard to justify as anything other than what it is—unreliable testimony tailored to be as favorable as possible toward the employer. The attorney lacks a good-faith basis for believing that the evidence is anything else.²²⁴

E. Using Unreliable Evidence Not Created by the Lawyer

The discussion thus far has assumed that the lawyer participates in the creation of unreliable evidence. But suppose that is not the case. Evidence may be unreliable through no fault of the attorney. For example, during a recent panel discussion on the ethics of evidence, a lawyer with many years of experience in family law asked what we thought about using the testimony of obviously coached children in custody disputes. He gave as an example a scenario in which the attorney sits down to talk to a child and the child says, "Oh yes, before I forget. Daddy's behind in his child support." The child then proceeded to give a well-prepared narrative of all the evil things Daddy had done to Mommy.

Another example is offered by Alan Dershowitz:

[In the O.J.] Simpson case . . . Marcia Clark and Chris Darden . . . knew . . . that the police account of the search was [dubious]. Everyone suspected

²²⁴ See *id.* at 41-45. The abuses associated with expert witnesses "have been accompanied for at least a hundred years by calls for reform of the expert witness system." E.g., Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53-56 (1901).

Simpson on the morning of the murders. [W]hen I first saw the television news of the two victims, one of them being Simpson's former wife, and heard an account of Simpson's previous arrest for spousal abuse, I turned to my wife and said, of course O.J. is the obvious suspect. . . . So everybody suspected O.J. Simpson, with the exception of five people, that is, the five police officers who swore under oath that they didn't suspect Simpson. As Van Atter put it, I no more regarded O.J. Simpson as a suspect than I did you, Mr. Shapiro.²²⁵

Perhaps the clearest situation is the use of charlatans as "experts." The leading example is a psychiatrist in Texas named James Grigson, who became known as "Dr. Death" after he testified against the accused in more than fifty death sentence hearings.²²⁶ In every case, whether he had examined the defendant or not, he testified that in his medical opinion the defendant had no regard for human life and was a remorseless sociopath who would continue his violent behavior if released.²²⁷ In all but one case, the jury then imposed a death sentence.²²⁸ Dr. Grigson was well known to favor the death penalty, and he could be counted on to give devastatingly effective testimony supporting capital punishment.²²⁹ Prosecutors continually used him to give such testimony, without regard to whether it was scientifically reliable, even after the American Psychiatric Association condemned him and said that no psychiatrist could accurately predict long-term behavior under these circumstances.²³⁰

Lawyers shop for expert witnesses all the time, seeking those who will give favorable testimony and rejecting those who will not, regardless of the merits of the case. The sad fact is that, even if all respectable experts hold a contrary view, someone can be found to testify as an expert for any view if one looks long enough.

²²⁵ Dershowitz, *supra* note 126, at 18.

²²⁶ Joseph R. Tybor, *Dallas' Doctor of Doom*, NAT'L L.J., Nov. 24, 1980, at 1.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See *id.*; see also Brief for the American Psychiatric Ass'n, filed in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (extensively discussing and condemning Grigson's methods and conclusions).

Is calling an expert known to be biased, who can be counted on to give favorable testimony regardless of the facts, unethical? It does not amount to subornation of perjury in the same sense as hiring a witness willing to testify to anything for a fee because it does not run afoul of the prohibition in Model Rule 3.3 against offering evidence *known* to be false. If frequency of occurrence were the measure of ethical conduct, there would be nothing wrong with this practice.

The good-faith principle, however, requires something more than a shrug and the observation that everyone's doing it. To say simply that it is ethical to present experts such as Dr. Death, and that doing so complies with the minimal legal requirements of expert testimony, is an incomplete answer. Having a legal basis for evidence is only part of the good-faith requirement. An attorney must also believe the evidence is accurate. Using a person to testify as an expert who can be counted on to give a favorable opinion, regardless of the merits, is presenting unreliable evidence that does not meet the good-faith standard.²³¹

Despite the fact that lawyers know they are presenting unreliable evidence, they continue to do so in the zealous pursuit of victory. For example, civil plaintiffs routinely use "consulting" experts willing to testify for a fee that cellular phones cause brain tumors, abortions cause breast cancer, television shows cause sociopathic juveniles to commit crimes, or that Prozac causes suicide. Civil defendants routinely call "experts" employed by them or an industry-funded research institute. For instance, General Motors engineers might testify that the placement of saddle-bag gas tanks on GMC pick-up trucks is safe, or scientists for the American Tobacco Institute might testify that there is no proven connection between smoking and cancer. Criminal prosecutors rely on "forensic experts" employed by the FBI or other law enforcement agencies who give completely unreliable opinions on handwriting identification²³² and

²³¹ See MARTIN L. NORTON, *ETHICS IN MEDICINE AND LAW: STANDARDS AND CONFLICTS*, IN *LAWYERS' ETHICS* 269-70 (A. Gerson ed. 1980).

²³² See Mark P. Risinger, D. Michael Denbeaux & Michael Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 U.P.A. L. REV. 731, 779-81 (1989) (concluding that there is no actual scientific basis for handwriting identification).

hair comparison.²³³ Criminal defendants call "experts" who make up mental conditions like the child sexual abuse syndrome.²³⁴

What is the solution? It is simple, but painful. As lawyers, we have become addicted to something harmful for which we are paying large sums of money. It is making the purveyors of bad evidence rich. We must recognize it as an addiction and stop. Our ability to do this is hampered by our self-delusion that because we do not *know* that the expert's opinions are false (after all, they are they experts), we may use them. If we did not use a crooked expert when everyone else does, we may be disadvantaging our client and not providing zealous representation.

We must stop fooling ourselves that this narrow view represents the whole world of ethical principles, and ask about the ethics of using these experts under the good-faith principle. Under that standard, the most fundamental, basic requirement of expertise is disinterestedness and scientific detachment.²³⁵ An expert who is biased, makes a good living as a professional witness, is testifying for his or her employer, or works for law enforcement and is called by the State, does not meet the most basic concept of an expert witness. The attorney lacks a good-faith basis to use that evidence. If we are serious about ethical evidence, let the parties or the judge²³⁶ seek the advice of a genuine expert. If that advice is unfavorable, settle the case.

F. Incomplete Evidence

One final issue is worth examining that has not previously been discussed in the ethics literature: Is an attorney's decision to present incomplete evidence unethical?

²³³ See *McGrew v. State*, 673 N.E.2d 787 (Ind. App. 1996) (stating that the court must be satisfied that expert testimony is scientifically reliable).

²³⁴ *Fleener v. State*, 656 N.E.2d 1140 (Ind. 1995) (holding that expert testimony was not proven reliable).

²³⁵ ROBERT MERTON, *THE SOCIOLOGY OF SCIENCE* 275-77 (1996).

²³⁶ See FED. R. EVID. 706 (stating that the judge may appoint an expert witness).

One aspect of incomplete evidence is easy. It is unethical to destroy or hide unfavorable evidence, or to refuse to turn it over in discovery.²³⁷ Model Rule 3.4 provides that “[a] lawyer shall not [u]nlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”²³⁸ Therefore, if the presentation of incomplete evidence is due to the attorney’s withholding it from the opposing party, it is unethical.

The harder determination is whether an attorney may attempt to create a false impression by withholding evidence from trial. I am not talking about the usual selection process, in which attorneys make decisions to focus their cases on a few main points and not waste the jury’s time with irrelevancies or redundant witnesses. There is nothing unethical about that, because the good-faith principle requires that the attorney believe the evidence to be relevant and admissible in order to offer it.²³⁹ Evidence withheld that is tangential, irrelevant, or a needless waste of time²⁴⁰ presents no ethical issue.

The question is whether it is ethical to withhold *material* evidence from the jury for tactical reasons, hoping that one’s opponent will also not offer it, and the jury will thereby not fully understand the scope of evidence against one’s client. It is tempting to adopt the view that zealous representation in an adversary system relieves one of any responsibility to present complete evidence.²⁴¹ No lawyer must do the other side’s job, and as long as the unfavorable evidence has been made available in discovery, the non-disclosing party can shrug and say it is not their job. After all, they did not make an affirmative misrepresentation.

²³⁷ *But cf.* RESTATEMENT (THIRD) OF THE LAW § 118(2) (2000) (stating that a lawyer may not destroy evidence “when doing so would violate a court order or other legal requirements”).

²³⁸ MODEL RULES OF PROF’L CONDUCT R. 3.4 (a) (1983).

²³⁹ *Id.*

²⁴⁰ FED. R. EVID. 403.

²⁴¹ FREEDMAN, *supra* note 20, at 9-24. *Cf.* Wolfram, *supra* note 76, at 833 (arguing for a loftier view of the adversary system). *But see In re Anonymous*, 346 S. Ct. 177, 193-94, 552 S.E.2d 10, 18 (2001) (stating that claiming an improper behavior was merely “zealous advocacy” will not justify it).

The issue is not quite so simple, however, if the opponent is incompetent.²⁴² If counsel assumes her opponent will offer the evidence and he does not do so, the jury will end up with a false impression of the facts. The fact that the impression is false by omission rather than commission is irrelevant. There is little difference between creating a misrepresentation through offering evidence or through concealing it.²⁴³ The fact that there was no intent to deceive the court at the beginning is irrelevant.²⁴⁴ If false evidence has been presented to the jury, and if the attorney allows that false evidence to go uncorrected, the result is the attorney misleading the court and jury. The attorney's obligation is therefore the same as for discovering other kinds of false evidence—to take some remedial action because the attorney lacks a good-faith basis for believing that the evidence presented to the jury is accurate. In the usual case, the appropriate remedy is disclosure to the court.

VII. Conclusion

The ethics of evidence involve more than a duty to be a zealous advocate and a rule against using false evidence. If that were all there were to it, trial attorneys would be ethically obligated to present unreliable and misleading evidence to a jury in an effort to deceive them, and to try to smuggle inadmissible evidence into the trial by ignoring the rules of evidence. Although some commentators have argued under slightly different terminology for exactly this result, it is clearly unacceptable. Ethics are not simply rules to be interpreted in the light most favorable

²⁴² See *Shack v. State*, 231 N.E.2d 36 (Ind. 1967) (holding that the defendant's counsel was incompetent at the trial court level).

²⁴³ See *In re Huffman*, 331 Or. 209, 215, 13 P.3d 994, 998 (2000) (en banc) (holding that, in a disciplinary action, "misrepresentation" includes an affirmative misstatement or an intentional failure to disclose material facts); *In re Forrest*, 158 N.J. 428, 433, 730 A.2d 340, 343 (1999) (stating that an attorney has an affirmative duty to disclose material facts); see also ERIC M. HOLMES & MARK S. RHODES, APPLEMAN ON INSURANCE 2D § 4.34 (1996) (stating that a party to an insurance contract violates the duty to act in good faith by either misrepresentation or concealment of material fact; they are the same thing).

²⁴⁴ *In re Huffman*, 331 Or. 209, 215, 13 P.3d 994, 998 (2000) (suspending an attorney for two years for deceiving the court) (en banc).

to clients, but moral principles that are supposed to guide our behavior as members of an honorable profession.

The ethic that proves the most helpful in analyzing how attorneys gather, prepare and present evidence is the good-faith principle. Lawyers have an obligation to present only evidence believed to be the truthful, unaltered, natural recollection of witnesses, and which is admissible under the rules of evidence. They should not fabricate evidence or use false evidence fabricated by a client. They should not manipulate evidence in a way that misleads the jury. They should not create unreliable evidence through suggestive preparation techniques or outright bribery. They have an obligation to make sure that all material evidence is before the jury. Underwood is wrong when he says there is no rule against trickery. The good-faith principle is expressed in a dozen ways throughout the Model Rules, and it should play a more prominent role in the evidentiary decisions we make.

