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The Professional and the Liar

Richard H. Underwood
University of Kentucky College of Law, runderwo@uky.edu

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ARTICLES

The Professional and the Liar*

BY RICHARD H. UNDERWOOD**

INTRODUCTION

MEPHISTO:
Sancta simplicitas!
Who ever thought of that?
Just testify,
and hang whether it’s true!¹

"[N]o fact is too patent to be denied."²

Lawyers in criminal cases, for prosecution
and defense, sometimes swim in a sea of lies ³

CONFIDENTIALITYnoun. An obligation
not to disclose the TRUTH.⁴

** Spears-Gilbert Professor of Law, University of Kentucky. B.S. 1969, J.D. 1976, Ohio State University. Co-author, WILLIAM T. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK (1996), and the earlier RICHARD H. UNDERWOOD & WILLIAM T. FORTUNE, TRIAL ETHICS (1988); Editor of the Kentucky Ethics Opinions and Professional Responsibility Deskbook (UK/CLE); Former Chairman, Ethics and Unauthorized Practice Committees, Kentucky Bar Association.
² ARTHUR TRAIN, THE CONFESSIONS OF ARTEMAS QUIBBLE 83 (Charles Scribner’s Sons 1924).
³ United States v. Zuno-Arce, 44 F.3d 1420, 1423 (9th Cir. 1995) (arising from the murder of DEA Agent Enrique Camarena-Salazar).
Mephisto, Old Scratch—the Devil by any other name—has been associated with lawyers since “the beginning.” Here is Britain’s poet Coleridge’s offering on the subject:

[The Devil] saw a Lawyer killing a Viper
On a dung heap beside his stable,
And the Devil smiled, for it put him in mind
Of Cain and his brother, Abel.⁵

Since I am an American lawyer, my natural reaction is to counter with a fallacious argument, *ad hominem*.⁶ Coleridge was a drug addict, and he was not very good about footnoting his sources either.⁷ Take that!

Coleridge’s poem may be among the nastiest of lawyer put-downs, but there are always new contenders. James Halpern, a first-time novelist and full-time corn collector, just published a novel titled *The Truth Machine.*⁸ As the story unfolds, software prodigy Randall Armstrong comes up with the ultimate lie detector—a *truth machine that actually works!* Good news? Not at all. The author takes great pleasure in announcing, as early as the jacket cover, that “[m]ost lawyers find themselves looking for new, productive jobs.”⁹

Another recent shot at lawyers came from an unlikely quarter—the “science” of archeology. A team of would-be Indiana Joneses working in Iraq (prior to the invasion of Kuwait and the Gulf War) claim to have found the biblical Sodom in the scorched ruins of a place called Mashkan-shapir. The city appears to have been an administrative and judicial center. The theory is that it was destroyed around 1900 B.C. when migrating underground oil and gas erupted from the earth and was ignited by cooking fires, creating a *pillar of fire*—a favorite Biblical attention grabber. Our earth-moving lawyer-bashers contend that this headquarters of the “Babylonian supreme court” was also the center of a

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⁵ *Samuel Taylor Coleridge, The Devil’s Thoughts,* in *The Poetical Works of Samuel Taylor Coleridge* 147 (James D. Campbell ed., 1924). As for Mephisto, it is notable that the Greek word for devil—*diabolos*—also means “slanderer.” *IV Oxford English Dictionary* 569 (2d ed. 1989).


⁹ *Id.* at dust jacket (emphasis added).
sort of Mephistophelian cult. Its citizens worshipped a sickle-carrying Satan prototype named Nergal. Referring to the destruction of the place, our critics quote Genesis: "Then Abraham fell upon his face and laughed." This quotation is wrenched way out of its original context, which makes one wonder about the whole Nergal-Sodom thing. You just cannot trust archaeologists. They are notoriously ideological and hardly more reliable than lotus-eating poets.

Still, archaeologists and poets are not the only people who think that all lawyers are liars. Some think lawyers are allowed to lie. Regrettably, some American lawyers apparently think so too.

Is that right? For example, may a lawyer knowingly elicit false testimony? Suppose that a lawyer’s client lies to the fact-finder, whether judge or jury. Assume that the lawyer was taken by surprise by the falsehoods of the client (perhaps the testimony was volunteered, given other than in response to the lawyer’s questions, or even given contrary to the lawyer’s instructions or warnings). May the lawyer use the false testimony to make the best case for the client? Must a lawyer ever disclose the truth to correct the client’s perjury? Sissela Bok, a certified moral philosopher, shares and has expressed the public’s doubt that such questions ever cross the minds of lawyers, or if they do, that the organized bar has ever taken any coherent position as to the correct answers. Being an academic, she is not without citations of authority:

[O]ne recent textbook on the professional responsibility of lawyers holds merely:


11 PELLEGRINO, supra note 10, at 177 (quoting Genesis 17:17).

There is simply no consensus, for example, as to the lawyer's duty to the court if he knows his client is lying. In that and other situations a lawyer can only be sensitive to the issues involved and resolve these difficult cases as responsibly as he or she is able. Closer to throwing up one's hands one cannot get. To leave such choice open to the sensitive and the responsible without giving them criteria for choice is to leave it open as well to the insensitive and the corrupt.\footnote{SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 162 (1978) (quoting THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 2 (1976)).}

In fairness, it ought to be said that the author Bok quoted was not stating his preference. He was, in a way, simply making the same observation that Bok was making—\textit{that in the United States there has been, and continues to be, a troubling lack of professional consensus when it comes to actual cases}.\footnote{Because the 50 state bar associations are not bound to adhere to the current views of an ABA drafting committee, this is still true. Cf. Karen L. K. Miller, \textit{Zip To Nil? A Comparison of American and English Lawyers' Standards of Professional Conduct, in Civil Practice and Litigation Techniques in the Federal Courts} 199, 221 (A.L.I.-A.B.A. Course of Study, 1995) (“The Model Rules, the public and the legal community have not agreed [on] how to reconcile these ‘trilemmas,’ allowing and leaving lawyers to sort out their own personal answers.”).} Indeed, lawyers who are neither corrupt nor insensitive have been accused by Bok of arguing that the elicitation of false testimony, and the use of it, \textit{is a professional responsibility}.\footnote{See BOK, supra note 13, at 159. This is Bok's characterization of such professional commentators as Monroe Freedman, \textit{see MONROE FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM} 27-42 (1975), and Charles Curtis, \textit{see Charles P Curtis, The Ethics of Advocacy}, 4 STANFORD L. REV. 3 (1951). This, too, strikes me as an unfair characterization, for reasons that shall be set out shortly.} Fairness also calls for some acknowledgment that even the most cunning, zealous, and successful of trial lawyers have agonized over such moral choices. For example, Adela Rogers St. Johns recounts several such struggles in her powerful biography of her father, Earl Rogers.

\textit{[Rogers, in defense of a man who “because he was stuck on another woman shot his wife in cold blood,”] argued, “Mootry loved his wife. He did not kill her. Martha, sitting there with her Bible—could any man no matter how low he had fallen slay his wife, as she sat in their home with her Bible open in her hands? Can you [members of the jury] believe any}
man would dare to do that? Wouldn’t he expect a bolt from heaven to strike him down?”

“No. Martha was growing stone deaf. She was in ill health that made her days a misery. She saw long years of pain and illness ahead of her in a world where she could hear no sound. So she dared to take her own life rather than be a burden on her husband.” The jury found Mootry not guilty.

[Reverend Rogers, the lawyer’s father,] watched Mootry, free, horribly triumphant, simper up with outstretched hand to thank the man who had procured an acquittal. “Get away from me you slimy pimp,” Earl Rogers said in disgust, “you’re guilty as hell.”

My grandfather walked out quietly. That night he sent for [Earl and] said, “There is a line as clear and broad to an honest man as the line between good and evil or right and wrong always is. You must draw that line Earl. The proper defense which is the right of every American citizen high or low in our republic. These words a proper defense constitute a line of sacred truth. An attempt to save a man you know to be guilty from justice by dishonest or deceptive means crosses that line. You see that?”

“The debate on this has been going on for centuries between the best minds in the legal profession,” Earl said. “As I see it, it is my business to defend everybody.”

“Very well, very well!” his father said, and got up and came over and patted his shoulder again, emphasizing his words. “Defend everybody. I agree to that. But with honor. If you use your talent, your power, to take one step over that line you are one with the criminal.” “Earl,” he said solemnly, “you can never lie in word, thought, or deed to save a man from justice. It would have been better for you if this man Mootry had been found guilty as you knew him to be.”

Skeptics and cynics may dismiss Reverend Rogers’s advice, but his son did not, and Earl Rogers was one of the greatest trial lawyers of American history. There are, in fact, rules of professional ethics relating to the use of false evidence. We do not have to rely solely upon the discretion of the “sensitive and responsible,” as it may be supplemented from time to time by the advice of the Reverend Rogers of the world. But if there is some professional consensus or agreed etiquette, what does it amount to in the application? What do the ethical rules mean on the dueling grounds?

I. THE PROFESSIONAL AND THE LIAR

A. The Rules of the Game

"You will observe the Rules of Battle, of course?" the White Knight remarked, putting on his helmet too.

"I always do," said the Red Knight, and they began banging away at each other with such fury that Alice got behind a tree to be out of the way of the blows.

"I wonder, now, what the Rules of Battle are," she said to herself, as she watched the fight, timidly peeping out from her hiding-place.\(^{17}\)

[My father] used to tell us that from his earliest days he had an ambition to be a lawyer, but his father had told him that, unless he would forego this ambition, he would not send him to school, as all lawyers were liars.\(^{18}\)

[Resolve to be honest at all events. \(^{19}\) If in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.\(^{19}\)

As a lawyer, my agenda has nothing to do with truth and justice. It has to do with winning within a certain set of rules.\(^{20}\)

\(^{17}\) Lewis Carroll, More Annotated Alice: Alice's Adventures in Wonderland and Through the Looking-Glass and What Alice Found There 276 (1990).

\(^{18}\) Arthur G. Powell, I Can Go Home Again 27 (1943). This is reminiscent of the joke: "Please don't tell my mother I'm a lawyer. She thinks I play the piano at the local bordello." Also, my late father-in-law, a retired coal miner, told his daughter (my wife), "I'd rather you grow beans!" when she announced that she was quitting her job as a teacher in rural Virginia to go to law school.

\(^{19}\) John Frank, Lincoln as a Lawyer 4 (1961) (quoting Abraham Lincoln, Notes for a Law Lecture (July 1, 1850)). In a Comment appearing in the Nebraska Law Review, lawyer Andrew Reisman notes that Lincoln's contemporaries occasionally felt that Lincoln was a bit too honest, sometimes at the expense of his clients. In several cases of note, Lincoln delivered uninspired and ineffective performances or literally abandoned clients mid-trial if he became convinced that they were guilty or that they were advancing false claims or defenses. See Andrew Reisman, Comment, An Essay on the Dilemma of "Honest Abe" The Modern Day Professional Responsibility Implications of Abraham Lincoln's Representations of Clients He Believed to Be Culpable, 72 Neb. L. Rev 1205 (1993).

\(^{20}\) Leslie Scanlon, Judge Subpoenas Lawyers to Defend Secret Prozac Deal: Significant Evidence May Have Been Withheld from Jury, COURIER-JOURNAL
Somehow that last point did not sound quite as bad when Simon Rifkind said essentially the same thing: "[T]he object of a trial is not the ascertainment of truth but the resolution of a controversy by the principled application of the rules of the game."\(^\text{21}\) Perhaps this sounds better to me because I know that Rifkind's position does not rule out the possibility that winning may be justice and that lawyers may have something to do with the truth. Lawyers frequently deal with ethical problems arising from the

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(Louisville, Ky.), May 7, 1995, at 1A. This interview was published in commentary on a product liability suit which arose out of a mass murder committed by a disgruntled, Prozac-taking employee of Standard Gravure in Louisville, Kentucky. It was reported that the plaintiffs and the defendant, Eli Lilly & Co., had reached some sort of agreement pursuant to which the plaintiffs would be paid an unreported and presumably significant sum of money. In exchange, the plaintiffs would not put into evidence certain facts regarding the safety of another drug, Oraflex, and would not appeal any jury verdict in the case. The jury did not see the controversial evidence and rendered a verdict for the defendant. See id. The plaintiffs and the defendant probably felt that the secret partial settlement was good "insurance" for both sides. Apparently, the withheld evidence had something to do with the fact that Oraflex (an anti-arthritis drug) had been pulled from the market by Eli Lilly after a number of patients died after using it. Eli Lilly pled guilty to 25 misdemeanor counts for failing to report evidence of adverse reactions to the Food and Drug Administration. See id. Why had the trial judge previously decided that the Oraflex evidence was relevant? A good case could have been made, and presumably was made, for its exclusion, but just before trial the judge ruled that he was going to let the evidence in. Given the highly charged and prejudicial effect that such evidence probably would have had, was this a case of evidentiary "greymail"? What do we now know about the safety of Prozac or Oraflex? Eli Lilly must have thought it was getting a fair shot at the vindication of Prozac--fair in the sense that it would not have to deal with the distraction of irrelevant evidence about Oraflex. What did Eli Lilly ultimately gain from the deal now that the secret is out? Nothing but headaches. One of the last newspaper articles I saw on the case reported that both Eli Lilly and plaintiffs' counsel are being sued for having "perpetrated a fraud on the Kentucky trial court and the public." Leslie Scanlon, Malpractice, Fraud, COURIER-JOURNAL (Louisville, Ky.), Sept. 2, 1995, at 1B. Meanwhile, the Kentucky Supreme Court issued an opinion authorizing the trial judge to get to the bottom of things. See Potter v. Eli Lilly and Co., 926 S.W.2d 449 (Ky. 1996). For a scathing rebuke of the lawyers in the case, see Marianne M. Jennings, The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative, 1996 Wis. L. Rev 1223, 1229-34 (1996).

truth value of evidence in the course of resolving controversies. The problem is that truth is not the only value. For the advocate, loyalty and confidentiality also figure into the equation, as do important systemic, political, and historical considerations. When these values come into conflict, how are we to strike the proper balance? Critics of the adversarial system suggest that it “places too low a value on truth telling; that we have allowed ourselves too often to sacrifice truth to other values that are inferior, or even illusory.” The defenders of the professional faith sometimes lean nearly as far the other way.

The question of limits—the question of what is and is not a “proper defense,” to use Reverend Rogers’s terminology—was put squarely before the public in a particularly bloody murder case. The crime was pretty terrifying. The victim’s throat has been cut from ear to ear. Surely the killer must have been covered with blood, and surely he or she must have left an obvious trail. And as it turned out, the cops did focus on a suspect quite early on. They suspected someone who was close to the victim, although he was disappointingly clean. No blood on this fellow. The press had been hard on the police of late due to recent failures, so the police were keen on public relations. They leaked each and every find in order to reassure the terrified public and point out that they were on top of things after all. Each leak fueled the fires of sensationalism, and witnesses were deluged by publicity, some unwanted and some sought after. The public was sure that the man in custody must be guilty.

Still, the evidence was circumstantial. There was not a single eyewitness to the actual cutting, and the murder weapon could not be found. A bloody glove, and later some blood-spotted items of clothing, turned up in places that were under the control of the alleged murderer. But these very places had been searched previously by zealous detectives! The defense naturally suggested that a police conspiracy was afoot. The evidence must have been planted. These belated discoveries were just too convenient. Everyone knows that no self-respecting cutthroat would screw up this way! Moreover, witnesses to the suspect’s demeanor before and after the crime disagreed. He acted guilty. He did not act guilty. He seemed to be sleeping well after the murder, so he could not be guilty. Self-appointed experts opined both ways on all the issues, whether the issues were real or imagined. Worried prosecutors fretted about the ability of jurors to convict.

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22 For an excellent and pithy description and justification of the adversarial system, see George P. Fletcher, A Crime of Self Defense: Bernhard Goetz and the Law on Trial 6-8 (1988).
on circumstantial evidence alone, no matter how strong it was. On the other hand, if not the accused, then who? No other possibility seemed the least bit plausible.

No, I am not talking about the murder of Ms. Nicole Brown-Simpson! The case was Regina v. Courvoisier. The victim was the seventy-something Lord Russell. The man who stood in the dock, accused of slitting Lord Russell’s throat, was his valet, Benjamin François Courvoisier. The case fits into our discussion because after the first day of trial Courvoisier did a terrible, inexcusable thing. He called for his lawyer, and in the privacy (in the sanctity?) of the attorney-client confessional, he confessed. He admitted that he had done the deed! What really annoyed his defense team was his refusal to plead guilty. He demanded a defense, as if his guilt were a trifling matter. He wanted off. His well-coiffed leading barrister, the envy of the local bar, Mr. Charles Phillips, was having a bad hair day. Things were going to get much worse for him before getting better.

Barrister Phillips had no ethics committee to turn to for an advisory opinion. In the end, he sought advice from an odd source. He asked the advice of Mr. Baron Parke, who was not the presiding judge but was sitting on the case and assisting Lord Chief Justice Tindal. According to reports, Mr. Baron Parke was quite put out. He rebuked Phillips and his co-counsel for informing him of the confession. Still, his advice was that Phillips was obliged to defend the client using “‘all fair arguments arising on the evidence.” Phillips did as he had been advised, vigorously cross-examined witnesses he knew were giving truthful testimony, suggesting that one might have been involved with someone other than Courvoisier in committing the crime (or at least that she had foreknowledge of it), and attempting to persuade the jury to acquit his client. Phillips told the jury, “The Omniscient God alone knows who did tis crime.” Several critics charged that Phillips had crossed the line. Directly or indirectly, he had asserted his opinion that his client was innocent, worse yet, knowing that

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25 As the Chairman of the Kentucky Bar Association Ethics Committee for 14 years (a “part-time” job), I answered questions like this, truly, at all hours of the day and night. See Richard H. Underwood, Confessions of an Ethics Chairman, 16 J. LEGAL PROF 125 (1991) [hereinafter Underwood, Confessions of an Ethics Chairman].
26 Mellinkoff, supra note 24, at 140 (quoting Letter from Charles Phillips, Esq., to Samuel Warren, Esq., Barrister-at-Law, 12 (1892)).
27 Id. at 222.
he was guilty. When the public got wind of what had happened, Phillips was condemned in the court of public opinion, although he received considerable support from the bar. Had he crossed the line? Nowadays, might he be charged with violating England’s Code of Conduct paragraphs 610(b) and (h)\textsuperscript{28} and possibly Annex H’s Standards Applicable to Criminal Cases paragraphs 3.4 and 3.5\textsuperscript{29}

Before commenting on specific rules against “lying,” let me set forth my assumption that we all agree that the ethics of advocacy permit and encourage the advocate to defend a “guilty client.”

In considering the duty of an advocate retained to defend a person charged with an offence who confesses to counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind:—(1) That every punishable crime is a breach of the common or statute law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the burden of proof rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the advocate for the accused.

His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or,

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\textsuperscript{28} Code of Conduct of the Bar of England and Wales para. 610(b) (1993), reprinted in Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices: Appendix, 7 Geo. J. Legal Ethics 865, 892 (1994) (prohibiting a barrister from asserting a personal opinion as to the facts or the law); \textit{id.} para. 610(h) (disallowing a barrister from suggesting that a witness is guilty of a crime or other bad act unless relevant and supported by reasonable grounds).

\textsuperscript{29} \textit{Id.} Annex H: Written Standards for the Conduct of Professional Work, Standards Applicable to Criminal Cases para. 3.4 (dealing with conflicts of interest); \textit{id.} para. 3.5 (addressing representation of other parties in later stages of the same litigation).
even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.

If the duty of the advocate is correctly stated above, it follows that the mere fact that a person charged with a crime has made such a confession to his counsel, is no bar to that advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the advocate from his imperative duty to do all he honourably can do for his client.

[But regarding limits. ]

But such a confession imposes very strict limitations on the conduct of the defence. An advocate “may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud.”

[It would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence, which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, an advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.]

Historically, courtroom rules of etiquette have placed considerable responsibility for preventing the introduction of false testimony on the shoulders of counsel for the proponent. Barristers from Forsyth to Boulton have written about the line that counsel may not cross. They sound a lot like Reverend Rogers.

The principle is as clear as noon-day, that no man ought to do for another what that other can not, without moral turpitude, do for himself. The advocate stands before the tribunal to plead the cause and represent the person of his client utimur enim fictione personarum, et velut ore alieno loquimur, but he cannot possibly by virtue of his agency acquire rights greater than are possessed by his principal. He may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate a fraud.

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30 WILLIAM BOULTON, A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES 71-72 (Butterworths, 6th ed. 1975) (emphasis added); see also CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES, Annexe H: Written Standards for the Conduct of Professional Work, Standards Applicable to Criminal Cases paras. 3.1-3.6 (1993) (addressing a variety of conflict of interest issues).

31 WILLIAM FORSYTH, THE HISTORY OF LAWYERS: ANCIENT AND MODERN 397-98 (1875) (citation omitted).
There are a number of the ABA's Model Rules of Professional Conduct which deal with lying.

Rule 4.1 Truthfulness in Statements to Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [which deals with what has traditionally been termed lawyer-client confidentiality].

Rule 3.3 Candor toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [that is, candor to the tribunal trumps lawyer-client confidentiality].
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 3.4 Fairness to Opposing Party and Counsel
A lawyer shall not:
(a) unlawfully 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;

33 Id. Rule 3.3.
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

Phillips did not knowingly offer perjured testimony. That matter is now addressed in Model Rule 3.3(a)(4). Model Rule 3.3(a)(4) marks the latest swing of the ABA pendulum:

[If the lawyer knows that the client has committed perjury, the Model Rules] require [the] lawyer to first remonstrate with the client and, that failing, to report the perjury to the court.

With respect to anticipated perjury, the ABA’s position has always been that an attorney cannot actively participate in the presentation of false evidence.

Under the Model Rules, [the] lawyer must attempt to dissuade [the] client from testifying falsely; if that fails, [the lawyer] may attempt to withdraw; and that failing, [the lawyer] must inform the court if perjury does occur.

Did we inherit this approach from the British barrister? One cannot be sure. Sir William Boulton stated:

Where, during a trial or after the conclusion of a hearing in which judgement is reserved, counsel is informed by his lay client that he has committed perjury, counsel is not under any duty to inform the Court of perjury, and it would be contrary to his duty to his lay client to do so; but he is under a duty (having regard to his overriding duty not to be a party

34 Id. Rule 3.4. Had the Model Rules been in effect in Phillips’ time, I assume that his critics would have alluded to Model Rule 3.4(e).

35 See supra text accompanying note 33.

to a fraud on the Court) to decline to take any further part in the case, unless his client has given him authority to inform the Court of the perjured statement, and he has so informed the Court.\textsuperscript{37}

If I am reading this correctly, it says that counsel should remonstrate with the client, but reasonable remedial measures do not appear to extend to blowing the whistle on the client.

Before the adoption of the Model Rules, there were other controversial, competing approaches to the problem of client perjury. In 1966, Professor Monroe Freedman published a provocative article advocating an “alter ego” approach.\textsuperscript{38} Professor Freedman argued that lawyers should try to persuade their clients to tell the truth, but if not persuaded, the lying client should be called to the stand and questioned as any other witness.\textsuperscript{39} When Freedman’s views first appeared, it was predictable that they would be embraced by criminal defense lawyers. It was just as predictable that they would be rejected by academics and judges.\textsuperscript{40} The pendulum was swinging in the opposite direction, toward the approach ultimately taken by the ABA Model Rules. But, by the mid-1990s, it had become fashionable to attack the establishment, Model Rules view and support Freedman’s position.\textsuperscript{41} The “Burger Court”\textsuperscript{42} \textit{dicta} in \textit{Nix v. Whiteside}\textsuperscript{43} probably invited much of the critical law review commentary, which included a somewhat negative

\textsuperscript{37} \textsc{Boulton, supra} note 30, at 77; \textit{cf.} \textsc{Model Rules of Professional Conduct} Rule 3.3(b).


\textsuperscript{39} \textit{See} Freedman, \textit{supra} note 38, at 1477-78.

\textsuperscript{40} One of the most influential attacks on the Freedman position was made in Charles W. Wolfram, \textit{Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System}, 1980 Am. B. Found. Res. J. 964.


\textsuperscript{42} This is academic code for “those reactionaries.”

review by one of the lawyers for the state who won the case. One “think piece” even found support for Freedman’s position in the history of Catholic casuistry.

The third view appeared in the early 1970s, when

an ABA committee suggested that a lawyer might call a willful client to the stand and sit on the sidelines while the client perjured himself, the lawyer [asking] no questions and [making] no reference to the testimony in summation. This proposal for testimony by client narrative was approved by the ABA Standing Committee on Criminal Justice Standards in 1971, but was never approved by the House of Delegates and was withdrawn in 1979.

This “middle way” is far from ideal, as the following personal anecdote indicates.

Quite a few years ago, I was a young law clerk working for a United States District Judge in the Southern District of Ohio in Cincinnati. In that role, I watched quite a number of federal criminal trials. One that I will never forget involved a young African-American man charged with being the get-away driver for a not very successful band of bank robbers. As anyone experienced in crime or familiar with any aspect of the criminal justice system will tell you, there is no future in robbing banks. The FBI is still pretty efficient when it comes to catching bank robbers. Bank robbers tend to be unsophisticated, and their prosecutors are usually able to come up with a glittering array of incriminating facts, including the footage of at least one security camera, finger and palm prints, eyewitness testimony, one or more confessions, and the testimony of at least one “stool pigeon.” But in this case all the prosecutors had was a stool pigeon—the ringleader or “brams” behind the rather-bramless operation—and some rather weak

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46 FORTUNE ET AL., supra note 36, at 480-81; see also Norman Lefstein, Client Perjury in Criminal Cases: Still in Search of An Answer, 1 GEO. J. LEGAL ETHICS 521 (1988).
eyewitness testimony. The stool pigeon lacked a certain something. All gadded up in a bright orange jumpsuit, courtesy of the maximum security prison that was his home, he informed the jury in rather casual tones that his occupation was bank robber. The most distinctive aspect of his gang’s *modus operandi* was a shotgun blast to the nearest wall clock in the bank to get everyone’s attention. This rather menacing individual related how he and the defendant had planned the caper the night before in a meeting in the White Castle hamburger joint (Cincinnatians call the White Castle the “Porcelain Room” because it is all white tile, inside and out) nearest the bank.

The defendant was represented by court-appointed counsel. But this was no ordinary court-appointed counsel. This lawyer was a solo practitioner, but he could do anything. He could write a will, he could form a corporation, and he could try a case with the best of them. And he did a great job. Everyone was expecting an acquittal, but then a curious thing happened. Before the defense rested, the lawyer approached the bench with his client. As I huddled with the lawyers at side-bar, I heard the defense lawyer urge his client not to testify, and I thought I heard the Judge urge the same! The defendant was having none of this. He was going to “tell his story.”

From his place at the podium, the frustrated defense attorney tried to look sympathetic and said something like, “Tell your story.” The defendant then launched into a rambling explanation that, while it was true that he had met with the prosecution witness in the White Castle, they were not planning a bank robbery. You see, the defendant “was not into violence.” It was not his style. He was a heroin dealer. They were planning a big heroin deal! At this point, a thirty-something mother of three on the jury glared at the defendant. It seemed to me that her eyes got two or three sizes bigger. I knew who the foreman of the jury was going to be and that the verdict was going to be guilty! I was right. The defense lawyer did not refer to the defendant’s testimony in his closing. It was a pretty good closing, but the verdict was guilty. This anecdote does not say much for the narrative approach, but would the defendant have been any better off if he had followed the Freedman position?

When counsel fails to use the client’s testimony, a clear signal is sent to the jury. This is but one variation of the difficulty that confounded

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47 The eyewitness testimony was only credible because the defendant had a distinctive birthmark just above a cheekbone. It was in the shape of a *fleur-de-lis*!
Barrister Phillips in Courvoisier\textsuperscript{48} and that has continued to confound generations of advocates. We know there must be limits, but how do you put on the brakes without signaling with telltale brakelights? Consider Edward Abinger’s lament, sung in his autobiography \textit{Forty Years at the Bar}, when he faced the somewhat analogous problem of defending a prisoner who confessed to him in confidence that he was guilty of the crime charged:

What was I to do [after the prisoner I was defending admitted to the forgery]? I had no one to advise me\textsuperscript{49}, so I decided to adopt the following course: I cross-examined the witness for the prosecution in exactly the same manner as I should have done had not the prisoner confessed the forgery to me, it being obviously my duty to see that the case was legally established against my client in the dock.

But when it came to my turn to address the jury I confined myself to bowing to both the Judge and the jury and not addressing them at all, much to the astonishment of everyone in court. The prisoner was convicted on this indictment \textsuperscript{50}

\textbf{B. The Rules Applied}

A duelist was tried on the ground that he had done a forbidden thing—grasped his adversary’s weapon—and a lot of experts testified that that couldn’t be done. Then a lot of duelists went on the stand and said that is a fencing school rule—when you go on the ground you go there to kill the other man and you do what you can.\textsuperscript{51}

Therefore be merry

\textsuperscript{48} \textit{See supra} notes 24-29 and accompanying text.

\textsuperscript{49} Phillip’s position in \textit{Courvoisier}\textsuperscript{9}.

\textsuperscript{50} \textsc{Edward Abinger}, \textit{Forty Years at the Bar} 277 (n.d.).

\textsuperscript{51} \textsc{Sheldon M. Novick}, \textit{Honorable Justice: The Life of Oliver Wendell Holmes} 139-40 (1989).
For thy solicitor shall rather die
Than give thy cause away.\textsuperscript{52}

Laws and the natural sentiments of
man contradict one another when
oaths are administered to the
accused, binding him to be
truthful when he can best serve his
own interests by being false; as if
a man could really swear to
contribute to his own destruction \textsuperscript{53}

"Look, whatever you want me to say, I'll say, if you want me to lie, I'll
lie. I'll say whatever it takes to, you know to arrest these guys, or to
get these guys, or whatever it is." [Goetz, the victim of the mugging
which preceded his celebrated subway shooting spree] was surprised that
the police rebuked him for his willingness to falsify evidence.\textsuperscript{54}

I want to say a few words about lawyers' \textit{attitudes} to the rules in the
United States. These are personal views, based on personal experiences.
Let me first quote a British commentator on British \textit{attitude}:

Generally speaking, the barrister representing the accused in England.
does not proceed upon the notion that his function is to obtain an acquittal
by enforcing each and every rule applicable to the trial in the hope that the
prosecution will falter. Nor does the defense barrister consider it proper
to interject irrelevant matters into the case to confuse the jury, to require
witnesses testifying as to uncontested matters to appear in court, to object
to break the flow of damaging testimony, to turn the trial into an
accusation against the complainant or the police where not called for
clearly by the evidence, or to ask the jury to try the prosecutor, the judge,
or society rather than the accused.\textsuperscript{55}

\textsuperscript{52} WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 1, lines 3.3:26-28, in WILLIAM
SHAKESPEARE, THE COMPLETE WORKS (Stanley Wells & Gary Taylor eds.,

\textsuperscript{53} CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 29 (Henry Paolucci trans.,

\textsuperscript{54} FLETCHER, supra note 22, at 13 (citation omitted).

\textsuperscript{55} Miller, supra note 14, at 223 (citing P.S. ATIYAH & ROBERT S. SUMMERS,
FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 368 (1987) (quoting MICHAEL
I offer this quotation to set up an important distinction.\textsuperscript{56} Few people actually in trouble in the United States would want such a lawyer. The typical American expects to win his or her own case, even if dearly held notions of ethics have to be abandoned along the way.\textsuperscript{57}

Returning to our list of Model Rules which prohibit various forms of lying, we can summarize them by saying that, in addition to the rules prohibiting the knowing use of perjury, the advocate is also prohibited from lying to the court and from asserting his or her personal opinion or belief. False imputation of guilt during cross-examination would appear to be prohibited, but there is no explicit language prohibiting the cross-examination of a “truthful” witness. There is a limited duty to disclose law to the court. There are also general prohibitions against lying and committing fraud, and these prohibitions apply even when we are dealing with other lawyers and non-lawyers out of court, subject to a caveat about confidentiality.

Are these rules followed? (1) Many lawyers probably do not like the current rule on perjured testimony. Whether or not they will admit it, they would like to have the Freedman rule. Some follow the Model Rule, and some do not. Few get caught if they do not follow it. (2) Lawyers like to

\textsuperscript{56} I also wonder if the source of these platitudes had read many volumes of Notable British Trials.

Let me say a few other things at the risk of offending. I have heard that the British system of educating, training, and admitting advocates is somewhat class-based. Control is exercised by the Inns. Until recently there was no “formal code” of lawyer conduct. Lawyers do not report the misconduct of other lawyers. Disciplinary proceedings take place in an atmosphere of secrecy. Barristers are immune from lawsuits for malpractice. In contrast, Americans insist on democratic access to the professional ranks and, more and more, are calling for the dismantling of unauthorized practice barriers, the curbing of the power of bar associations, the adoption of ever more detailed codes of conduct (usually at the behest of journalists, who, incidently, reject the adoption of codes to govern their own conduct, although a free and independent bar may be as important as a free press), mandatory lawyer reporting of the misconduct of other lawyers, open disciplinary proceedings, and more “accountability” for lawyers!

\textsuperscript{57} Many times I have recommended a lawyer, noting along the way that he or she was a straight-shooter and highly ethical. The usual response is, “I want someone who will screw the other side, strip the meat off their bones!” Americans say they want ethical lawyers, but they do not shop for ethical lawyers. Some say that there is a Gresham’s Law at work in the lawyer marketplace, the “bad” lawyers are driving out the “good.”
believe, and certainly will say when asked, that a lawyer should never lie to the court. Some lawyers lie to the court nevertheless, some regularly and rather brazenly. (3) Many lawyers do not know that there is a rule against asserting one's personal opinion or belief. When the Kentucky Model Rules were drafted, we spoke to lawyers about them prior to their adoption. Many lawyers angrily charged that I had invented Rule 3.4(e). When they learned that it was actually already in the existing Disciplinary Rules, they fell silent or changed the subject. (4) American lawyers do not shrink from cross-examining the "truthful" witness. Also, it is not uncommon for lawyers to falsely attribute guilt or misconduct to parties and witnesses. If American lawyers are to be believed, much crime in the United States is committed by wandering bands of unidentified and unidentifiable criminal elements. (5) Many lawyers fail to disclose controlling law to the court. Indeed, the Kentucky Supreme Court explicitly rejected the Model Rule requiring lawyers to disclose controlling authority. They did so without comment or explanation, although the duty was set forth in the earlier Disciplinary Rules. (6) Many lawyers routinely, and some proudly, lie to other lawyers and non-lawyers. They are not students of Kant. They are followers of lawyer-philosopher Grotius, insisting that others have no right to expect the truth, or have the status of barbarians. Anyone who is not the client is to be treated as a deadly enemy who has no right to truthful answers. Let me also say that a substantial number of lawyers probably violate Model Rules 3.4(a) and (b), and these rules simply state that a lawyer must obey the dictates of the criminal law.

58 See generally Bok, supra note 13, at 162. In Michael Higgins, Fine Line, A.B.A. J., May 1998, at 52, the author quotes an American law professor's view of the effect of ethics rules on improper witness preparation: "If the lawyers do not believe in these rules, they will find a way to get around them." Id. at 57. For a widely cited, if controversial, article written by an American lawyer, see Curtis, supra note 15.

59 In contrast, note the arguments in United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987). In this case, a defense lawyer's conviction for obstruction of justice was upheld after he continued to advise his "client" (for the benefit of a third party) to assert the Fifth Amendment privilege even after the witness/client had been immunized. The attorney's lawyers and helpful amici from the Massachusetts Association of Criminal Defense Attorneys advanced the proposition that "[s]o long as an attorney tenders a facially legitimate explanation for conduct performed in the course of his defense of a client, a fact-finder must evaluate the behavior on that basis. Hidden motivations, how so ever corrupt, remain forever hidden." Id. at 990 (emphasis added). This will "insulate lawyers from encroachments on the 'zealous representation' of clients accused of crime." Id. Needless to say, the
So much for bright lines. Needless to say, where the lines are not bright, one can hardly expect any more in the way of enforcement. No case exhibits this better than In re A., which was decided by the Supreme Court of Oregon in 1976. The lying in this case was not done by a criminal defendant facing the death penalty. Instead, we have yet another example of asset-hiding in a divorce case. That is to say, we have perjury committed for the sake of a relatively small—surprisingly small—amount of money.

Several years prior to the initiation of a first round of divorce proceedings, the mother of Gordon Goheen, the client on one side of the "v", was overtaken by the ravages of old age senility. Since Gordon had obtained a power of attorney, he simply took possession of his mother's assets, liquidated them, and invested the boodle in a mutual fund in his own name. As the woman's only offspring and heir, he was appointed guardian. Gordon and his wife were divorced in 1966, without any question arising as to the mother's funds or the guardianship. The Goheens later remarried. Inevitably, as night follows day, another petition for divorce was filed in 1971. Goheen hired lawyer A.

In the course of his representation of Goheen, lawyer A discovered that Goheen had never filed a proper inventory of the guardianship assets. Furthermore, he had applied for and received welfare benefits for his mother's support without making any disclosure of her assets (the mutual funds) in the welfare application. At the time of the application the boodle had grown to $20,000, making the nondisclosures almost certainly material and fraudulent. Lawyer A quite properly instructed Goheen to terminate the welfare payments. "Shortly thereafter", Goheen advised [A] that his mother had died and was buried in Salem [and that he had] contacted the First Circuit did not accept this proposition. For a detailed discussion of cases involving the prosecution of lawyers for perjury, subornation of perjury, obstruction of justice, and witness-tampering, see Richard H. Underwood, Perjury!—The Charges and the Defenses, 36 DUQUESNE L. REV 715 (1998) [hereinafter Underwood, Perjury!—The Charges and the Defenses].

In re A., 554 P.2d at 480.

In divorce cases, it is often the case that the smaller the marital estate, the more bitter the fight between the divorcing partners will be. Perjury is common as well. Professor Eben Moglen has said, "Every divorce proceeding I have ever touched has perjury—and more than potential—most of the time [What do people lie about in life? They lie about money, and they lie about sex. When litigation is about those things, people don’t tell the truth.” Kate Shatzkin, Perjury Is a Crime Seldom Prosecuted; Legal Experts Differ on How to Treat Clinton, BALTIMORE SUN, Jan. 27, 1998, at 4A (quoting Professor Eben Moglen).

See In re A., 554 P.2d at 480.
Public Welfare Commission and made arrangements for repayment of the amounts paid by the Commission.  

A attended to the guardianship and probate paperwork, listing the mutual funds in the inventory and so forth. The money was transferred to the mother’s estate, and the welfare claim was paid off.

While the probate was moving along, the divorce was also grinding on. Goheen’s deposition was taken by his wife’s lawyer. Naturally, that lawyer began trolling for assets. Goheen alluded to the fact that he held some mutual funds as his mother’s guardian that were used for her support. This exchanged followed:

Q: Do you still do that on a regular basis?
A: No, it’s not being taken out now. There’s been enough of an income I believe that’s been able to take care of her payments?

There was no further inquiry on this issue. No one asked if the mother was still alive, and Goheen was not about to volunteer anything. Lawyers insist that their clients not volunteer information. Our motto is “Make the Other Side Work.”

Later, during proceedings before the tribunal, Goheen again testified that the mutual fund belonged to his mother. More questions and answers:

Q: Is any part of that fund being used for your mother’s upkeep at this time?
A: No.

Q: Where is your mother at this time?
A: Salem.

This last may have been literally true, but such a misleading answer should be unacceptable by anyone’s standards.

The Judge shouldered his way in:

The Court: Because your mother does not have a husband and because you are the only son, did you enter into any verbal arrangement

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63 Id.
64 See id.
65 Id. at 481.
66 I would like to have that on a crest in Greek and Latin.
67 In re A., 554 P.2d at 481.
with her that upon her death, you do [sic] just consider this money yours and therefore it wouldn't have to be probated in any way?

The Witness: Well, the only reason it might have to be probated -- yes.

The Court: You made that arrangement with your mother?

The Witness: Yes, that I handle her affairs. That was made, your Honor, back when I was made power of attorney originally -- after my father's death she's been mentally, really incapacitated

The Court: Had she died in the interim, you would have treated all of this money as your own? You would not have probated her estate as far as these funds?

The Witness: I would have probated it only in regards to any debts she might have, but I don't know. I had not thought that far ahead about that type of thing because -- I suppose it went as far as it did because I didn't have other brothers or sisters, or anybody to consult. I did it on my own. 68

Throughout the record of the case, Goheen equivocated and attempted to misdirect the questions, in one case by turning to A for an answer to the court's question. The lawyer did not have Goheen correct the misimpressions; the lawyer chose to remain silent. There is little or no doubt that the court would have increased the award to the wife had it known the true facts.

The lawyer was charged with complicity in falsely misleading the court, and a disciplinary Trial Committee concluded that the lawyer violated old Disciplinary Rule 7-102(B), 69 reasoning that the rule required the lawyer to reveal the client's fraud to the court. 70 An earlier ABA

68 Id. at 481-82.

69 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1969).

70 See In re A., 554 P.2d at 484; cf In re Carroll, 244 S.W.2d 474 (Ky. 1951) (holding that a lawyer "should not sit by silently and permit his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party on a matter vital to the issue under consideration"). At the time of A's alleged misconduct, Oregon's Disciplinary Rule 7-102(B), as in Kentucky, provided "in effect, that if the lawyer knows that his client has perpetrated a fraud on the tribunal, he shall call upon the client to rectify the same, and if the client refuses, the lawyer is required to reveal the fraud to the tribunal." In re A., 554 P.2d at 485. The In re A. opinion does not address the possible technicality that Goheen did not commit perjury because he told the literal truth. For a case dealing with this technicality, see Bronston v. United States, 409 U.S. 352 (1973).
opinion, interpreting an amended version of DR 7-102(B), had suggested that there was no duty of candor to the tribunal sufficient to override an obligation to safeguard the confidences and secrets of the client. With this in mind, the Reviewing Board split hopelessly over whether A had a duty to disclose, a duty to withdraw without disclosing, or a duty to the client to keep silent and do nothing. The reviewing court then concluded that A had not had sufficient guidance and that he should not be disciplined.

There has been substantial disagreement in the Bar over which rule takes precedence in this kind of situation—the duty to disclose or the duty to protect the client’s confidences and secrets.

As for a duty to withdraw, the accused was never formally charged with any failure to withdraw as a violation of professional conduct.

In the future, more would be expected. A lawyer in A’s position would have a [mandatory] duty to withdraw from representing the client, but lawyer A was off the hook this time. Case dismissed!

The ABA Model Rules have now been considered by each state’s governing authority. Each state bar has had an opportunity to tell us which

72 The 1974 amendment, which was formally adopted in very few states, added a final provision to DR 7-102(B): “except when the information is protected as a privileged communication.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1974). The ABA opinion interpreted “privileged” to include not only confidential information within the attorney-client evidentiary privilege, but also “secrets” of the client. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). Secrets included any information gained during the relationship, the disclosure of which could be detrimental or embarrassing to the client. See MODEL CODE OF PROFESSIONAL CONDUCT DR 4-101(A) (1983).
73 In re A., 554 P.2d at 487
74 An Oregon Ethics Committee Opinion issued after the conduct in question stated that the lawyer must withdraw in these circumstances, but not disclose. See id.

By way of comparison to the conduct in In re A, consider the curious goings on in the deposition of President William Jefferson Clinton in the Paula Jones sexual harassment case. During that deposition, there had been an effort to pin things down with a detailed definition of the meaning of “sexual relations” between the President and Ms. Lewinsky. After some questioning, the President’s lawyer Robert Bennett urged Judge Susan Weber Wright to limit further inquiries on the ground that Ms. Lewinsky had given an affidavit “saying that there is absolutely no sex of any kind of any manner, shape or form, with President Clinton.”
rule reflects its official position on the lawyer's responsibilities with respect to perjured testimony. ABA Formal Opinion 93-376 now states that the lawyer has a duty to correct false statements given in a deposition.


When Judge Wright cautioned Mr. Bennett that she did not want any coaching of the witness, Bennett insisted that the president was already fully aware of the contents of the affidavit. The president took this all in and made no effort to disagree with the use of the affidavit, saying nothing to contradict what his lawyer was saying to the judge. Later, he would claim that the statements were literally true. He had had some kind of sexual contacts with Ms. Lewinsky in the past, but this was in the past at the time the deposition was given. Mr. Bennett had simply said that there is no sex; this was true at the time Mr. Bennett uttered his sentence. See id. On September 30, 1998, after the cat was out of the bag so to speak, Mr. Bennett sent a letter to Judge Wright informing her that she should not rely on Ms. Lewinsky's affidavit or on Mr. Bennett's characterization of its contents. See Peter Yost, MORE LEGAL PROBLEMS LOOM FOR CLINTON, PLAIN DEALER (Cleveland, Ohio), Oct. 10, 1998, at 10A, NEWS, BALTIMORE SUN, Oct. 9, 1998, at 6A. One assumes that Bennett was attempting to fulfill his obligations under Model Rule 3.3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1998).

Professor Gillers has raised the question of whether cases such as Bronston v. United States, 409 U.S. 352 (1973), which says that the witness who has given a literally true but deliberately misleading answer has not committed perjury, might also protect a lawyer who "counsel[s] a client on how to dodge a question." Terry Carter, TERMS OF EMBITTERMENT, A.B.A. J., Nov. 1998, at 42, 44. Lawyer critic Carter alludes to the case of Anderson v. Children's National Medical Center, No. 92-233 (D.D.C. 1992). In a deposition in that case, the witness was asked whether he knew of the whereabouts of the original of a document. The witness's lawyer interrupted to throw the hunter off the track: "Have you got the original of this?" Carter, supra, at 44. The witness then gave a literally true answer: "[N]o." Id. The witness had just given the sought-after original to his counsel, who had it in her briefcase during the deposition! Compare the following criticism of "lawyers' logic" from AUGUSTUS DE MORGAN, FORMAL LOGIC: OR, THE CALCULUS OF INFERENCE, NECESSARY AND PROBABLE 270 (1847):

We are often reminded of the two men who [s]tole the leg of mutton [in the Aesop fable of The Two Boys and the Butcher]; one could [s]wear he had not got it, the other that he had not taken it. The an[s]wer of the owner of the leg of mutton is [s]ometimes to the point, 'Well gentlemen, all I can [s]ay is, there is a rogue between you.' That a barri[s]ter is able to put off his foren[s]ic principles with his wig, nay more, that he becomes an upright and impartial judge in another wig, is curious, but certainly true.

Id.

even though doing so would reveal client confidences.\textsuperscript{76} One would think that sufficient attention has been drawn to these problems so that one could say with some confidence that a lawyer ought to know where the limits are, on a state-by-state basis at least. Still, in the United States, rules that are written by a bar committee and adopted by a state's high court may not reflect any real consensus.\textsuperscript{77} In application, a rule may not be much of a rule after all. What lawyers do and what they say they do are still two different things, and what they say they do may vary depending upon the audience.

C. \textit{New Rules for a New Game?}

I sought no trickery, nor swore false oaths.\textsuperscript{78}

"We have strict statutes, and most biting laws."\textsuperscript{79}

[Dick the Butcher.]
"The first thing we do let's kill all the lawyers."\textsuperscript{80}

For the most part, Americans do not read Shakespeare anymore and do not know that Dick was a follower of the Kentish rebel Jack Cade, who led an uprising during the disastrous reign of the weakling Henry VI. While

\textsuperscript{76} See \textit{id.}

\textsuperscript{77} I have encountered lawyers who quote the American Trial Lawyer Association's \textit{Code of Conduct} as if it were the governing law. That code has never been adopted in any jurisdiction and was more or less a trial balloon or advocacy document floated by the ATLA when that organization was lobbying against the ABA Model Rules. Another source of confusion are ethics opinions issued by organizations such as the National Defense Lawyers' Association. Opinions issued by specialty bar associations may or may not be useful and will not provide a lawyer with any certain cover. For further discussion, see Underwood, \textit{Confessions of an Ethics Chairman, supra} note 25, at 145-46, and Richard H. Underwood, \textit{Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals}, 81 KY. L.J. 1, 104 (1993).

\textsuperscript{78} \textit{BEOWULF,} line 2738, \textit{as quoted in} C.S. LEWIS, \textit{THE ABOLITION OF MAN} 62 (1946).

\textsuperscript{79} \textit{WILLIAM SHAKESPEARE, MEASURE FOR MEASURE} act 1, sc. 4, line 1.3:19, \textit{in} SHAKESPEARE, \textit{supra} note 52.

\textsuperscript{80} \textit{WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH} act 4, sc. 2, line 4.2:78, \textit{in} SHAKESPEARE, \textit{supra} note 52.
Dick's lines find many a sympathetic ear these days, few consider the context. Cade and Dick were about to hold a kangaroo court and put to death the clerk Emmanuel (a play on words, since documents of the day were often prefixed with the word Emmanuel, meaning "God with us") because he was able to write his name. A little later, Cade and his rowdy boys executed Lord Say. Granted, Say had been sent against them and would have had Cade's head if he had been able to take it, but what really set our collectivist-minded proles into a state of frenzy was the fact that Say let slip some lines of Latin.® Cade's campaign theme was that "all scholars, lawyers, courtiers, gentlemen"—these "false caterpillars"—must die.® Then the people would hold all things in common.

Our century has seen many Cades. Among his most recent incarnations are the followers of the monster Pol Pot.® Once the law and the lawyers

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® See id. sc. 7

® Id. sc. 3. In the United States, similar courts are setting up shop illegally "in at least a dozen states...indicting public officials, conducting mock trials, issuing phony judgments and filing fabricated liens. "Attorneys are the enemy. They have made their own laws—laws of precedent rather than law[s] of man," [says one of the proponents of these "common law" courts]." Hope Viner Samborn, Courting Trouble: Emergence of Common Law Courts Raise Concerns Among Critics, A.B.A. J., Nov. 1995, at 33; see also John Hanna, "Christian Court" Finds Judge "Guilty," NAT'L L.J., Aug. 25, 1997, at A8 (recounting meeting of "Supreme Court of Christian Jurisdiction" that met in the Kansas Statehouse and tried and found guilty U.S. District Judge J. Thomas Marten on a variety of charges, including treason). The leader of this "court" is affiliated with the Kansas Territorial Agricultural Society, which is an offshoot of the anti-government Posse Comitatus. Historically, Kansas has been something of an American Kent. For a portrait of America's Dick the Butcher, see the front page of the National Law Journal from May 8, 1995. See NAT'L L.J., May 8, 1995, at A1.

In March 1996, a group called the Freemen began an extended confrontation with federal agents at a remote ranch in Montana. The Freemen allegedly do not recognize the established courts, nor much of established law, and insist on being tried in their own courts for crimes committed against persons outside their group. Meanwhile, another news account described the goings on of a session of "Our One Supreme Court of Common Law," held at the Hannibal, Missouri Ramada Inn. In an unintended parody of Shakespeare's Henry VI, any lawyers present were required to take an oath denouncing the bar association. The article ended with a tale of violence and threats of murder directed at court recorders in California. See Angie Cannon, Common-law Courts Used to Attack Judges, Lawyers With Phony Liens, LEXINGTON HERALD-LEADER (Lexington, Ky.), June 2, 1996, at A1.

® The Anka Leu knew how to tap the same undercurrents that were tapped by Cade. For a discussion of the education of some of the managers of the mass
have been done away with, the true nature of the new order emerges. The beast shows its face and bares its teeth.

Cade: "Away! Burn all the records of the realm, my mouth shall be the Parliament of England. The proudest peer in the realm shall not wear a head on his shoulders unless he pay me tribute. There shall not a maid be married, but she shall pay to me her maidenhead ere they have it." \(^{84}\)

Killing all the lawyers is overkill; yet killing all the lawyers is just the beginning of the killing. A somewhat fictionalized Sir Thomas More (created by Robert Bolt) warned us in these terms:

[When you had cut the last law down], and the Devil turned round on you—where would you hide the laws all being flat? This country's planted thick with laws from coast to coast. and if you cut them down d'you really think you could stand upright in the winds that would blow then?\(^{85}\)

In actuality, More must not have thought much of other lawyers (although he was Chancellor of England), for he had his Utopians ban them from their island.\(^{86}\) Utopians are high on the banning of lawyers and the killings, see DAVID CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 19-42 (1992). Chandler notes that Rousseau was one of Saloth Sar's (Pol Pot) favorites. See id. at 34. Television news wants us to believe that a deceased Pol Pot was immolated in a bonfire of furniture and worn tires on the Cambodian-Thai border on or about April 17, 1998. I would like to believe it.\(^{84}\) SHAKEPEARE, supra note 80, act 4, sc. 7, lines 4.7:12-14. Compare the plans of Cade's progenitor, Wat Tyler, who is said to have boasted, "that within four days there should be no laws in England save those which proceeded out of his own mouth." CHARLES OMAN, THE GREAT REVOLT OF 1381, at 72 (Haskell House 1968) (1906). His lieutenant, Jack Straw, was motivated by the same song as the homicidal followers of Pot: "[W]hen there was no one greater or stronger or more learned than ourselves surviving, we would have made such laws as pleased us." Id. at 82. In his younger days, Pol Pot complained that under the Cambodian monarchy the people were "like animals, kept as soldiers (pol) or slaves (knom ke), made to work night and day to feed the king and his entourage." CHANDLER, supra note 83, at 40. Sadly, this is exactly how Pol Pot treated the people—and worse—when he came to power.\(^{85}\) ROBERT BOLT, A MAN FOR ALL SEASONS act 1, at 66 (Random House 1962). \(^{86}\) See THOMAS MORE, UTOPIA 68-69 (Robert M. Adams trans. and ed., W W Norton & Co. 1975) (1516).
simplification of the law. A near contemporary utopian writer, Mambrino Roseo, imagined an ideal commonwealth, Garamantia, that

only had seven laws—but they reveal the dehumanizing neatness to which Utopianism was prone [and still is]. The first law was that the other laws should never be changed; the second that only two gods should be worshipped, one the lord of life, the other of death; the third, that everyone should be dressed in identical clothing to avoid envy and ostentation; the fourth that any woman having more than three children should be killed; the fifth, that anyone detected in telling a lie should be put to death; the sixth, that all inheritances should be split into equal parts; the seventh, that no man should be allowed to live for more than fifty and no woman more than forty years.87

These laws probably strike most of us as draconian solutions to the world’s problems, but at least a few of these mad measures (or something close, anyway) have actually been put in practice in one or more countries of the world, even in (especially in?) modern times!

That thought brings us to some reflections on some new attitudes and to some new rules of the game. Some prosecutors are beginning to target lawyers using the ethics rules and the criminal laws. In order to understand the reach—I would say the overreach—of these new “biting laws,”88 let us consider the following cases involving the cross-examination of witnesses in open court.

The first case is Kiner v. State.89 Kiner was convicted of robbing a Family Express Store in Michigan City, Indiana, and appealed. He complained that the trial court improperly excluded from evidence a photograph and any reference to it. The photograph was offered during the

89 Kiner v. State, 643 N.E.2d 950 (Ind. Ct. App. 1994). The court cited a number of cases it considered analogous, including some in which defense counsel had secretly substituted someone for the defendant at the defense table in the hope that the “eyewitness” would erroneously point out the sub as the perpetrator. Several courts have opined that this is an unethical dirty trick. Sanctions and contempt citations have been handed out. See id. at 953. The Kiner opinion also cites RICHARD H. UNDERWOOD & WILLIAM T. FORTUNE, TRIAL ETHICS (1988).
cross-examination of Ms. Gumms, the storekeeper and eyewitness who identified Kiner as the robber. During the cross-examination of this critical witness, the defense lawyer showed Ms. Gumms a photograph, defendant's exhibit "B."

Q: I'm going to show you what's been marked as Defendant's "B," which is a picture of Alex Kiner when he had shorter hair. If you had seen that picture, would you have picked it out? (Indicating.)

A. Yes, sir.

Q: That's him?

A. Yes, sir.

Q: No doubt?

A. No doubt.90

The lawyer then revealed that the photograph was not Kiner. Defense counsel had lied to the witness 91 when he told the witness that the man in the picture was Kiner but with shorter hair. It was instead someone named Lacey Gay. The trial court viewed this as an improper trick, refused to admit the photo into evidence, and admonished the jury to disregard any reference to it. The judge rejected the argument that counsel was "merely engaging in the 'art of cross-examination.'"92 One may very well agree that this was the kind of greasy kid stuff that should be discouraged in a court of law, although I doubt that every "John Doe" would find it objectionable. Some lawyers would find it perfectly acceptable. But how much time should we spend fussing about sanctions in a case like this? Not very much. Move on with the case! Having said that, I have a very strong feeling that somewhere out there there is a federal prosecutor or two, and maybe even a judge, who would be more than willing to draw the disciplinary gun or read 18 U.S.C. § 1512, the new "Riot Act," to the lawyer.93 I am not alone in my paranoia— and they are actually out to get us, after all.

90 Kiner, 643 N.E.2d at 952-53.
91 This would be a violation of MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (1998).
92 Kiner, 643 N.E.2d at 954.
My second case comes from Alan Dershowitz’s book The Best Defense.95 Professor Dershowitz gives us the blow-by-blow of his battle with a key prosecution witness against his client. The witness had been tape recorded during certain critical conversations, but one crucial statement was not on the tape. The strategy of the cross-examiner was to induce the witness to believe that there were no tapes, so that he would lie, believing that it was one man’s word against another. “We would elicit answers from him that we knew—while he did not—would be exposed as lies by his own words as recorded by the hidden tape machine.”96 Then the cross-examiner would incorporate some materials from the tape, verbatim, planting in the witness’s mind the existence of tape recordings of the conversation.97 Then the cross-examiner would pretend to continue verbatim quotations from a make-believe transcript, in the hope of getting the witness to adopt the statements in the make-believe (or “reconstructed”) transcript—to lead the witness to assume that anything the defense lawyer alluded to was in hand and irrefutable, on the tapes and in the transcripts to which Dershowitz was referring during his cross-examination.98 If this strategy had the desired effect, then Dershowitz could ask about crucial statements that were not on the tapes or in the transcripts of them, anticipating, correctly, that the witness would concede that they were made.99 Dershowitz felt that this was permissible, since his client had assured him that the promises had been made, and since he was only trying to catch a liar. He had a factual basis for assuming that the unrecorded statements or promises had been given, and he was acting in good faith in an effort to find the truth.100 The ploy worked. Dershowitz appeared to be reading from a transcript, and the witness took the bait. But the tables were turned when the court got involved in the cross-examination, and began asking the professor to read lines of the transcript to pin down the evasive witness who was attempting to qualify his answers. Dershowitz played along, and the day ended on a high note. The witness had been destroyed.101 Or so it seemed.

Unfortunately, when the tapes were turned over, the prosecutor used them against Professor Dershowitz, arguing that Dershowitz had “‘misled the Court and misled the witness’ by reading apparent ‘quotations’ that

96 Id. at 52.
97 See id.
98 See id. at 52-53.
99 See id.
100 See id.
101 See id. at 52-60.
were not on the tape." The court took the prosecutor’s side of it, criticized Dershowitz, and ruled that he would ignore what was on the tapes, the fact that the tapes impeached the witness, and the witness’s crucial admission.

Had Dershowitz done anything wrong? If he had, it is hard to articulate exactly what it was. He had not actually lied to the court or the witness. Still, one wonders whether in the current climate, if the cross-examiner had been an unknown, or a novice, would the court have imposed draconian sanctions? Would the prosecutor have moved to disqualify, filed a bar complaint, or pressed charges under 18 U.S.C. § 1512?

One commentator tells us that “[o]ne ethical rule of thumb is, never suggest unrecalled details of a relevant event that are anything other that what you believe to be true.” This is sage advice, since lying to a witness in an effort to mislead them and with a view to obtaining false testimony could (theoretically, at least) lead to the lawyer’s prosecution for obstruction of justice and witness tampering. However, there is some hope that courts will exercise caution if prosecutors (who may, after all, be motivated to prosecute for tactical reasons) will not. I offer the reader the views of the judges of the U.S. Court of Appeals for the Fifth Circuit in Resolution Trust Corp. v. Bright, which, although it is a civil case, may nevertheless prove useful to the lawyer who finds himself or herself on the defensive.

In Bright, several shareholders, directors, and officers of Bright Banc Savings Association in Dallas were sued by Resolution Trust Corporation (“RTC”) for fraud, negligence, and breach of fiduciary duty. But in a strange twist, the RTC lawyers handling the case became the target of sanctions (including “disbarment” from practicing before the district court) on the theory that they had acted improperly during their interviews of one Barbara Erhart, formerly the Senior Vice President of Finance Support at the Bright Banc. The gist of the allegations was that after their interviews of Ms. Erhart, the lawyers had asked her to return to their office and sign an affidavit “summarizing” what she had told them in the course of the interviews. The affidavit apparently contained some statements that the witness had not given to the lawyers, but which the lawyers believed were

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102 Id. at 61.
103 See id. at 63.
105 See infra Part II.
106 Resolution Trust Corp. v. Bright, 6 F.3d 336 (5th Cir. 1993).
supported by the evidence. The lawyers did not attempt to hide the fact that new statements had been added. Indeed, they "brought the statements to her attention and warned her to read them carefully" in the hope of persuading her to see their theory of the case. They may have been "persistent and aggressive," but the witness testified that she did not feel intimidated and only felt that the lawyers were "doing their job." The witness rejected some of the additions and made changes of her own. She then read and approved the final affidavit. On the motion of the defendants, the trial judge ruled that the lawyers had "tampered" with the witness's evidence, had attempted to "manufacture" evidence, and had "probably violated" 18 U.S.C. §§ 1503 and 1512 as well as Texas Rules of Professional Conduct 3.04, 4.01(a), and 4.04(a). Fortunately, the appellate court set aside the sanctions. The interviewing may have been aggressive and even "sometimes laborious," but the interviews were only conducted to obtain "an accurate and favorable affidavit from a key witness." Thus it was an effective strategy, but a happy ending was reached only after much delay, expense, and anxiety. There are lessons to be learned here.

D. Conclusion

When the district attorney arose and the jury turned to him with uplifted faces, then, for the first time, I realized the real attitude of the community toward us; for in scathing terms he denounced us both as men not merely

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107 See id. at 339.
108 Id. at 342.
109 Id.
110 Id. at 339.
111 See id.
112 Id. at 340.
113 See id. at 342. The court cited United States v. Brand, 775 F.2d 1460 (11th Cir. 1985), which held that giving a witness a draft affidavit that included matters not previously discussed with the witness is not obstruction of justice, and Koller v. Richardson-Merrell, Inc., 737 F.2d 1038 (D.C. Cir. 1984), vacated on other grounds, 472 U.S. 424 (1985).
114 Bright, 6 F.3d at 342. This might be compared with the facts in Artemas Quibble's case. See TRAIN, supra note 2, at 175-78. In that case, "Quib" prepared the affidavit for the witness, knowing that he was untrustworthy. When the witness took the oath, he winked and said, "It's the truth—not!" Id. at 178. Of course, he immediately swore it was the truth when Quib impressed upon him the importance of the formalities. See id.
who defended criminals but who, in fact, created them; as plotters against the administration of justice; as arch-crooks, who lived off the proceeds of crimes which we devised and planned for others to execute. It was false and unfair; but the jury believed him—I could well see that.\(^{115}\)

When I began collecting my thoughts about lawyers and liars, the O.J. Simpson case was well underway, and the members of the Fourth Estate were whipping up a frenzy about the tactics of the defense lawyers. On August 6, 1995, an *L.A. Times* editorial condemned the defense lawyers for “flinging motes in the jurors’ eyes in the hope that the jurors finally will not see what is plainly before them.”\(^{116}\) But by August 18, the Simpson case

\(^{115}\) *Train*, supra note 2, at 223 (recounting the thoughts of Artemas Quibble during his trial for subornation of perjury—he was convicted). Quibble has not been the only trickster to receive his just deserts, although many a slick fish has gotten away. On the very day—January 19, 1999—that President William Jefferson Clinton, a prisoner in the impeachment dock, was brazenly delivering a State of the Union address promising to give away the store in exchange for the continued, seemingly blind love of the American voter, former Tory Minister Jonathan Aitken—a “meteor” of conservative politics in Britain—stood in the dock at the Old Bailey and pled guilty to perjury and “perverting the course of justice.” Kamal Ahmed, *Aitken’s ‘Sword of Truth’ Cast Aside*, GUARDIAN (London), Jan. 20, 1999, available in 1999 WL 5107041, Jamie Wilson, *Aitken: Guilty of Perjury and Perverting Justice*, GUARDIAN (London), Jan. 20, 1999, available in 1999 WL 5106973; *A Meteor Falls: Some Truths Emerge at Last*, GUARDIAN (London), Jan. 20, 1999, available in 1999 WL 5106968. The charges arose from his perjury in a civil libel case against *The Guardian* (a private matter?). Like Oscar Wilde, he had foolishly sued and invited his own destruction. The issue was a small and silly one: who had paid his hotel bill at the Ritz in Paris? He lied, and got his daughter to lie too, by signing a false supporting affidavit. “[H]e] was caught telling a lie. And then telling a worse one to cover it up. And a worse one after that.” Wilson, *supra*. Oh, what tangled webs! Only a week before he entered his plea (his surrender), it had been learned that DNA tests proved that he had fathered a love child 18 years earlier (these “pols” are all the same, all over the world, you say?). Aitken resigned his membership in the Privy Council. He awaits sentencing. *See id.*

President Clinton has also received his just deserts. Although he survived impeachment, he has been held in contempt of court in the suit brought by Paula Jones. This ruling may affect Clinton financially and in his ability to practice law in the future. *See Jill Abramson, Analysis: For Clinton, A Jarring Legal Aftershock*, N.Y. TIMES NEWS SERVICE, Apr. 13, 1999.

\(^{116}\) Neal Gabler, *How We Know What We Know: Logic Meets Illogic at Simpson Trial*, L.A. TIMES, Aug. 6, 1995, available in 1995 WL 9814417
had turned into the Fuhrman case, and the Fuhrman case was looking substantial after all. Detective Mark Fuhrman had clearly lied under oath about something.  He had lied about how he found critical items of evidence? Had there been a frame? If so, had the police framed an innocent man or a guilty one? Few remained who thought that the answer to that question mattered much in terms of the outcome of O.J.'s criminal trial. By then it was predictable. Damn lawyers!

Lawyer bashers keep telling us that a new day is dawning. Apparently there is talk on Capitol Hill of the need for national lawyer regulation under standards drafted by the House and Senate! Ignoring the blatant hypocrisy of it all, it is worrying how the folks in Washington can have so little appreciation of the need for an independent bar, and so little recollection of the terror that has accompanied government control of lawyers in times and places not so very distant from our own. But if federal regulation is not bad enough, some continue to argue that the time has come for respectable society to bid adieu to the lawyer.

Bold, hasty, and wise, a concocter of lies.
A rattler to speak, a dodger, a sneak,
A regular claw of the tables of law,
A shuffler complete, well worn in deceit,
A supple, unprincipled, troublesome cheat;
A hang-dog accurst, a bore with the worst,
In the tricks of the jury-courts thoroughly versed.  

On October 3, 1996, (now retired) Detective Fuhrman pled “no contest” to a misdemeanor count of perjury and received a sentence of probation coupled with a small fine. See Fuhrman Gets Probation for Lying in Simpson Trial, COURIER-JOURNAL (Louisville, Ky.), Oct. 3, 1996, at 1. The California Attorney General crowed at his triumph over police corruption, see id., but one suspects that this outcome will have little deterrent effect on police perjury.

I have this on the authority of a young lawyer who called me in my capacity as a member of the Kentucky Bar Association’s “Ethics Hotline.” I answered his ethics question to his satisfaction, whereupon he turned on me and berated me for 10 minutes, letting me know, among other things, that the “hotline” was a farce! He informed me that he was working with Senator Kennedy on legislation to federalize the regulation of the bar. The prospect of a federal ethics machine implementing legislation drafted by Senator Kennedy is a terrible thing to contemplate.

Still, I suspect that lawyers, ethical and unethical, will be around for some time yet. Oh, you playwrights may scorn us, and you journalists scold, but the rhyme is 2400 years old!\(^{120}\)

**II. COACHING WITNESSES:**

**ETHICS, UNETHICAL TECHNIQUES, AND RISKS**

Let us consider the problem of coaching. American lawyers ordinarily prepare their witnesses.\(^{121}\) Most would consider it unprofessional not to go over the expected testimony with a witness.\(^{122}\) Within limits—there are always limits—witness preparation is ethical in the United States.\(^{123}\)

Apologies to Dr. Seuss. Aristophanes’s play was written around 423 B.C.E. See id. Introduction, at 262.

It is asserted that British, Australian, and Canadian lawyers view American practices as unethical if not illegal. See, e.g., Miller, supra note 14, at 204.

\(\text{Cf. United States v. Funt, 896 F.2d 1288 (11th Cir. 1990).}\)

[Witness] was an accountant called by [Codefendant A]. [Witness] testified that an associate had prepared the chart reflecting coin orders and deliveries and that [Witness] had reviewed the chart, comparing it to the customer files. During the government’s cross-examination, it became apparent that [Witness] was either lying or had been extremely slipshod. Defense counsel was informed that [Witness] in fact had not supervised the chart; in turn, the defense lawyers told the court that they were concerned that the witness was committing perjury. The court instructed the jury not to consider [Witness’s] testimony against [Codefendant B], and granted [Codefendant C] a continuance to obtain another accountant. [Codefendant A’s] motion for a mistrial was denied. [Codefendant A] now argues that he was entitled to a mistrial because, through no fault of his own, perjured testimony infiltrated the trial, prejudicing him and resulting in a miscarriage of justice.

This is not a case where the defendant is ambushed by the government, but instead a case where the defendant ill-advisedly chose to present evidence which was subject to devastating impeachment. In an adversary system, absent governmental misconduct affecting the evidence, a defendant must accept the consequences of the evidence he offers. Had the defense adequately prepared and examined [Witness] and his proposed testimony, the defense would not have permitted [Witness] to take the stand and suffer such impeachment.

\(\text{Id. at 1296-97}\)

See UNDERWOOD & FORTUNE, supra note 89, § 11.3, at 320-23; FORTUNE ET AL., supra note 36, § 11.4, at 364-68; Richard C. Wydick, *The Ethics of Witness*
In a widely cited opinion, the justices of the Supreme Court of North Carolina spouted this conventional [American] wisdom and then some!

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney’s questions and the witness’ answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Nothing improper has occurred so long as the attorney is preparing the witness to give the witness’ testimony at trial and not the testimony that the attorney has placed in the witness’ mouth and not false or perjured testimony.

I am informed that this American attitude is not accepted elsewhere. One commentator notes the following:

An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said that it would be illegal; and

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125 See United States v. Poppers, 635 F Supp. 1034 (N.D. Ill. 1986) (determining that it is not obstruction of justice to coach a witness to present the story in the “best” light, as opposed to coaching a witness to lie); see also Resolution Trust Corp. v Bright, 6 F.3d 336 (5th Cir. 1993) (deciding that it is not obstruction of justice or witness tampering to give a witness an affidavit with statements not previously discussed in it or to attempt to persuade a witness in an arm's length interview, even aggressively, that her initial version of a certain fact situation is not complete or accurate).

126 What about the lawyer suggesting a substitution of terms, for example “cut” for “stab”? The practice of suggesting alternative words and phrases is widespread. See the interesting case of Haworth v. State, 840 P.2d 912, 914 (Wyo. 1992), in which the prosecutor learned all about “weekend trial preparation sessions” from a deputy sheriff who was working off-duty for the defense lawyer!

127 McCormick, 259 S.E.2d at 882 (citing A. MORRILL, TRIAL DIPLOMACY, Ch. 3, Part 8 (1973)). For a helpful bar association ethics opinion, see D.C. Bar, Formal Op. 79 (1979). See also United States v. Torres, 809 F.2d 429, 434 (7th Cir. 1987) (determining that defense counsel invited an objection, which was sustained, and a reply from the prosecutor in closing argument, by persisting in characterizing as “sinister” the prosecutor’s nine-hour session with a witness).
an American lawyer’s view was that not to prepare a witness would be malpractice.\textsuperscript{128}

I cannot vouch for the accuracy of these observations about Australian and Canadian professional mores. As noted earlier, British barristers follow a rule that prevents them from interviewing witnesses. There are, however, exceptions for clients, expert witnesses, and certain character witnesses.\textsuperscript{129} England’s Standard 607.3 is worth setting out in full.

A practicing barrister must not when interviewing a witness out of court:
(a) place a witness who is being interviewed under any pressure to provide other than a truthful account of his evidence;
(b) rehearse practise or coach a witness in relation to his evidence or the way he should give it.\textsuperscript{130}

On the other hand, this is not the same as saying that witnesses are not prepared by someone.\textsuperscript{131} Furthermore, the “gingering” of expert testimony is rather widespread, both in civil and criminal cases.\textsuperscript{132} Nevertheless, the American attitude is wide-open by comparison.

\textsuperscript{128} Miller, supra note 14, at 204; see also Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices, 7 GEO. J. LEGAL ETHICS 865, 869-70 (1994) [hereinafter A Panel Discussion].

\textsuperscript{129} See Miller, supra note 14, at 222 (citing CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES para. 607.3, Annexe H: Written Standards for the Conflict of Professional Work, General Standards paras. 6.1, 6.2); see also A Panel Discussion, supra note 128, at 868. Barrister Michael Hill opines:

The reason lying behind the [English] rule against counsel seeing witnesses is quite simply [that] [testimony should be] the testimony of the witness and not the result of the advocate’s interrogation of the witness in circumstances in which the witness is liable to seek to adopt the advocate’s perception of the events rather than his own recollection of those events. \textit{Id.} at 869. A skeptical questioner asked the obvious question: “[D]oesn’t the same concern apply to the defendant, his expert witnesses, and his character witnesses [all exceptions to the English rule against meeting with witnesses]?” \textit{Id.} at 879. Barrister Hill responded that while there may be some hypocrisy in the system, the conflict is the result of striking a balance. See \textit{id}.

\textsuperscript{130} CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES para. 607.3 (1993).

\textsuperscript{131} I gather that they are prepared by police officers on the prosecution side and otherwise by solicitors. See A Panel Discussion, supra note 128, at 868.

I shall point out shortly that in the United States we have "beefed up" our criminal law in the hope of deterring pressure tactics. But preparation and rehearsal are not in the least unusual. Where do we Americans draw the line between permissible preparation and rehearsal and subornation of perjury? I can only talk around the issue, knowing that the whole subject may shock those of you who are used to the Code of Conduct of the Bar of England and Wales.

Most American lawyers think that we know [subornation] when we see it, even if we cannot come up with a definitional litmus test. "There is a fine line between coaching someone to lie and coaching someone to present a story in the 'best' light." Coaching, "woodshedding," or "horseshedding" of witnesses has been viewed as ethical, while the "gingering up [of] witness[es]" has been condemned. Consider this language from *United States v. Root*:  

Appellee Forde has injected a new element in oral argument not contained in his brief.

He urges that an attorney in counseling his client has latitude in aiding the client in the presentation of the client's story at trial time.

Quaere: Does this attorney-client relationship permit the client to relate a story manufactured by the attorney as Count One of this indictment charges?

Answer: No.  

What follows is hardly a detailed catalogue of tricks used down at the woodshed. From time to time, practitioners have tried to justify virtually every one of these techniques on the theory that it is okay as long as the


134 "Ginging up" is a British term. *See* C.P. Harvey, *The Advocate's Devil* 65 (1958).

135 *United States v. Root,* 366 F.2d 377 (9th Cir. 1966). This case was a spin-off of the Frank Sinatra, Jr. kidnapping affair.

136 *Id.* at 383.

137 For the techniques of coaching at depositions, see *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 502 F. Supp. 1092, 1096-99 (C.D. Cal. 1980) (recounting defendant's lawyers attempt to represent lower-level employee and former employee witnesses and control their testimony), and *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. Pa. 1993) (harshly criticizing coaching *during* depositions and setting forth unusual rules or guidelines).
lawyer is trying to get the truth.\textsuperscript{138} "All I did was tell the witness to listen to the question, and answer only the question—don’t volunteer anything." For the most part this is good and ethical advice. But what does the lawyer mean to convey when he or she says that? What does the witness hear? Such advice can go over the line.\textsuperscript{139}

Some techniques are quite crude, and many lawyer coaches are quite bold. I have seen witnesses carry scripts\textsuperscript{140} and cribnotes to the stand despite the fact that scripts and cribnotes may be seized by the cross-examiner and turned against the witness.\textsuperscript{141} Most witnesses leave their

\textsuperscript{138} See, e.g., Altman, \textit{supra} note 104, at 38-39. This is an excellent article. Mr. Altman’s purpose is to point out the ethical pitfalls, but as I will argue later, he may be too ready to dismiss criticisms of the standard techniques as “academic.”

\textsuperscript{139} See \textit{id.} Altman suggests that the lawyer might have gone over the line in \textit{United States v. Ebens}, 800 F.2d 1422 (6th Cir. 1986), when she told witnesses how to answer questions “truthfully” but in a manner that would divert the examiner’s attention away from the contents of a critical and “unfavorable” conversation. \textit{See id.} at 1443. Can a list of instructions to witnesses handed out before depositions (in some venues, such a song sheet is known as a “gouge”) go too far? Much ink has been spilled regarding a document styled “points to make in an affidavit,” which is now floating around in the latest Washington, D.C., sex scandal. \textit{See} Michael Isikoff & Evan Thomas, \textit{Clinton and the Intern}, \textit{NEWSWEEK}, Feb. 2, 1998, at 31, 37 Sometimes it is hard to say whether any line has been crossed, even if something smells. For an interesting set of instructions, see \textit{Accidental Exposure}, \textit{HARPER'S} MAGAZINE, Jan. 1998, at 20, which sets forth the verbatim text of law firm Baron & Budd’s \textit{Preparing for Your Deposition}. I like the line (a variation on the theme of “don’t volunteer”) that tells witnesses that “[a]t the deposition, it might help to pretend that you are a ‘prisoner of war’ in an enemy camp where you must give only your ‘name, rank, and serial number.’” \textit{Id.} One assumes that there is nothing wrong with this instruction in the abstract.

\textsuperscript{140} In \textit{CHARLES W WOLFRAM, MODERN LEGAL ETHICS} 648 n.96 (1986), Professor Wolfram cites a case from 1880 in which a lawyer was disciplined for writing out the answers for a witness. \textit{See In re Eldridge}, 82 N.Y. 1961 (1880).

\textsuperscript{141} See, e.g., \textit{FED. R. EVID.} 612. Unfortunately, not everybody understands this. In my first or second year of practice with a firm, I faced an opposing witness in a tiny municipal court. During my opponent’s direct examination, I kept objecting that the witness was reading a narrative that he (or someone) had prepared beforehand. He actually had the whole thing written out. The witness became so frustrated that he threw the script at me. I thought I was doing a great job, but the judge’s puzzled looks turned to anger. He thought I was being mean. Unfortunately, the confused call the shots at all levels and not just in the Municipal Court of Franklin County, Ohio. Who can forget the great moments in trial advocacy in the Iran-Contra hearings? Professor John Applegate of the University
scripts at home. They will not need them if they have been sufficiently “prepped.”

Some lawyers get their clients and friendly witnesses to change their stories during rehearsal by wincing or throwing up their hands when a witness mentions a “bad fact.” Some lawyers go so far as to say things like, “If you say that, you’ll lose.” Some will say that such things do not happen or that they occur only in the imaginations of lawyer-hating academics. But they do happen.

Almost as crude a technique is “group preparation,” in which witnesses are prepared together and coached to give “consistent” testimony. This used to be the sort of thing that one would expect only from law enforcement officers. Now lawyers on both sides of the “v” are using the technique in civil as well as criminal cases. This sort of preparation can even result in a waiver of privilege and work product, but only if the lawyer “gets caught.”

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of Cincinnati was watching too, but unlike me, he had the presence of mind to write some of it down. Here the questions are coming from Mr. Liman, counsel for the Senate committee investigating the Iran-Contra affair, the answers are coming from Lt. Col. Oliver North, and the objections are coming from Mr. Sullivan, counsel for North:

Mr. Liman. [Y]ou are looking at a book there. What is the book, sir?
Mr. North. The book is made up of notes that I have made in trying to prepare with counsel for this hearing.

[Objection by] Mr. Sullivan. Don’t tell him what it includes.
Mr. Liman. Well, I think that if a witness is looking at something that I, as counsel, am entitled to see what he is refreshing his recollection with. Mr. Sullivan. I think you are wrong. That is a product of lawyers working with clients.

That is none of your business

Liman did not argue waiver of work product or attorney-client privilege, and there was no one to rule on such fine points. Liman simply dropped the matter! See id. at 285.

143 See Ex Parte Brandley, 781 S.W.2d 886, 888 (Tex. Crim. App. 1989). This case is discussed infra text accompanying notes 261-69, 271-83.
144 See Applegate, supra note 141, at 350.
145 See id. at 351.
Perhaps not quite so bad is the so-called “hub-and-spoke” method, in which group consistency is assured by separate interviews with members of the group, in which each is made aware of the testimony of others.\textsuperscript{146} Another variation of the same theme is the way that witnesses can be shown the error of their ways by placing their observations in “context” - “Well, that’s not how your boss remembers it[’]”\textsuperscript{147} Coercive, isn’t it? On the other hand, is it wrong to compare the witness’s recollection with other evidence if it will help them remember? This can be done at trial, at least up to a point. The witness’s certainty could be tested by asking the witness if he or she is aware of the boss’s testimony and so on. On the other hand, this cross-examination would be done in open court, and the court and the opponent could see if it were misleading and coercive. Again, arguments can be made both ways about the legitimacy of the technique.\textsuperscript{148} It depends on the circumstances and on the lawyer’s intent.

Some argue that even the old-fashioned “lecture” is perfectly respectable if the lawyer means well. Most readers know that the “lecture” was the technique used by Jimmy Stewart (usually playing the epitome of the straight-shooter) to help his client come up with a “temporary insanity” defense in the movie \textit{Anatomy of a Murder}\textsuperscript{149} Before the defendant committed himself to a story, he was told about the defenses that might be available if only there were facts to support them. The defendant was not stupid and more or less tried the defenses on for size.

Before moving on to a brief discussion of a relatively new law that might be used to prosecute lawyers who cross the line, I would like to note that Monica Lewinsky’s “talking points” are not the only thing that got folks all abuzz over the ethics of witness preparation. An equally hot item was a document that surfaced in an asbestos product liability case in Texas. One of the plaintiffs’ law firms, Baron & Budd, had provided its clients with a document styled “Preparing for Your Deposition.” It was predictable that it would surface sooner or later at a deposition. When it did, its contents got the firm into hot water. Several commentators have opined

\begin{itemize}
\item \textsuperscript{146} See \textit{id.} at 351 n.140. Appelgate alludes to \textit{United States v. Townsley}, 843 F.2d 1070 (8th Cir. 1988), which held that communications with an attorney were not privileged because the attorney separately encouraged several witnesses to give consistent untruthful testimony.
\item \textsuperscript{147} Piorkowski, \textit{supra} note 142, at 399.
\item \textsuperscript{148} See Altman, \textit{supra} note 104, at 40.
\item \textsuperscript{149} ANATOMY OF A MURDER (Columbia Pictures 1959). The movie was based on a 1958 play of the same name written by Judge J. Voelker of Michigan and published under the pseudonym “Robert Travers.”
\end{itemize}
that they think this twenty-page document goes too far and tells witnesses “how to testify.” For example, the memo provides such advice as, “It is important to maintain that you NEVER saw any labels on asbestos products that said DANGER or WARNING.”

A. The New “Witness Tampering” Law

Lawyers may be prosecuted for perjury and for subornation of perjury. But more recent legislation widens the net, or expands the “field of fire” in terms of defining punishable conduct or “hostile” personnel. These new laws include 18 U.S.C. § 1957, which makes it a felony for anyone to knowingly engage in a financial transaction with knowledge that the property involved is derived from crime, 26 U.S.C. § 6050I, which mandates the reporting of cash payments for services if they equal or exceed certain limits, and 18 U.S.C. § 1512(b), which addresses witness tampering and defines obstruction of justice as including misleading conduct engaged in with intent to influence witness testimony. While these new laws were promoted as weapons aimed at gangster types—thugs, drug dealers, and money launderers—they are not in the least bit discriminatory on their face. They are about as surgical as a claymore


152 See id. § 1622.

153 See id. § 1957


mine. 156 Criminal defense lawyers are definitely in the kill zone157—maybe even some prosecutors.158 Jack Cade would approve of these laws.

18 U.S.C. § 1512, which covers tampering with a witness, victim, or an informant, provides in pertinent part:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—
(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(D) be absent from an official proceeding to which such person has been summoned by legal process;

shall be fined [by not more than $250,000] or imprisoned not more than ten years, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.159

One assumes that in the current scandal wars in Washington, the argument under 18 U.S.C. § 1512 would run something like this: Monica Lewinsky may have violated the statute when she tried to persuade Linda Tripp to lie in a deposition using the “talking points.” If someone gave Monica the “points” to do that, told her to try the tactics set forth in the “points,” told her to evade or delay giving testimony by going to another jurisdiction, told her something misleading like “they don’t prosecute perjury in civil cases,” or got her a job after having a discussion with her, then that someone could have a § 1512 problem. It does not look like it would be all that difficult to make a prima facie case under the statute. Of course, securing a conviction is another thing.

Are any of the techniques of coaching listed above “witness tampering” under the new criminal statute? Remember that a violation of 18 U.S.C. § 1512(b)(1) can be based on the lawyer’s “misleading conduct” toward the witness with “intent to influence” the witness’s testimony in an official proceeding. That is all there is to a prima facie case.160 It is an affirmative

160 In Kiner v. State, 643 N.E.2d 950 (Ind. Ct. App. 1994), defense counsel falsely suggested to an eyewitness on the stand that an old photo was a photo of the defendant. When the witness took the bait and testified that she could have picked
defense, which the defendant lawyer must establish by a preponderance of the evidence, that his or her conduct "consisted solely of lawful conduct and that [the lawyer's] sole intention was to encourage, induce, or cause the other person to testify truthfully."\(^{161}\)

Lawyer John Wesley Hall, Jr. provides witness tampering scenarios that might be encountered by a criminal defense lawyer:

Your client says "Witness B is going to say such-and-such about me. I'm going to talk to him and get him to not be so positive against me. He knows the truth." Worse, your client says "I'm going to show him why he needs to change his story." Or worse, your client says "I'm going to pay...

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\(^{161}\) 18 U.S.C. § 1512(d). This exercise in burden shifting has been ruled constitutional. See, e.g., United States v. Clemons, 658 F. Supp. 1116, 1125 (W.D. Pa. 1987), aff'd, 843 F.2d 741 (3d Cir. 1988); Kalevas, 622 F. Supp. at 1527. It has been suggested that this defense was put in to head off "the possibility of a judge, prosecutor, or presiding officer violating the statute by threatening a witness with a perjury prosecution for false testimony." Judah Best & Virginia White-Mahaffey, An Analysis of the Victim and Witness Protection Act of 1982, in CRIMINAL LAW AND URBAN PROBLEMS 1984, at 89, 98 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4168, 1984). Of course, such warnings can go overboard, and result in the reversal of a conviction if the defendant is deprived of the benefit of the witness's testimony. See, e.g., Webb v. Texas, 409 U.S. 95 (1972); United States v. Risken, 788 F.2d 1361 (8th Cir. 1986).

In terms of excuses, the following quote should be considered: "The 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." In re Robinson, 136 N.Y.S. 548, 556 (App. Div. 1912), aff'd, 103 N.E. 160 (N.Y. 1913).
him to shut up." Even worse, your client says "I'm going to kick his [and show him who's boss]."

Hall claims that a California lawyer was indicted under 18 U.S.C. § 1512 "for telling witnesses that they did not have to talk to government officers without consulting a lawyer." This seems pretty far out, but then again, indictments are pretty much had by the prosecutor for the asking. In my own home state of Kentucky, a lawyer was recently suspended from practice following his conviction under 18 U.S.C. § 1512(b)(1) for attempting to persuade another person not to testify in official proceedings. The lawyer also got a fifty-seven month prison sentence!

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162 Hall, supra note 94, at 332-33. Lawyers in civil cases are also subject to allegations of misconduct. For an interesting case in point, see Red Ball Interior Demolition Corp. v. Palmadessa, 908 F Supp. 1226 (S.D.N.Y. 1995). In this classic case of closely-held corporation "squeeze out," involving brother against brother, allegations were made that plaintiff's counsel should be disqualified for making allegedly improper payments to a lay witness in violation of 18 U.S.C. § 201(d) and for allegedly misleading or threatening statements in violation of 18 U.S.C. § 1512(b). The judge denied the motion to disqualify See id. On the issue of payments to witnesses, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996).

163 Hall, supra note 94, at 334.

164 It is probably worth noting that a variety of allegations of misconduct of counsel may be advanced post conviction. The United States Supreme Court did lawyers a great disservice when it decided to cut off arguments in direct appeals through the application of "waiver and by-pass" rules, only to entertain substantially similar arguments in habeas corpus under the rubric of "ineffective assistance of counsel." Nowadays, the dissatisfied client (inmate) will almost certainly attack his former defense lawyer with a variety of creative if not contrived claims, all with the encouragement of a taxpayer-supported cadre of public advocates. The latest weapon is the claim that counsel was suspected of subornation and that counsel therefore was "chilled"—prevented from furnishing sufficiently zealous advocacy—by threats from the prosecutor or the trial judge. What fresh hell is this? one may well ask. Cf. Johnston v. Love, No. 95-3727, 1995 U.S. Dist. LEXIS 21426 (E.D. Pa. Oct. 18, 1995) (detailing convicted murderer's unsuccessful claims that he should get a new trial because a witness suggested that defense counsel was accused of subornation by a witness, the judge gave dirty looks to counsel, and counsel was intimidated, failed to testify to rebut the witness's testimony, etc.).

165 See Kentucky Bar Ass'n v. Zeman, 828 S.W.2d 609, 609 (Ky. 1992).

By expressing less than unalloyed enthusiasm for these new federal criminal laws, I do not want to leave the reader with the impression that subornation does not take place or that lawyers are harshly or unfairly treated when they get caught. My point is simply that 18 U.S.C. § 1512 may sweep too broadly and invite abuse by the prosecution and law enforcement. The bad cases may end up going unpunished or going lightly punished while draconian measures are reserved for the trivial or even the innocent. Of course, some would simply say, “That’s the law.”

While 18 U.S.C. § 1512, the federal witness tampering statute, applies only to federal proceedings, state laws have also widened the net. For example, Kentucky law now punishes some “unsworn falsifications” (lies) intended to “mislead a public servant in the performance of his duty”\(^1\) The Kentucky statute relates only to certain written statements, false records or forged instruments, or false samples, specimens, maps, boundary marks, or the like.\(^2\) The statute is not as sweeping as its federal counterpart 18 U.S.C. § 1001. Section 523.110 of Kentucky’s statutes goes on to make it an offense to give a “peace officer” a false name or address with “intent to mislead the officer as to [one’s] identity,” but the offender must first be warned that giving a false name or address is a criminal offense.\(^3\) It can be seen that in at least some states legislators are not so enthusiastic about widening the net (lest they be caught up in it?). On the other hand, Kentucky is typical to the extent that it has enacted a number of laws punishing acts amounting to interference with judicial administration such as witness tampering through bribery, harassment, intimidation, retaliation, or tampering with physical evidence and the like.\(^4\) As of yet, however, nothing so sweeping as 18 U.S.C. § 1512 has been proposed.

## III. PROSECUTORS, POLICE PERJURY, AND THE SNITCH PROBLEM

The owner class went cold with fear.
It drew its sharpest knife
Of treachery and perjury,

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168 KY. REV STAT. ANN. § 523.100 (Michie 1990).

169 See id. § 523.110.

170 Id.

171 See id. §§ 524.010-.120.
And Tom was framed for life.\textsuperscript{172}

In Hollywood movies and mystery novels, detectives catch the villains by skillful deduction and the piecing together of clues. In real life, they depend on snitches.\textsuperscript{173}

I suspect that we can all agree that clearer rules will not make all of the ethical problems go away. Luminous boundary lines will not keep the reckless, the drunk, and the power drunk on the road and in the proper lane. Bright lines are no more effective than restraining orders in domestic violence cases. Consider the letter, and then the reality, of the ethical guidelines for the prosecution.

The ABA Standards for Criminal Justice\textsuperscript{174} provide:

\textit{3-5.6. Presentation of evidence}

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity\textsuperscript{175}

In 1935, in the case of \textit{Mooney v. Holohan},\textsuperscript{176} the Supreme Court of the United States got around to announcing the obvious:

[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the

\textsuperscript{172} Mike Quin, \textit{Farewell, Mother Mooney}, quoted in CURT GENTRY, \textit{FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS} 384 (1967).


\textsuperscript{174} In praise of the Standards, see John M. Burkoff, \textit{Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"} 53 U. PIT. L. REV. 271 (1992). The quote in the title refers to \textit{Berger v. United States}, 295 U.S. 78 (1935), in which the Court opined that “while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” \textit{Id.} at 88. In DAVID PANNICK, \textit{ADVOCATES} (1992), Pannick used the line while alluding to an unreported American case in which defense counsel appealed his client’s conviction on the ground that the prosecuting attorney had “‘farted about 100 times’” during counsel’s closing argument. See \textit{id.} at 51.

\textsuperscript{175} \textit{STANDARDS FOR CRIMINAL JUSTICE}, The Prosecution Function, Standard 3-5.6 (1993).

\textsuperscript{176} Mooney v. Holohan, 294 U.S. 103 (1935).
pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.\textsuperscript{177}

The case arose from the 1916 San Francisco Preparedness Day Bombing. One of the six people arrested for the bombing was the pugnacious labor leader and Socialist, Thomas J. Mooney. Among the witnesses against him were "a drug addict, a garrulous prostitute, an ex-convict in need of a favor, and an apparently upright woman who later said she had witnessed the crime in her 'astral presence.'"\textsuperscript{178} John McDonald, the supposed drug addict, later confessed that he had been coached to commit perjury by the district attorney himself.\textsuperscript{179} "My testimony was untrue and false," said McDonald (somewhat redundantly) in a public statement issued shortly before he returned to California for a hearing conducted by the Supreme Court of California.\textsuperscript{180}

Another witness, Frank C. Oxman, testified that Mooney and the other bombers had been at the scene of the crime. It was later discovered, however, that Oxman was miles from San Francisco when the bomb exploded.\textsuperscript{181} A famous series of photographs offered by the defense shows Mooney and his wife on a roof more than a mile from the blast, with a clockface in the photo showing the time just a few minutes before the explosion. The prosecutor had first tried to suppress the photographs but finally turned over copies that had been blurred deliberately.\textsuperscript{182} Mooney was convicted anyway. Not even the 1935 Supreme Court opinion would free him.\textsuperscript{183} His case was sent back to the California courts for factual findings, and the California courts more or less rehabilitated the perjured

\textsuperscript{177} Id. at 112.
\textsuperscript{178} Ed Cray, "It Was Lies, All Lies!", CAL. LAW., Sept. 1983, at 42, 44.
\textsuperscript{179} See GENTRY, supra note 172, at 283-84. Even after he had confessed to perjury, he indignantly insisted that he was not a drug addict.
\textsuperscript{180} Crime: California's Witness, TIME, July 21, 1930, at 19.
\textsuperscript{181} See Cray, supra note 178, at 44; GENTRY, supra note 172, at 286-87 The title of Cray’s article comes from the mouth of McDonald based on words spoken by him during his testimony before the Supreme Court of California. See id. at 340. The trial judge in the Mooney case once declared that the case was "one of the dirtiest jobs ever put over." Crime: California’s Witness, supra note 180, at 19. The foreman of the jury said that the jurors’ decision had turned on the testimony of McDonald and Oxman, both of whom he now considered discredited. See id.
\textsuperscript{182} See GENTRY, supra note 172, at 161.
\textsuperscript{183} See Mooney v Holohan, 294 U.S. 103 (1935).
witnesses and covered up for them.\textsuperscript{184} It was not until 1939 that Mooney was pardoned. By then he had become an “international folk hero.”\textsuperscript{185}

Where there is knowing use of perjured testimony, there is usually a \textit{quod pro quo}. Again, the ABA Standards provide rules just waiting to be broken.

3-3.2. \textit{Relations with victims and prospective witnesses}

(a) A prosecutor should not compensate a witness, other than an expert, for giving testimony\textsuperscript{186}

Leave aside the question of what is or is not “prohibited compensation.” We will deal with that when we come to the subject of jailhouse informers and “snitches.” For now, consider this much: if the inducement is improper, or if there is strong impeaching, contradictory, or other exculpatory evidence, then the crooked prosecutor will attempt to keep the defense in the dark regarding same. Again, the Standards have lots to say about this:

3-3.11. \textit{Disclosure of evidence by the prosecutor}

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all

\textsuperscript{184} \textit{See In re Mooney, 73 P.2d 554, 558 (Cal. 1937).} In early August 1930, the Supreme Court of California had sat as an advisory pardon board and had heard the new testimony of McDonald and others. It was reported that Justice Preston, a former district attorney, served as a sort of prosecutor and cross-examined McDonald with “ferocity.” “Was [your earlier testimony] a lie? Weren’t you lying when you said that? You’ve told five different stories at five different times. How is the court to know which one to believe?” \textit{Radicals Retired, TIME,} Aug. 11, 1930, at 18. In the view of the justices, McDonald was such a liar that his admission of perjury could not be believed!

\textsuperscript{185} Cray, \textit{supra} note 178, at 42. Throughout, the villain of the piece was Charles Marron Fickert. It may be of interest to the reader that Mooney once described Earl Warren as “the Fickert of 1936-37” GENTRY, \textit{supra} note 172, at 414. For his part, when Warren was elected Attorney General of California, he “express[ed] the hope that if the governor did decide to free Mooney he would not designate him the victim of a frame-up.” \textit{Id.} at 419. Governor Olson did just that, and Warren “took his anger out on [Mooney’s confederate,] the hapless Billings” by voting with the majority of the Pardon Advisory Board to keep Billings in jail. ED CRAY, \textit{CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN} 107 (1997).

\textsuperscript{186} \textit{STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.2 (1993).}
evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.187

It is now acknowledged that a prosecutor's failure to disclose such exculpatory evidence can deprive a defendant of constitutional due process of law,188 and claims of nondisclosure or suppression of material evidence have kept cases in the public eye for years.189

187 Id. Standard 3-3.11.
188 See Brady v. Maryland, 373 U.S. 83, 86-88 (1963). It is true that Brady had not yet been decided when prosecutors withheld exculpatory evidence from Dr. Sam Sheppard's defense lawyers, see CYNTHIA L. COOPER & SAM REESE SHEPPARD, MOCKERY OF JUSTICE: THE TRUE STORY OF THE SAM SHEPPARD MURDER CASE 83 (1995), but the notions of fairness announced in Brady are much older than either Sheppard's or Brady's cases. Cf. United States v. Burr, 25 F. Cas. 30 (D. Va. 1807). In 1942, long before the murder of Dr. Sheppard's wife, the Supreme Court decided Pyle v. Kansas, 317 U.S. 213 (1942), wherein Justice Murphy opined that the "inexpertly drawn" papers submitted by the prisoner alleged that "his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him." Id. at 215. If the prisoner could prove this, he must be set free. Note that where there is knowing use of perjured testimony, there will also be suppression of evidence—the two necessarily go hand in hand, and a link to other specific constitutional guarantees such as confrontation and compulsory process have been suggested. See generally Jean Montoya, A Theory of Compulsory Process Clause Discovery Rights, 70 IND. L.J. 845 (1995).

ABA Model Rule 3.8 provides that "[t]he prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense " MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1998). The older ABA Disciplinary Rule 7-103(B) was similar. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1983).

189 Alleged "failure to disclose" temporarily resurrected the infamous Wayne Williams—"Atlanta Child Murder" case. See Mark Curriden, The Case That Shook Atlanta Rises Again, NAT'L L.J., Jan. 17, 1994, at 8. And in 1992, Alan Dershowitz attempted to obtain a new trial for Dr. Jeffrey MacDonald, who had been convicted in the "Green Beret Fatal Vision" murders of his wife and two daughters.
No less an authority on courtroom etiquette than Britain’s Barrister Richard Du Cann has held forth that prosecuting counsel should be: “An officer of Justice. He must present the case against the defendant relentlessly, but with scrupulous fairness.”

Translated, this might read: “he must prosecute and not persecute.” In practice it means he must present all the facts to the court whether they are favourable or unfavourable to the case he is instructed to put forward. If he has in his possession statements from witnesses whom he does not intend to call who might give relevant evidence for the defence, then the defence must be furnished with the names and addresses of those MacDonald claimed that his family had been slaughtered by drug-crazed hippies, one of whom (a female) had long blond hair. Dershowitz claimed that blond wig hairs and some dark wig fibers found in Mrs. MacDonald’s hairbrush had not been provided to the defense by the prosecution and that they might have led the jury to believe MacDonald’s story if they had been offered in evidence. In rebuttal, FBI expert witnesses provided affidavits that the hair and fibers in question were very much like Barbie doll hair and that the dark fibers could be matched to a wig owned by Mrs. MacDonald. MacDonald’s attempt to secure a new trial failed. See DAVID FISHER, HARD EVIDENCE 112-13 (1995) (recounting the FBI version of the story). In the spring of 1997, following the release of a Justice Department report critical of the FBI Crime Lab, new evidence surfaced that caused many to question the accuracy and credibility of the information supplied by the FBI fiber expert in the MacDonald case. The particular agent was described as being notorious for providing prosecutors with unequivocal conclusions without sufficient supporting evidence. In another case involving the impeachment of U.S. District Judge Alcee Hastings, the same expert had been charged by a colleague with having given false and misleading testimony (the particular testimony did not involve fiber evidence). See Laurie P Cohen, Strand of Evidence; FBI Crime-Lab Work Emerges as New Issue in Famed Murder Case; Jeffrey MacDonald’s Lawyer Alleges Fraud by Agent with History of Problems; Mystery of the Blond Fibers, WALL ST. J., Apr. 16, 1997, at A1. In the MacDonald case, at least two disinterested industry witnesses came forward and disclosed that FBI agents had pressed them to sign affidavits that did not reflect the true facts about the use of synthetic fibers in doll and wig manufacture. See id. For more on the FBI Crime Lab report, see Gary Fields & Kevin Johnson, Report Confirms FBI Lab Flaws; Challenges to Verdicts Now Expected, USA TODAY, Apr. 16, 1997, at 1A, and B.J. Palermo, Defense Bar Angry Over Lab Scandal, NAT’L L.J., Mar. 10, 1997, at A1. Of course, the problems of false evidence at the FBI are not unique. See Gary Taylor, Fake Evidence Becomes Real Problem, NAT’L L.J., Oct. 9, 1995, at A1; Richard H. Underwood, “X-Spurt” Witnesses, 19 AM. J. TRIAL ADVOC. 343 (1995) [hereinafter Underwood, “X-Spurt” Witnesses].
witnesses. If he knows that a witness on whom he is relying to prove his case is of bad character, the defence must be given the details of his convictions. If he hears one of his witnesses giving evidence which differs from a statement which he has in his possession his duty is to hand that statement to the defence or to the Judge so that the witness may be cross-examined on it.\footnote{190}

This is all very right and proper, but in the United States, at least, the rules are one thing and what the prosecutors actually do is another thing.\footnote{191}

\footnote{190} RICHARD DU CANN, THE ART OF THE ADVOCATE 38 (1964). Annexe H of the CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES is in accord, and states in pertinent part that:

1.1 Prosecuting counsel should not attempt to obtain a conviction by all means at his command. He should not regard himself as appearing for a party

1.2 Prosecuting counsel should bear in mind that it is his duty to ensure that all relevant evidence is either presented by the prosecution or made available to the defence.


\footnote{191} See, e.g., Daniel Kladman, Prosecutor Faces Ouster; In Rare Rebuke, Former Head of AUSA Group Suspended for Misconduct, LEGAL TIMES, Oct. 2, 1995, at 1. For a recent case of some notoriety, see Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), in which prosecutors failed to disclose exculpatory evidence to the courts and to the detainee, an alleged Nazi war criminal, resulting in his extradition to Israel on a capital charge of which he was ultimately acquitted. For examples of less publicized, almost “routine” violations, see United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1992) (discussing government’s withholding of a memorandum undermining witness’s credibility), and United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988) (discussing prosecutor’s failure to make disclosure of Jenks Act material and to correct testimony known to be false).

Only this year, previously “suppressed” blood and semen samples yielded DNA results strongly suggesting that convicted murderer Richard Eberling may have been the killer of Marilyn Sheppard, wife of Dr. Sam Sheppard. Prosecutorial misconduct figured into the accounting of the Dr. Sheppard murder trials. See COOPER & SHEPPARD, supra note 188, at 83-84. The “newly discovered” scientific evidence supports their argument that evidence of rape and leads pointing in Eberling’s direction may have been ignored at the direction of the prosecution. Eberling had washed the windows at the Sheppard estate. See Fox Butterfield, New Clues in an Old Murder Case, N.Y. TIMES, Feb. 5, 1997, at A12.
People v. Ramos provides a shocking taste of reality. Alberto Ramos was a twenty-two-year-old student and part-time teacher's aide when he was charged and convicted of raping a five-year-old girl in the restroom of a day-care center. According to the reported opinion in the case, the victim, who was six years old at the time of the trial, did not identify Ramos in court but managed to describe the alleged incident through the use of anatomically correct dolls (a sort of "poppet" popular among social workers). She had originally stated that one of the little boys in the class had been the one who had done something wrong, but this was explained away. There was virtually no corroboration for the child's story. It was not supported by other teacher's aides who were on duty at the day-care center. Indeed, Ramos had been left alone with the child for no more than fifteen minutes. Medical evidence indicated that there was some bruising in the vaginal area and some slight stretching of the hymen, but there were also references in the medical records (which were not introduced into evidence) that the child had told the hospital personnel that an older boy or boys (she named the same child that she had previously named) were responsible. A doctor was permitted to testify despite objection that she was able to conclude that "the child had possibly been sexually abused [because of] the fact that the child was able to give 'such an accurate description of everything that happened.'" While this statement, implying that the child had made an accusation, was admitted into evidence, the content of the accusation was not.

193 See id. at 978.
194 See id.
195 Fans of Arthur Miller's play, The Crucible, will recall that the false witnesses in the Salem witch trial of Elizabeth Proctor accused her of concealing "poppets," the Puritan version of voodoo dolls, in her house. Unfortunately, the prosecuting witnesses were the one's consorting with the devil. See Arthur Miller, The Crucible 237-38, 278-79, 299-300, reprinted in Arthur Miller's Collected Plays 225 (Viking Press 1957).
196 See Ramos, 614 N.Y.S.2d at 978.
197 See id. at 979.
198 Id. at 979-80. The appellate court observed parenthetically, While not before us on this motion, the propriety of admitting such testimony may be questioned in light of the Supreme Court's decision in Idaho v. Wright, holding that an expert may not repeat a child's hearsay accusation without an initial determination as to whether the expert conducted the interview with the child in a way that was not unduly suggestive.
Ramos was convicted and sentenced to eight and one-third to twenty-five years in prison.\(^{199}\) He had served over seven years of this sentence when he received some astounding documents from a private investigator who had worked for the day-care center in the defense of a parallel civil suit for money damages brought by the child's parents. That case had apparently been settled, but the investigator had been convinced of Ramos's innocence.\(^{200}\) In the materials provided to Ramos by the investigator were facts which were known to and withheld by the prosecutor in Ramos's criminal case. This withheld evidence showed that, prior to the alleged abuse, the child was known to “masturbate openly at school [and] expos[e] herself to other[s]”;\(^{201}\) that the child had been seen imitating sexual intercourse using dolls; and that she had been in the habit of watching late night “HBO movies” and describing the “sexual things she sees.”\(^{202}\) Numerous witness statements that were exculpatory or contradicted evidence offered at the trial were kept from Ramos’s defense lawyers. Since “[t]he crux of the defense at trial [had been] that the entire incident never occurred and that the child's testimony was simply false, either deliberately or because she had come to believe it herself by having been subjected to repeated suggestive inquiry,”\(^{203}\) the evidence suppressed by the prosecutor could not have been more critical. Ramos was set free.

\(^{199}\) See Ramos, 614 N.Y.S.2d at 980.

\(^{200}\) See id.

\(^{201}\) Id. at 981.

\(^{202}\) Id.

\(^{203}\) Id. at 983. The reality of this case might profitably be compared to the many assumptions made by the treatise writers and rule-makers regarding the psychology and testimony of children. For example, here are some generalizations taken from a new handbook on the law of evidence:

Even older children, particularly if they are victims of sexual or physical abuse, may have difficulty testifying in open court in the presence of their abuser. In recent years a variety of procedures and devices have been adopted to facilitate testimony by children, including the use of anatomical dolls to help overcome verbal inhibitions in describing sexual activity and liberalized rules allowing the child's parent or other trusted person to sit near the child and provide support while she is testifying.

Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 6.2, at 505 (1995) (footnotes omitted). In a recent case in western Kentucky, a child of tender years was the complaining witness in a sexual assault case. She testified that her
There is little point in holding forth at much length on the problem of police perjury. That some police officers will perjure themselves to get a conviction or protect themselves is an “open secret,” although many judges still piously instruct jurors that “the officer has no reason to lie.” This is an absurd and repellant mantra, but as long as lawyers tolerate it, it is unlikely that appellate judges will strike it from the script. One suspects (admittedly, I am guessing) that direct police perjury—in which the officers themselves lie—takes place mostly in run-of-the-mill cases (traffic and DUI) or in response to motions to suppress evidence (in support of warrants or in justification of warrantless searches—exigent circumstances and all that). The perjured cop of today is but an updated version of Arthur Train’s Officer Delany:

He had never been called upon to swear away an innocent man’s liberty, but more than once he had had to stand for a frame-up against a guilty one. That phantasmagorical scintilla of evidence needed to bolster up a weak or doubtful case could always be counted on if Delany was the officer who had made the arrest. None of his cases were ever thrown out

assailant had a mole and freckles on his penis. Her testimony was extremely graphic and reportedly very believable—it must be true! The defense lawyer prevailed upon the court to allow the defendant to put himself on display (it seems that a private viewing by the judge followed by a stipulation—“no mole and no freckles on this bad boy”—would have been just as effective and certainly more decorous). Defendant was acquitted. I am not making this up. See Robin Divine, *Officials Review Caldwell Trial Nudity*, PADUCAH SUN (Paducah, Ky.), June 18, 1995, at 1A. I am quoted for the brilliant statement—“I’ve never been in that position.” *Id.* One cannot help but speculate on what might have happened in the case of Paula Corbin Jones v. William Jefferson Clinton, see Complaint para. 22, Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998) (No. LR-C-94-290) (referring to “distinguishing characteristics in Clinton’s genital area”), had the case not been thrown out of court in April 1998. See Jones v. Clinton, 990 F. Supp. 657, 662 (E.D. Ark. 1998).


205 See Irving Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551 (1967). Younger discusses “dropsy testimony” (the defendant dropped the evidence, so there was no unlawful search and seizure) and systematic lying about defendants who conveniently provide confessions in the form of spontaneous and voluntary apologies. See id. at 552.
of court for lack of evidence, but then, Delaney never arrested anybody who wasn’t guilty.\footnote{206}{Arthur Train, 
By Advice of Counsel 5 (1928).}

Although mundane, motions to suppress are made in some pretty sensational cases. The notorious O.J. Simpson case had hardly started before the commentators and pundits were psychoanalyzing the investigative officers and suggesting that they fudged in order to justify their searches of the Simpson premises. Professor Alan Dershowitz, one of the defense “dream team,” made the sensational charge (which sounded more and more plausible as the case unfolded) that the Los Angeles Police Department taught its officers the art of “testilying.”\footnote{207}{Dershowitz has expressed his views on police perjury in his many writings. See, e.g., Dershowitz, supra note 95, at 68-69. “Testilying” has been the subject of complaint in conservative as well as liberal circles. See, e.g., Robert Bauman, Exclusive Justice, REASON, May 1995, at 48-50. Bauman, a Republican Congressman from Florida from 1973 to 1981, reports widespread abuse in Boston, New York, New Orleans, and Los Angeles. For the latest reported outbreak in the “Big Apple,” see Pockets of Corruption, N.Y. Times, Apr. 9, 1995, at 43; George James, Judge Dismisses Case Against Police Officer ‘Slaps, Kicks’ Are Not Assault, She Rules, N.Y. Times, Apr. 8, 1995, at 27; Robert D. McFadden, Three More in Precinct Are Accused: Sergeant and 2 Officers Charged with Perjury, N.Y Times, Apr. 7, 1995, at B1, George James, Police in an Informer Program Are Investigated Themselves, N.Y. Times, Mar. 30, 1995, at B3; and Clifford Krauss, 3 From Queens Precinct Indicted in Theft of $1,400 from Man, N.Y. Times, Mar. 29, 1995, at B3.}

One law review article made much of a detective’s demeanor, or body language, as he testified at the suppression hearing.\footnote{208}{See Morgan Cloud, The Dirty Little Secret, 43 EMORY L.J. 1311, 1336-39 (1994). For a more recent contribution, see Christopher Slobogin, Testilying: Police Perjury and What To Do About It, 67 U. COLO. L. REV 1037 (1996).}

Not everyone jumped on the police-bashing bandwagon, but the accusations struck a nerve. Later they would become body blows and land hard.\footnote{209}{For the theory that the O.J. case involved an effort to frame a guilty man, see Eric Zorn, Maybe O.J. Did It and the Cops Tried To Frame Him Too, CHI. TRIB., Feb. 6, 1997, § 2 (Metro Chicago), at 1. In this piece, the author states that “studies have shown that [in Cook County] just over three-quarters of police officers say they think their colleagues ‘shade the facts a little or a lot to establish probable cause’ for searches.” Id. One former public defender and Assistant U.S. Attorney is quoted as saying:

Somewhere, a police officer is speaking to a young prosecutor and he’s shading the truth. Or he’s lying. And the prosecutor is in the process of...}
The *Simpson* case is, after all, only one case. Put it aside. There is still plenty of evidence that police perjury is not confined to fencing matches over legal technicalities. Police officers can, and sometimes do, write false and misleading reports. They commonly suppress exculpatory evidence by deleting it from their reports. Some critics charge that the abuse is systematic in some departments. One of the most notorious cases of this genre is *Jones v. City of Chicago*. The case arose from the rape and murder of a twelve-year-old girl. The perpetrator had also beaten her ten-year-old brother. However, the semi-comatose brother indicated to detectives that the killer was a light-skinned African-American gang member named George who lived in the neighborhood. One detective, Frank Laverty, suspected that the bad guy was probably a gang member who went by the nickname of “King George” and was lighter skinned than the complaining witness. This theory fit the facts. He ultimately making a decision. “Do I call him a liar?” he’s thinking. “Or do I go ahead and let the judge or the jury decide?”

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See Stanley Z. Fisher, “Just the Facts Ma’am” *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 *New Eng. L. Rev* 1 (1993). For a small town perspective, see EARLEY, supra note 173. There are other variations on this theme. Professor Weinberg reports that police in the U.S. routinely “smooth reports” for the file and destroy their original notes. Sometimes they are encouraged to do this by prosecutors. *See A Panel Discussion*, supra note 128, at 875. Other panelists suggested that this would be viewed as unethical in the English system.

See *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *see also* *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985). Both cases are discussed in Fisher, supra note 210, at 42. Palmer was a class-action lawsuit that challenged the Chicago Police Department’s so-called “double file system.” *Palmer*, 755 F.2d at 565. Under this system, any exculpatory evidence is gathered and preserved in a “street file” that is never made available to the defense. *See id.* at 565-66. Can it be that prosecutors do not know about this system? If they do, then so much for *Brady v. Maryland*, so much for the ABA Standard 3-3.11(a), Model Rule 3.8(d), DR 7-103(B), and so much for good faith in discovery. Fisher cites *People v. Young*, 591 N.E.2d 1163, 1165 (N.Y. 1992), and reports that prosecutors in New York only recently discovered that a similar system of “unofficial” or “confidential” files were kept by the N.Y.P.D. These files were “intra-departmental” and were kept from the prosecutors. Fisher, supra note 210, at 36 n.179. Obviously, defense lawyers are going to have to start pressing for the turnover of all files, “official” and “unofficial.”

See *Jones*, 856 F.2d at 988.

See *id.* at 991.
determined that two men, one of them being “King George,” had probably done the crime. The “King” even confessed to a similar rape and murder that had been committed in the same area.\textsuperscript{214} Alas, this detective was not kept on the case.\textsuperscript{215} The folks that were kept on the case had it in their heads that the crime should be pinned on George Jones, the dark skinned, studious editor of the Fenger High School student newspaper and the son of a Chicago policeman. The beating victim was interviewed several times and pressed in a suggestive manner to identify Jones’s photograph and finger him as the assailant. The witness’s responses were confused at best.\textsuperscript{216} No matter. The investigators got an indictment and, in the meantime, prepared an “official” report (inconvenient, exculpatory evidence was hidden away in a separate, secret “street file”) that Seventh Circuit Judge Richard Posner (the conservative law and economics guy who is not exactly known as “the felon’s friend”) later described as “full of falsehoods.”\textsuperscript{217} It falsely stated that witnesses had picked Jones’s picture from a group or array of photos (only Jones’s picture was displayed), that Jones’s father had not seen him on the morning of the crime (the father had said just the opposite), and that the ailing star witness had said that his assailant was a Fenger High student (he had told the detectives nothing of the kind). The report also omitted such exculpatory facts as the original description of a “light-skinned George” and warnings by the victim-witness’s doctors that his head injuries left him with a questionable memory\textsuperscript{218} Jones found himself on trial, facing the death penalty, and thoroughly identified by confused witnesses. Fortunately, Detective Laverty learned what was going on and came to the rescue. Laverty told Jones’s lawyer about the information in the “street file.”\textsuperscript{219} It also came to the judge’s attention that Laverty had even been threatened by the detectives in charge of the case—one was going to “blow him away” if he messed up their case.\textsuperscript{220} A mistrial was declared, and the prosecution dropped charges against Jones.\textsuperscript{221}

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\item See id.\textsuperscript{214}
\item See id. at 990-91.\textsuperscript{215}
\item See id. at 988-90.\textsuperscript{216}
\item Id. at 990.\textsuperscript{217}
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\item Id.\textsuperscript{220}
\item See id.\textsuperscript{221}
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The really spectacular cases of perjury that have surfaced of late have involved the use of "turncoats" (potential codefendants turned state's evidence), "stool pigeons" (decoys and informants set up by the police), and "snitches" (police informants, particularly jailhouse informants). Their use in law enforcement and their depredations are well documented in the case law and in the professional literature.

Randall Adams may be this generation's most celebrated victim of prosecutorial deal-making. He was convicted and sentenced to death for the killing of Dallas police officer Robert Wood. Dr. Grigson—the infamous Dr. Death—testified that Adams would kill again. As an "expert," he was certain of it. But David Harris, the key witness against Adams, surely committed the murder. Ironically, but not surprisingly, it was he, the state's witness, who would kill again before the truth set Randall Adams free. Critics of the prosecution contend that the prosecutor knew or should have known that Harris's testimony was false, that he was the real killer, and that "some of the crucial prosecution documents which showed perjury and suppression..."

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222 It is hard to keep up. See Mark Hansen, How a Vision Failed: Indictment Calls Prosecution a Conspiracy Against Suspect, A.B.A. J., Feb. 1997, at 26 (reporting the indictment of three Chicago-area prosecutors for offenses ranging from obstruction of justice to concealment of evidence and presentation of false evidence); David E. Rovella, Prisoner Released After Judge Finds Frame-Up, Nat'l J., May 5, 1997, at A7 (reporting on the Pennsylvania trial of Lambert v. Blackwell, No. 96-6244 (Apr. 21, 1996), in which the U.S. District Judge released a state convict and made a "referral" of sorts to the United States Attorney, alluding to a possible prosecution of the state prosecutor). Hopefully everyone understands that there is nothing new under the sun. The lethal combination of perjury, prosecutorial misconduct, and abuse of "scientific" expert testimony accounted for the conviction of lawyer Albert T. Patrick for the murder of millionaire William Marsh Rice, of Rice University fame, in 1902. It seems that everyone who was anyone had some connection with the case. See Martin L. Friedland, The Death of Old Man Rice: A True Story of Criminal Justice in America (1994). Friedland mentions along the way such luminaries as Mark Twain, Sir Arthur Conan Doyle, Francis Wellman, Arthur Train, William Randolph Hearst, Charles Evans Hughes, Grover Cleveland, and casts as a possible villain, the erstwhile illustrious James A. Baker of Baker & Botts! See id.

223 I may be misusing the lingo. No doubt these terms have specific, scientific meanings.


226 On Grigson and like "X-Spurts," see Underwood, "X-Spurts" Witnesses, supra note 189, at 343.
of exculpatory evidence" were only discovered because of the efforts of movie-maker Errol Morris, who told the story in The Thin Blue Line.227 Other less highly publicized cases of this genre include Brown v. Wainwright228 and McMillian v. State.229

Brown was convicted of the murder, rape, and robbery of Earlene Barksdale, who was the co-owner of a small shop and the wife of a well-known Tampa lawyer.230 Brown was sentenced to death and was only seventeen hours from execution before his lawyer was able to persuade authorities that his conviction had been based on perjured testimony231

The scenario was all too typical of criminal cases these days. The evening of the Barksdale murder, a man and a woman were robbed at a motel. The following day, Brown turned himself in and confessed that he had been a participant, along with Ronald Floyd, and gave the police some information that enabled them to locate the gun, belonging to Raymond Vinson, that was used in the robbery. All three were charged in the motel robbery.232 When Floyd and Vinson were taken into custody and learned that Brown had named them, they turned on him, and, quite naturally, started thinking of ways to save themselves. They fingered Brown for the murder of Barksdale, which had been committed earlier the same day.233 With this as background, zip ahead through space and time to Brown’s trial. Floyd was presented by the prosecutor as the only witness who could place Brown at the scene of the Barksdale murder. He testified that he,

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227 The Thin Blue Line (H.B.O. 1988). The story is now told in Randall Dale Adams et al., Adams v. Texas (1991). See also the discussion in the brief filed by Professor Eric Freedman and attorney Harold Tyler in Schlup v. Delo, 513 U.S. 298 (1995), reprinted in Verbatim: Former Death-Row Inmates Speak Out, Legal Times, Oct. 3, 1994, at 15. Prior to Schlup, the law (the so-called "miscarriage of justice" doctrine) was that a petitioner in habeas corpus had to show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. On January 23, 1995, a five-to-four majority of the Supreme Court ruled that the habeas corpus petitioner who had been sentenced to death need only show that a constitutional violation "'probably resulted'" in the conviction of one who was actually innocent. Schlup, 513 U.S. at 326-27.

228 Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986).


230 See Verbatim, supra note 227, at 15; Curriden, No Honor, supra note 225, at 55-56.

231 See Curriden, No Honor, supra note 225, at 56.

232 See Brown, 785 F.2d at 1459.

233 See id.
Brown, and a never-identified player by the name of “Poochie” rode in Vinson’s car to the Barksdale shop. He, Floyd, waited in the car, while Brown and Poochie went in. He did not know, he said, that Brown was armed with Vinson’s gun. After fifteen minutes had passed, he heard a shot and went to the door of the shop. Poochie and Brown emerged with some merchandise, and they all piled in the car and drove away. Vinson testified as to an admission made to him by Brown, and Floyd testified to Brown’s outright confession of the murder, made the next day. This, in essence, was the direct testimony that constituted the case against Brown. The defense lawyer rose to cross-examine Floyd in the style of all graduates of NITA—that is, in the generally accepted manner. He brought out the witness’s prior criminal record and the possibility that he could be seeking revenge from Brown for his having implicated Floyd in the motel robbery. Then he went into the matter of the witness’s interest in the outcome of Brown’s prosecution.

Q In this [motel] robbery, have you been sentenced?
A No, I have not.
Q You have not been sentenced?
A No.
Q When did you plead to it?
A October.
Q Of 1973?
A Yes.
Q Do you have any knowledge of why you haven’t been sentenced in this case?
A No, I haven’t. Just that I have been put on PSI.
Q PSI?
A Yes, presentence.
Q What does that stand for?
A Presentence investigation.

Then, with respect to the Barksdale case:
Q Right. Has the State made any promises or agreements with you in this case?

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234 See id.
235 Id.
236 See id.
238 See Brown, 785 F.2d at 1459.
A Not to my knowledge they haven't.
Q They haven't?
A No.
Q Have you been charged with this case?
A No, I haven't.
Q Have you been given immunity in this crime?
A No, I have not, not as I know of.
Q You haven't been charged and you haven't been given immunity?
A Not as I know of.
Q Are you afraid that you might be charged with this crime?
A Yes, I am.
Q This is a first degree murder trial--
A Yes, I know that.
Q --isn't it? And you are absolutely certain that you haven't been given any immunity, is that correct?
A I'm certain.
And later:
Q Has the state promised you anything in the sentencing in [the motel] case if you cooperated in this case?
A Well, like I told you before, I do not have any knowledge of it whatsoever.
Q Do you think it might be beneficial to you to testify in this case?
A I don't know.
And still later, with respect to the Barksdale case:
Q And, so, you've decided to just cleanse your soul and take the chances of whether the State of Florida is going to charge you with this murder?
A Yes.\(^{239}\)

Floyd's testimony was critical. The ballistics evidence was inconclusive. There was no fingerprint evidence. For all practical purposes, Floyd was the whole case against Brown.\(^{240}\) The prosecutor knew this, and in his closing argument to the jury, he emphasized the "fact" that no deals had been made with Floyd to bolster his testimony: "And I submit that there has [sic] been no promises made to Ronald Floyd for his testifying in this case."\(^{241}\)

The truth was that there had been a plea agreement in the motel robbery case. It was true that Floyd had not been sentenced, but he and Brown had

\(^{239}\) *Id.* at 1459-60.
\(^{240}\) See *id.* at 1460.
\(^{241}\) *Id.* at 1460.
pled guilty.\textsuperscript{242} After the Barksdale trial, Floyd was given probation, and Brown was given twenty years.\textsuperscript{243} The jury should have known about the agreement. This was not the half of it, however, for Floyd’s testimony about agreements in connection with the Barksdale case was false. The prosecution knew it was false, let him lie, and exploited the lie in closing argument.\textsuperscript{244}

Eight months after the trial, Floyd (he was in prison serving a sentence for yet another robbery\textsuperscript{1}) gave Brown’s attorney an affidavit retracting his Barksdale testimony and admitting that it had been exchanged for “favorable consideration”\textsuperscript{245} in the motel robbery and Barksdale murder cases. He repeated this before the trial court. Indeed, the state proffered evidence indicating that there had been an agreement, admittedly upon certain conditions, not to prosecute Floyd for the Barksdale murder.\textsuperscript{246} On habeas corpus, the Eleventh Circuit thundered:

This case does not involve mere nondisclosure of impeaching evidence but knowing introduction of false testimony and exploitation of that testimony in argument to the jury.

The government has a duty not to present or use false testimony. It did use false testimony. If false testimony surfaces during a trial and the government has knowledge of it, as occurred here, the government has a duty to step forward and disclose. Here the government told the jury “there has been no promises [sic] made to Ronald Floyd for his testifying in this case” when it knew the contrary was true.\textsuperscript{247}

The \textit{McMillian}\textsuperscript{248} case followed the same pattern. McMillian and Myers were jointly indicted for capital murder and robbery in connection

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\textsuperscript{242} See \textit{id}. at 1461.
\textsuperscript{243} See \textit{id}. Brown’s conviction was affirmed in \textit{Brown v. State}, 381 So. 2d 690 (Fla. 1980).
\textsuperscript{244} See \textit{id}. This is a common pattern. See the discussion of the \textit{Jimerson} case in David Protess & Rob Warden, \textit{Nine Lives: The Justice System Sentenced These Men to Death. The Justice System Ultimately Set Them Free. Is That Justice?}, CHI. TRIB., Aug. 10, 1997, Magazine, at 20. “[P]rosecutors did not disclose the deal—and failed to correct [the witness’s] perjury when she denied any deal existed.” \textit{Id}.
\textsuperscript{245} Brown, 785 F.2d at 1461.
\textsuperscript{246} See \textit{id}. at 1461-62.
\textsuperscript{247} \textit{Id}. at 1464 (citations omitted).
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with the killing of Ronda Morrison, who worked at a dry cleaners. Their cases were severed, and Myers testified against McMillian. Myers was white. McMillian was black. McMillian was convicted and sentenced to death. The Alabama Court of Criminal Appeals remanded to the trial court for findings on the question of whether any witnesses had been offered inducements or consideration for their testimony. Satisfied that all was in order, the appellate court affirmed the death sentence. Five months after the trial, Myers pled guilty to a lesser included offense, but because he was a habitual offender, he still got thirty years. He then recanted his trial testimony and told McMillian’s attorney that he “knew nothing about the crime, that he was not been present when the crime was committed, that he had been told what to say by certain law enforcement officers, and that he had testified falsely against McMillian because of pressure from the [police] officers.” As in Brown’s case, the defense had relied on an alibi and had attempted to attack the credibility of the stool pigeon. The defendant did not testify Myers’s testimony had been critical.

The matter took another trip through the Alabama courts as McMillian sought post-conviction relief. The trial court surveyed the evidence and expressed the sort of skepticism expressed by the California high court in the Mooney case. “Clearly, Ralph Myers has either perjured himself at trial or has perjured himself in front of this court.” Was he lying then, or is he lying now? Who can believe a liar? So where does that leave the convicted person? The trial court concluded that Myers had not perjured himself at the trial, and the appellate court would not reverse on that issue alone.

249 See id.
251 In re Mooney, 73 P.2d 554 (Cal. 1937); see supra text accompanying notes 176-84 and accompanying text.
252 See McMillian, 616 So. 2d at 936.
253 Id. at 940.
254 See id. at 941. For a discussion of the legal issues as well as a very interesting factual account of the infamous case of People v. Dotson, 424 N.E.2d 1319 (1981), affd, 516 N.E.2d 718 (Ill. App. Ct. 1987), see Margaret Frossard, When the Accuser Recants: People v. Dotson, LITIG., Summer 1988, at 11. This case captured the imagination of the public in March 1985 when NBC’s Today show produced Cathleen Crowell-Webb, who told the TV audience that her testimony against convicted rapist Gary Dotson in 1979 had been a lie. Ms. Frossard was the lawyer for the State of Illinois who fought Dotson’s efforts to obtain a release following Crowell-Webb’s “recantation.” See id.
Fortunately, McMillian’s new lawyer was shooting with both barrels. The prosecutor had failed to produce certain tape-recorded statements given to the police by Myers and by one Isaac Dailey. The prosecution had also suppressed a police report and certain medical records. The Myers statements were both exculpatory of McMillian and impeaching of Myers. They would have undermined the prosecutor’s closing argument to the jury, in which the prosecutor insisted that Myers was believable because he had told the same story from the beginning. In fact, he had not.255

The Dailey statement related to another killing. Myers had originally been arrested for the murder of another person, Vicky Pittman. However, he was questioned about both the Pittman and Morrison killings. Issac Dailey had also been arrested in connection with the Pittman slaying. Dailey told a state investigator working on both cases that “while he and Myers were incarcerated in the jail, he overheard Myers say, in the presence of other persons whom he named, that he and Karen Kelly had killed Pittman and that they were plotting to blame the killing on McMillian.”256 This statement had been suppressed by the prosecution for reasons that are all too obvious.

There was also the statement of Miles Jackson, former owner of the cleaners where the Morrison murder was committed. Mr. Jackson had provided the police with a statement to the effect that he had been at the cleaners at 10:30 a.m. and that Ms. Morrison was still alive and alone at that time. He said he could verify the time from a bank deposit slip. He had made the deposit just before dropping by the cleaners. Apparently, Mr. Jackson’s information was not to the prosecution’s liking. It conflicted with testimony given by Myers and with the state’s theory regarding the time of death. Investigator’s notes indicated that Jackson was given a polygraph, but no information was ever provided as to why he was given a polygraph or what the results were.257 In addition to this suppressed evidence, there was the matter of the nondisclosure of records from the Taylor Hardin Secure Medical Facility. While at that facility, Myers had told four doctors on various occasions that the police were pressuring him to testify falsely. Again, the appellate court opined that the defendant’s right to due process had been violated by the nondisclosure of exculpatory or impeaching information. The court was able to pay lip service to the findings of the lower court that perjury had not been committed, while still reversing the

255 See McMillian, 616 So. 2d at 942-46, 948.
256 Id. at 946.
257 See id. at 947
conviction and death sentence. The McMillian case is the subject of a newly released book, Circumstantial Evidence.

A review of these cases supports the view that the "snitch problem" is a serious one. The United States Court of Appeals for the Ninth Circuit recently opined, "By definition, criminal informants are cut from untrustworthy cloth, and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." There are other interesting aspects to the problem. If one reviews the cases with an open mind, one can only conclude that it is extremely difficult to detect lying. There is also a tension between lower court fact finding and appellate review. A law professor could build a whole course around just a few of these cases. The Texas case of Ex parte Brandley proves my points. The majority opinion is guaranteed to provoke outrage, but a strong dissent may leave you scratching your head. Could the authorities have actually done what the majority opinion said, or was the majority opinion a sort of imaginative revisionism? Here is the tale told by the majority.

The opinions in Brandley came as a result of collateral review of a state court conviction for rape and murder. In other words, there was a state court trial (actually two in this case, the first ending in a mistrial) and a conviction, followed by direct appellate review affirming the conviction. Then, the case was reviewed on a petition for habeas corpus at the state trial court level, followed, once again, by appellate review—conviction overturned!

We begin with the majority appellate opinion reviewing a lower court's findings on a habeas corpus petition that the state investigators and the prosecution had such a "blind focus" on the defendant that they manufactured evidence against him. According to the appellate opinion, which more or less accepts the facts as found by Texas trial court judge Perry D.

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258 See id. at 948-49.
259 EARLEY, supra note 173.
260 United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993).
263 See Ex parte Brandley, 781 S.W.2d at 894.
264 Id. at 887. They "ignored leads to evidence inconsistent with the 'premature conclusion that [Brandley] had committed the crime.'" Id. The defense team for O.J. Simpson made the same pitch to the jury. This is a popular and occasionally effective theme.
Pickett at the state habeas corpus hearing, Cheryl Ferguson was raped and murdered during a girl’s volleyball tournament held at the high school in Conroe, Texas, on August 23, 1980. The girl’s body was found behind a sheet of plywood in a loft behind the stage area of the school auditorium. Classes were supposed to start on August 31, and “authorities announced to the public that a suspect would be arrested prior to the commencement of classes.” Needless to say, this is the sort of pressure investigators do not need if they are to get at the truth.

Enter Texas Ranger Wesley Styles, the man called upon to head up the investigation. Styles began his investigation on August 28 and arrested Brandley the next day without interviewing any witnesses. Brandley was a janitor at the school. On Saturday, August 30, Styles called to the school three other janitors, Acreman, Martinez, and Sessum, for what he called a “walk through.” During this walk through of the sequence of events on the day of the murder, these men were questioned in each other’s presence despite the elementary rule that witnesses should be questioned separately.

Sessum knew something. He had seen Acreman and a former janitor by the name of Robinson follow the girl up the stairs, after which she had screamed, “No,” and “Don’t,” but he was afraid of Acreman and Styles. Acreman had threatened Sessum shortly after the murder and repeated the threat prior to the walk through. Sessum had testified against Brandley at the earlier trial, but he now stated that he had lied. Indeed, Sessum stated

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265 Judge Pickett’s explication of his fact finding is a bit florid. He wrote:
“The litany of events graphically described by the witnesses, some of it chilling and shocking, leads me to the conclusion [that] the pervasive shadow of darkness has obscured the light of fundamental decency and human rights. I can only sadly state [that] justice has been on trial here, but of more significance [or more accurately], injustice has been on trial.”
Id. (quoting Judge Pickett’s opinion).
266 See id. at 897
267 Id. at 888.
268 See id.
269 Id.
270 Remember the Biblical tale of Daniel and the Elders? The same “error” was committed in the McMillian case, 594 So. 2d 1253 (Ala. Crim. App. 1991), when Ralph Myers and Karen Kelly were questioned in the same room. They had even been left alone together—a perfect setting for the fabrication of mutually supporting stories. See EARLEY, supra note 173, at 276-77; see also supra notes 146-48.
271 See Ex parte Brandley, 781 S.W.2d at 888.
that he had tried to tell Styles what he knew during the walk through, but Styles had threatened to arrest him if he did not cooperate. In addition to this recantation by Sessum, Brandley offered tapes into evidence at the habeas corpus hearing on which Acreman implicated Robinson, saying that Robinson had "threatened him into lying about the murder." Acreman’s own testimony at the hearing was inconsistent and unconvincing. It also turned out that Martinez, the third janitor who participated in the walk through, had given several inconsistent stories. After the walk through, Martinez’s story changed to coincide with events as dictated by Styles. Styles testified that he procured written statements from the three after the walk through, but he stated that he could not vouch for the accuracy of the statements. Nor could he account for why Sessum’s statement was signed a month after the walk through.

Another janitor, Henry Peace, testified against Brandley at both trials. Peace stated that “[Brandley] repeatedly ordered [him] to search the loft where the girl’s body was, until Peace ultimately discovered the victim.” At the habeas corpus hearing, he told Judge Pickett that Styles had forced him against a wall, choked him, and then took him to the police station for a statement. He testified that Styles threatened to blow his brains out on the way to the station. Peace further testified that he was kept at the station until he signed a statement. He could neither read nor write and testified that the police would not allow a family member (apparently someone he could trust) to read it to him.

In retrospect, the problem with the investigation was its “blind focus.” When he arrived at Conroe, Styles had only one suspect: Brandley This was so “despite the fact that a Caucasian pubic hair, not belonging to the victim, was found near the victim’s vagina. The State resisted all efforts to obtain hair samples for comparison from the three

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272 See id.
273 Id. at 889.
274 See id.
275 See id.
276 Id.
277 See id. at 889-90.
278 Id. at 887 The methodology of detectives may lead to such a focus—a refusal to look for and a tendency to discard inconvenient facts. This is the argument advanced by COOPER & SHEPPARD, supra note 188, at 98 (“Detectives come up with hypotheses and try to prove them.”). In theory, if not always in practice, a scientific investigator would have as much interest in disproving the hypothesis. See Underwood, “X-Spurt” Witnesses, supra note 189, at 343.
janitors who saw the victim before the assault."\textsuperscript{279} The state did not test semen found in the victim's vagina for blood type or other characteristics even though such tests were standard procedure. Furthermore, the state did not attempt to obtain blood samples from Acreman, Martinez, or Sessum. There was type A blood on the victim's shirt. The victim had type A blood, but no wounds were found on the body. Thus the blood could have been matched to the perpetrator. Brandley was type O. Both Acreman and Robinson were type A, but this was not determined until long after Brandley's conviction.\textsuperscript{280}

Finally, there was the lead from a Cheryl Bradford, one of the volleyball players. Bradford saw the victim in the hallway near the restroom where she was apparently murdered. At the habeas hearing, she also claimed that she saw two white men whose particulars matched Acreman and Robinson rushing through the gym. She told her coach about the men, and she and the coach reported this to the police. "[T]he police 'were not real interested in [her] information and were in a rush to get [her] off the phone.'"\textsuperscript{281} She recontacted them, but no one ever told the defense about her information.\textsuperscript{282} Brandley's conviction was reversed.\textsuperscript{283}

The case of James Joseph Richardson\textsuperscript{284} was almost as highly publicized as the Randall Adams case, discussed above.\textsuperscript{285} Richardson was a Florida farm worker convicted of murder in 1967 and sentenced to death for poisoning his stepdaughter. She was only one of seven children, three of whom were Richardson's natural children, who died when someone put the insecticide parathion in their lunch—"one of the South's most ghastly crimes."\textsuperscript{286}

It is an understatement to say that it looks, in retrospect, as though the Richardson case might have been another case of "blind focus" or investigatory tunnel vision. The babysitter and next-door neighbor Betsy Reese was the most likely suspect. She had served the food to the children, and during the investigation, she and another individual reportedly found a bag of parathion in a shed that had previously been searched by investiga-

\textsuperscript{279} Ex parte Brandley, 781 S.W.2d at 890.
\textsuperscript{280} See id.
\textsuperscript{281} Id. at 890-91.
\textsuperscript{282} See id.
\textsuperscript{283} For subsequent civil litigation, see Brandley v. Keeshan, 64 F.3d 196 (5th Cir. 1995).
\textsuperscript{284} Richardson v. State, 247 So. 2d 296 (Fla. 1971).
\textsuperscript{285} See supra notes 226-27 and accompanying text.
\textsuperscript{286} Curriden, No Honor, supra note 225, at 52.
tors. She was also a suspicious character. For one thing, she had done time for shooting her second husband to death, and her first husband dropped dead after eating her beef stew. For another, parathon has a rather strong metallic odor. Reese should have noticed the odor when she was dishing up the grub. The investigators remarked on the smell when they first arrived at the locus in quo but claim that they did not question Ms. Reese about it. Furthermore, Richardson and his wife were at work picking fruit while the kids were chowing down. On the other hand, there were some bad facts against Richardson as well. First of all, he had insured the lives of his children the night before. He also failed a polygraph.

Further, there was his stoic demeanor (jurors don’t trust stoics) throughout the ordeals of investigation and trial. This seems to have hurt him with investigators and with the jury. According to an article in the ABA Journal, the prosecutor in the case initially felt that there was insufficient evidence to secure a conviction, but the case became considerably stronger after three jailhouse snitches indicated a willingness to testify that Richardson had confessed to them while he was in the “clink.”

Two of

287 See id. at 53.
288 See id.
290 See Richardson, 247 So. 2d at 297; Curriden, No Honor, supra note 225, at 52.
291 The opinion affirming his conviction mentions the princely sum of $1000 per child. See Richardson, 247 So. 2d at 298. According to Curriden, an agent had visited the home two days prior to the deaths and had talked Richardson into insuring each child for $500, his wife for $1000, and himself for $2000. See Curriden, No Honor, supra note 225, at 53.
292 See Vick, “Now I’m Free,” supra note 289, at 1A.
293 See Curriden, No Honor, supra note 225, at 53. One is reminded of the fate of the stoic insurance salesman, Wallace, who was wrongly convicted of murder in Liverpool in the 1930s. See JONATHAN GOODMAN, THE KILLING OF JULIA WALLACE (1969).
294 See Curriden, No Honor, supra note 225, at 53.
295 I am informed that there actually was—is—a “Clink.” It was a prison in Southwark, London, and was owned by the Bishops of Winchester from the twelfth century until 1626. In the sixteenth century, religious “prisoners of conscience” were kept there. The Bishops also licensed brothels, so the Clink was in the city’s red light district. The Globe theater was in the same district. All in all, an interesting neighborhood. See EYEWITNESS TRAVEL GUIDES: LONDON 177 (1993).
the snitches got deals in exchange for their testimony. The remaining snitch, Ernell Washington, was murdered before Richardson’s trial started, but the judge allowed into evidence “former testimony” that he had given at a preliminary hearing. It has already been noted that Richardson was convicted and sentenced to death. He was saved from execution when the Supreme Court of the United States temporarily blocked the death penalty in Furman v. Georgia. His sentence became one of life imprisonment without possibility of parole for twenty-five years.

Twenty-one years later, his conviction was vacated. The only then-living snitch recanted. James Weaver reportedly told Richardson’s lawyers that his testimony against Richardson was “dictated to him by a deputy sheriff who hit him ‘upside the side of the head.’” Other witnesses—Reese’s medical caretakers—came forward to testify that Reese had confessed to being the murderer while she was in their care. Reese is now incapacitated by Alzheimer’s disease. All of this revisionist history seems to have been inspired by competing TV investigative reports of A Current Affair and Inside Edition. These stirred up enough controversy about Richardson’s twenty-one-year stay in the joint (14,000 letters of protest from angry viewers) to grab the attention of Governor Bob

296 Their testimony was crucial. See Richardson v. State, 247 So. 2d 296, 297 (Fla. 1971). Actually, they started out giving inconsistent versions of what Richardson had said. Before trial, one snitch had said that Richardson had said that the babysitter had killed the children. Another snitch, Weaver, had said that Richardson had killed the children in a jealous rage because his wife had been having a lesbian affair with the sitter. At trial, however, both pointed the finger at Richardson. Weaver also seems to have forgotten about the affair by the time of the trial, since he told the jury that Richardson had not said why he had committed the crime. The defense knew nothing of these prior statements and so could not capitalize on the inconsistencies. See Curriden, No Honor, supra note 225, at 53-54.

297 This former testimony had not been recorded, but persons who were present and heard it (what old-timers refer to as “bystanders,” as in the old “bystanders bill of exceptions”) were allowed to testify at trial. All of this is quite proper under the rules of evidence. See Richardson, 247 So. 2d at 299-303.


299 Karl Vick, Court Asked to Grant “Fair Trial,” ST. PETERSBURG TIMES, Feb. 10, 1989, at 1B [hereinafter Vick, Court Asked to Grant “Fair Trial”].

300 See Curriden, No Honor, supra note 225, at 54.

Martinez, who appointed special prosecutor (now Attorney General of the United States) Janet Reno to get to the bottom of things.\(^2\)

The course of the post-conviction fracas is hard to follow. Richardson’s lawyers argued before the Florida Supreme Court on a writ of *coram nobis*,\(^3\) claiming that the prosecution had kept evidence from the defense and “permitted” perjury to take place, while back at the trial court Janet Reno presented a report of her investigation to Florida trial judge, the Honorable Clifton Kelly. In the end, it was Judge Kelly who set Richardson free, accepting the Reno view that there was insufficient evidence against Richardson in the first place. Reno asked some good questions, like why Reese expressed no concern for her own children, “who were playing very near the scene of the deaths,” and why no one asked her why she had not noticed the “potent metallic stench” of parathion.\(^4\)

The State of Florida declined to retry Richardson, but that was not the end of the story by any means. Richardson’s prosecutor, now retired, sued Richardson’s lawyers for slander.\(^5\) Richardson sued for $35 million for alleged violations of his civil rights by the county sheriff and the prosecutor (who one would think would be immune from suit).\(^6\) At last report, Richardson’s civil rights case had been settled in part, but the “details are sealed.”\(^7\) Richardson also sued a Tampa lawyer who had “persist[ed] in proclaiming that [he was] guilty,”\(^8\) and sued his former prosecutor’s defense lawyers. Richardson later dropped the suit. The Tampa lawyer had been an expert witness for the defense opposing Richardson’s civil rights case, and he had been highly critical of Janet Reno’s handling of the matter.\(^9\)

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\(^3\) See *Vick, Court Asked to Grant “Fair Trial,”* supra note 299, at 1B. For the opinion denying the writ, but holding that relief could be sought in the trial court, see *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989).

\(^4\) Vick, “*Now I’m Free,*” supra note 289, at 1A.

\(^5\) See *Vick, Court Asked to Grant “Fair Trial,”* supra note 299, at 1B.

\(^6\) See Mark Journey, *Richardson to Seek $35 Million in Suit*, *St. Petersburg Times*, Aug. 3, 1989, at 1B.

\(^7\) Across the *USA. News from Every State–Florida*, USA TODAY, Oct. 19, 1992, at 12A.

\(^8\) Stephen Nohlgren, *Freed Man Drops Defamation Suit Against Lawyer*, *St. Petersburg Times*, Mar. 23, 1993, at 3B.

\(^9\) Former prosecutor Schaub commented about Reno in a local paper: “How about prosecuting her for dropping the case?” *Vick, “Now I’m Free,”* supra note 289, at 1A. Since then, Reno has gone on to bigger (if not always better) things, and she has pretty much had the last laugh.
Richardson's lawyers dropped this latest suit, a judge awarded attorneys' fees to the defendants.\textsuperscript{310} Is it over? A fitting final note on the snitch problem is provided by Leslie White. A veteran Los Angeles County jailbird who has been arrested more than thirty times in his career, White showed authorities how he was able to get deals from prosecutors and thereby gain his release. He did this by using the phone booth inside the county jail and wheedling information out of district attorneys and cops by claiming to be a detective. "All you need is a telephone and 20 cents for Ma Bell,"\textsuperscript{311} and you can get information known only to "the criminal" and the authorities and then trade on it. Says White, "[W]hat can they do? They can do nothing. If I say one thing, it's believed unless they can prove differently. The defense can't do anything. The defense lawyer will say, 'You're lying, aren't you?' I say, 'No, sir.' "\textsuperscript{312} The ABA Journal reported that White's disclosures to 60 Minutes forced the L.A. District Attorney to undertake a review of 200 murder cases. Naturally, White is now making $250 a day as an expert witness for defense lawyers, evaluating the trustworthiness of informants.\textsuperscript{313} White's successes in stringing along investigators is in no way unique. In Circumstantial Evidence, which tells the story of the McMillian case, journalist Pete Earley explains how the "snitches" work in rural Alabama. Their modus operandi is the same as in L.A. One felon who nearly escaped after selling one bogus story about the killing was asked how he knew facts that the police thought only the killer would know:

"I did my homework. I read everything I could. If they had checked with the prison, which I figured they wouldn't, they'd've learned that inmates are allowed to get newspapers and watch TV while in the Hole." He had asked several armed robbers in prison what caliber of gun they would have used to rob a dry cleaners during a Saturday on a busy street. "Every one of 'em said something easy to hide, like a twenty-five caliber." How had he known Ronda was shot three times? "Most twenty-fives carry five bullets and because them small guns ain't very accurate, I guessed three or maybe four had hit that girl." Beating the polygraph

\textsuperscript{310} See Nohlgren, supra note 308, at 3B.
\textsuperscript{311} Curriden, No Honor, supra note 225, at 55.
\textsuperscript{312} Id.
\textsuperscript{313} See id. For the latest horror story arising from Customs and DEA reliance on professional informants, see Mark Curriden, Informer's Lies Trigger a Tragedy, NAT'L L.J., Mar. 6, 1995, at A1 [hereinafter Curriden, Informer's Lies].
had been easy. "I lie so much, sometimes even I don't know when I'm telling the truth." 314

The prevailing ethic takes it for granted that deals—the inducement being dropped or lessened charges—are not prohibited. Indeed, the infamous U.S. Sentencing Guideline, Rule 5K1.1, authorizes federal prosecutors to recommend "downward departures" from the mandatory minimum sentences to defendants who provide "substantial assistance" in the investigation or prosecution of others. 315 A federal judge has been quoted as saying, "'[t]alk about what has contributed to an increase in witnesses making up stories and fudging the truth, the sentencing guidelines are culprit number one.'" 316 And prosecutors are willing to go further. By 1993, payments to informants from the federal government totaled $97 million. Worse yet, this figure does not include the informant's cut of asset forfeitures, which can reach twenty-five percent of the total amount forfeited. 317 Are any inducements prohibited?

The United States Supreme Court has never ruled on the abstract question of the limits of inducement—the limits on what can be offered. In 1984, a panel of the Eighth Circuit ruled that a deal struck with a witness amounted to a "bounty" or "contingency agreement." 318 The witness pled guilty in exchange for the prosecutor's recommendation that his sentence be reduced by two years if his "continued cooperation led to further indictments." 319 The defense contended that this was outright bribery, and the panel more or less agreed. 320 The entire court reviewed the panel's opinion en banc, however, and the judicial voting was evenly split. The net effect was an affirmation of the lower court's rejection of the defendant's contentions. 321 A similar attack on contingent plea agreements in exchange

314 EARLEY, supra note 173, at 68.
318 United States v. Waterman, 732 F.2d 1527, 1528-29 (8th Cir. 1984).
319 Id. at 1528.
320 See id. at 1530-31.
321 See id. at 1533.
for testimony succeeded in a federal trial court in Boston: the judge
suppressed the suspect testimony, but the First Circuit reversed.

On July 1, 1998, a panel of the Tenth Circuit rocked the Justice
Department with a startling ruling regarding a prosecutor's promise of
leniency to a witness in return for testimony against a defendant in a
cocaine trafficking case. The court ruled that any such promise violates
18 U.S.C. § 201(c)(2) and Model Rule 3.4(b). According to this court, the
prosecutor is prohibited from buying testimony with leniency just as the
defense is prohibited from buying testimony with any other coin. This is
truly a most remarkable and revolutionary holding! Panicked Justice
Department lawyers successfully sought a review en banc. To their relief,
an en banc hearing was granted, and the court held that promises of
leniency did not violate federal law.

There is a tantalizing irony worth alluding to at this point. One of the
original investigators in the McMillian case was Monroeville police
lieutenant Woodrow Ikner. When the case was reopened, Ikner was

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vacated, 759 F.2d 192 (1st Cir. 1985).
323 See United States v. Dailey, 759 F.2d 192 (1st Cir. 1985); see also Neil
Eisenstadt, Note, Let's Make a Deal: A Look at United States v. Dailey and
324 See United States v. Singleton, 144 F.3d 1343 (10th Cir.), vacated and
rehearing en banc granted, 144 F.3d 1343 (10th Cir. 1998), rev'd, 165 F.3d 1297
(10th Cir. 1999). Most district courts outside of the Tenth Circuit have rejected
Singleton. See, e.g., Nero v. United States, CIV A. 97-2721, CRIM. 91-321-02,
Guillaume, 13 F Supp.2d 1331 (S.D. Fla. 1998) (holding that, in enacting 18
U.S.C. § 201(c)(2), Congress clearly intended to exclude plea agreements between
a defendant and a prosecutor). But see United States v. Lowery, 15 F Supp.2d
1348 (S.D. Fla. 1998), rev'd, 166 F.3d 1119 (11th Cir. 1999).
325 See Singleton, 144 F.3d at 1343; see also Justice Department to Fight Ban
on Lemiency For Witnesses, LEXINGTON HERALD-LEADER (Lexington, Ky.), July
10, 1998, at A11; Barbara Grzincic, Not Exactly What They Bargained For:
'Influence' Case Could Lead to Tougher Laws, DAILY RECORD (Baltimore, Md.),
July 18, 1998, at 17; Patrick A. Tuite & Ronald D. Menaker, Court Slams
Testimony-For-Lemiency Deals, CHI. DAILY L. BULL., July 15, 1998, at 6; Stuart
326 See United States v. Singleton, 165 F.3d 1297, 1301-02 (10th Cir. 1999),
rev'g 144 F.3d 1343 (10th Cir. 1998); accord United States v. Ware, 161 F.3d 414
forthcoming with and helpful to McMillian's new lawyer, although he honestly believed that McMillian was guilty. What he revealed was that he had taken an entire file of witness statements. Of course, none of these had been turned over to the defense or to McMillian's new lawyer. The lawyer found it awkward to contact Ikner, however, because he had been fired from the police department after being convicted of perjury for manufacturing evidence against a black burglary suspect. Ikner informed the lawyer that he was innocent—he had been framed by the local "powers that be." His conviction was later reversed by the Alabama Court of Criminal Appeals.\footnote{Ikner v. State, 600 So. 2d 435 (Ala. Crim. App. 1992).}

**CONCLUSION**

**A POSTSCRIPT: THE CASE OF ROLANDO CRUZ**

All of the familiar themes run through the case of Rolando Cruz. In February of 1983, a ten-year-old girl was kidnapped from her home, raped, and murdered. The case was not "solved" by modern science. Instead, the police followed an "anonymous tip" to an Aurora, Illinois (site of the infamous Wayne's World), youth by the name of Alejandro (a.k.a. "Crazy Alex") Hernandez. Hernandez was apparently excited about a reward and pointed in the direction of Rolando Cruz, who for his part was characterized as a street punk.\footnote{In Game of Lies, Everyone's a Loser, CHI. TRIB., Mar. 15, 1994, § 2 (Metro DuPage), at 1.} No physical, scientific evidence tied Cruz to the crime but the police claimed that Cruz told them that he had had a "dream vision" and that the dream contained details of the crime. Both Cruz and Hernandez were convicted and given the death penalty. As Cruz and Hernandez fought for a new trial, convicted sex offender and murderer Brian Dugan was confessing to six similar rape-murders. Indeed, he confessed to doing the crime in question. This information was not pursued by police or prosecutors.\footnote{Truth Be Told, Lies Condemned Cruz, CHI. TRIB., Feb. 15, 1994, § 2 (Metro DuPage), at 1 [hereinafter Zorn, Truth Be Told].}

With the passage of time and the aid of volunteer lawyers, Cruz and Hernandez would win new trials and then win new trials again after being convicted a second time. The prosecution insisted on a third trial even in

\footnote{See EARLEY, supra note 173, at 279-80. For the published judicial opinion, see Ikner v. State, 600 So. 2d 435 (Ala. Crim. App. 1992).}

\footnote{See Protess & Warden, supra note 244.}
the face of new DNA evidence that excluded Cruz and Hernandez and pointed in the direction of Dugan. At Cruz’s third trial, a police officer who had previously testified about the “dream statement” admitted that he had lied in his original testimony. This caused the outraged trial judge to direct a verdict of acquittal. This triggered a grand jury investigation of the police and the prosecution. Prosecution witnesses who had attempted to recant their testimony on prior occasions, only to be ridiculed, now began to be taken seriously. They told tales of witness intimidation—they had been forced to testify falsely by the prosecution, who threatened to indict them for perjury and obstruction of justice if they did not toe the line.

Defense lawyers had long contended that the “dream statement” was a fabrication. The police had never memorialized it in any report, and it was not presented to the grand jury that indicted Cruz, although the police supposedly had it at the time. “[N]either the police nor prosecutors even revealed the existence of the vision statement until two years after the fact.” Telling was the fact that all three officers who backed each other’s stories about the statement made the same mistake. “They identified the

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331 See id. Much credit for the ultimate release of Cruz and Hernandez goes to reporter Eric Zorn, who pursued their story relentlessly.
332 In this third trial, the prosecution was reduced to threatening to put Dugan on the stand under a grant of immunity, eliciting his confession, and then attempting to disprove it! See Maurice Possley & Jeffrey Bils, Dugan May Take Stand in Cruz Trial; Prosecutors Consider a Grant of Immunity, CHI. TRIB., Nov 1, 1995, § 1 (DuPage Sports Final), at 1.

Investigators pressured [witness Pecoraro] to embellish his story by attributing new and more vivid statements to Cruz, Pecoraro said a DuPage County detective then threatened him with a perjury charge and jail time that would probably cause him to lose his business if he didn’t repeat his 1985 testimony at trial.

Id. The tables were turned on the detective because he interviewed Pecoraro at the latter’s pawn shop where a security camera and recorder caught the detective’s tactics on tape. See Ted Gregory, Nicarico-Case Detective Lied, Cruz Lawyers Charge, CHI. TRIB., Oct. 14, 1995, § 1 (North Sports Final), at 5.
335 See Zorn, Truth Be Told, supra note 329.
336 Terry H. Bums, Prosecutors, Police Indicted in Cruz Conspiracy, COPLEY NEWS SERV., Dec. 12, 1996.
day Cruz told them about the dream, May 9, 1983, as a Friday. In fact, it
was a Monday. Officer Montesano had testified in a preliminary hearing
that another officer had called him on May 9 to tell him of the “dream
statement.” At the third trial, he admitted that he had actually been in
Florida on May 9 and that he had no real recollection of being called that
day. That was when things began to fall apart.

Indictments were issued against three (former) prosecutors and four
police (sheriff’s) officers—now known as the “DuPage 7.” One former
prosecutor had become a state court judge. Another had become an
Assistant United States Attorney. The prosecutors were named on the
theory that they had participated in a conspiracy. The indictments charged
that the officers fabricated Hernandez’s vision statement and that prosecu-
tors and police conspired to conceal Dugan’s confession that he had
murdered the victim. Multi-million dollar civil suits soon followed. Predictably, the new defendants—the “DuPage 7”—launched a furious attack
on the special prosecutor. Debate became bogged down in talk about
the special prosecutor’s conflicts of interest and the like. The defense
was an offense, and the air was full of charges of prosecutorial
misconduct. (Does this sound like a depressingly familiar strategy?) But
while the trial judge tossed a bone to the defense, ruling that Officer (now
Lieutenant) Montesano could not be prosecuted for perjury because he had
“recanted” his earlier testimony when he admitted the “lie” at Cruz’s third
trial, the trial judge refused to drop the conspiracy count. Finally, on May

337 Jeffrey Bils, Cruz, Hernandez Prosecutions to Face Scrutiny; Grand Jury
Begins to Delve Into Cases, CHI. TRIB., June 27, 1996, § 2 (MetroWest), at 1.
338 See id.
339 See Burns, supra note 336.
340 See William Grady & Jeffrey Bils, Nicanco Suit Looms in DuPage; Lawyer
Threatens to Go After Millions, CHI. TRIB., June 29, 1996, § 1 (DuPage Sports
Final), at 1.
341 See Ted Gregory, DuPage Judge Is Target in Cruz Case; Prominent Attor-
neyes Begin a Defense Fund, CHI. TRIB., Dec. 11, 1996, § 1 (DuPage Sports Final),
at 1.
342 See William Grady, Politics and Law Weave Tangled Web in Cruz Case;
County Workers, GOP Caught Up in Issues, CHI. TRIB., Mar. 16, 1997, § 4 (Metro
DuPage), at 1.
343 See Ted Gregory, Special Prosecutor in Cruz Case Draws Fire; Targeted
DuPage Officials Alleged Misconduct, CHI. TRIB., June 6, 1997, § 2 (Metro
DuPage), at 1.
344 See Terry H. Burns, Perjury Charge Dropped in DuPage 7 Case, COPLEYS
NEWS SERV., Jan. 21, 1998; Art Barnum & Ted Gregory, Perjury Charge Dropped
13, 1999, two of the "DuPage 7" defendants were acquitted by the trial judge. Both were former Cruz prosecutors. The other five defendants were acquitted as well a few weeks later—after ten and one-half hours of deliberation by the jury. The prosecution of the prosecutors turned out to be yet another trial of Cruz, whose credibility was easily shattered. The next day, talk began to spread about a possible perjury change against Cruz.


See Maurice Possley, Case Against DuPage 7 Starts to Shrivel Up, CHI. TRIB., May 16, 1999, § 1 (Chicagoland), at 1.


See Maurice Possley & Ted Gregory, Cruz Could Face Perjury Charge, CHI. TRIB., June 6, 1999, § 1 (Chicagoland), at 1.