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LAWYERS, TRUTH, AND HONESTY IN REPRESENTING CLIENTS

PETER J. HENNING*

INTRODUCTION

The Supreme Court asserted in *Nix v. Whiteside* that a trial is a search for the truth.¹ While this may be a clear expression of the operating rationale of the justice system, it is wrong to translate that assertion into a prescription for how lawyers are to operate when they provide legal representation to clients. A distinction must be drawn between the goal of the judicial system and the broader category of legal representation that incorporates the rules regulating how lawyers represent clients.

To say that the rules governing lawyers do—or should—reflect a commitment to truth is a worthy goal, but it misapprehends how the professional standards should be applied. The rules have to set minimum criteria for how lawyers practice their profession, which entails the representation of clients in dealing with the judicial system and other individuals, including opposing lawyers. While those rules should not undermine the judicial system, they need not mirror the goals that system tries to

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1. 475 U.S. 157, 171 (1986) (“[U]nder no circumstance may a lawyer either advocate or passively tolerate a client’s giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called ‘a search for truth.’”); see *Williams v. Florida*, 399 U.S. 78 (1970), stating:

The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as ‘due process’ is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id. at 82; see also Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 926 (“Efforts aimed at the ascertainment of truth must be central to the role of counsel in any system for the resolution of disputes.”).

achieve.² The regulations for lawyers must deal with every type of legal representation, and not simply when a lawyer stands up in court. While the picture of the attorney appearing in a courtroom is paradigmatic of the profession, it should not be understood as representing the large volume of legal representation that is also governed by the rules of the profession.

The rules governing the legal profession recognize that a lawyer must be a zealous advocate for the client, putting that person's interests ahead of all others.³ As Lord Brougham famously described the lawyer's role in 1820: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."⁴ Some have argued that advocacy must be limited if it obstructs the search for the truth because the lawyer's paramount obligation is to the court's ascertainment of the truth and not the client's interest in a favorable outcome, particularly in a criminal case.⁵ For the prosecutor, this means that justice must be served and the government's lawyer has a "duty to refrain from improper methods calculated to produce a wrongful conviction."⁶ Yet, the same obligation is not imposed on the defense lawyer, whose duty to the client is paramount. As Justice

2. One can reasonably question whether the adversarial system is even designed to achieve a relative approximation of the truth, as opposed to an inquisitorial system. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 19 (2004) ("[O]ne value that the American adversarial system prefers over Truth is the protection of an individual's freedom to act without having to account to the state for the act, and freedom from state monitoring or intervention: in short, a sphere of individual autonomy . . ."); Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 236 (2002) ("With the full Truth, inquisitorial systems can then go on to dispense the exact and proper justice required . . ."). For the purposes of this Article, I accept the Supreme Court's assertion in *Nix v. Whiteside* regarding a trial as a search for the truth as the principle goal of the judicial system.

3. See CANONS OF PROFESSIONAL ETHICS Canon 15 (1908) ("The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.'" (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 78-79 (photo. reprint 1993) (5th ed. 1896))).

4. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821).

5. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve."); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 128 (1987) ("[I]f stricter limits on truth-subversion were instituted, the rights of persons accused of crimes generally would be enhanced.").

6. *Berger v. United States*, 295 U.S. 78, 88 (1935); see also Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313

White asserted in *United States v. Wade*, “[W]e countenance or require conduct [by a criminal defense lawyer] which in many instances has little, if any, relation to the search for truth.”⁷

Lawyers must deal with a conundrum because they are required to act as officers of the court—presumably working to advance the truth—while providing loyal representation to clients who may have little to gain from its ascertainment, particularly in criminal cases.⁸ Neither goal can be fully achieved in every representation, and it is from the competition between these two principles that much of the criticism of the legal profession arises.⁹ Many accuse lawyers of being liars with little devo-

(2001) (“[T]he prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth.”).

7. *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., concurring in part and dissenting in part); see also Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) (“[D]efense counsel’s commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt.”).

8. See Arthur Gross Schaefer & Leland Swenson, *Contrasting the Vision and the Reality: Core Ethical Values, Ethics Audit and Ethics Decision Models for Attorneys*, 32 PEPP. L. REV. 459, 474–75 (2005).

[T]he [Model] Rules [of Professional Conduct] are silent regarding how the lawyer is to act when balancing conflicting rules within the Rules. For example, the Rules state that the lawyer has a specific duty to promote the interests of the client, as well as a duty to not mislead the court. While overt lying is clearly forbidden, selective silence can easily violate the spirit of an attorney’s duty to the court.

Id.

9. See STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON’T, CAN’T, AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH 1 (2001), stating:

The popular image is that lawyers, and trial lawyers in particular, are cunning deceivers and misleaders, flimflam artists who use sly rhetorical skills to bamboozle witnesses, turning night into day. In this conception, lawyers tell stories only in order to seduce and beguile the hapless jurors who fall prey to the advocate’s tricks.

Id.; see also RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 163 (1999) (“Lawyers are perennially rated among the least beloved people in America. Perhaps the foremost reason is that almost everyone thinks they lie—from late-night talk show hosts performing monologues and reporters writing hit pieces to legal scholars, judges, and even lawyers themselves.”); Pye, *supra* note 1, at 922 (“The proper balance between zealous representation and the obligation of the lawyer to the court and to the public is not a new problem.”); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1337 (1995) (“The long-term effect deceptive practices have in undermining society’s confidence in lawyer professionalism is relatively abstract and is unlikely to seem economically significant to lawyers currently engaged in the practices.”).

tion to the truth,¹⁰ while the law imposes on them a fiduciary obligation to put their clients' interests ahead of their own.

The term "truth" makes the lawyer's professional role even more difficult because it is a word easily used but difficult to define in the context of representation of a client, and it is quite possibly irrelevant for much of the day-to-day legal work performed by lawyers. Most representations have little to do with ascertaining the truth in situations in which an attorney advises a client on how to structure a transaction, negotiate a contract, or formulate an estate plan; these types of representations do not seek to determine the actual state of affairs at issue in a criminal trial. Even when a judicial proceeding is the subject matter of the representation, most of the work occurs outside the courtroom during the gathering and organizing of information. Even when considering a trial, which makes up a surprisingly small share of the work of the vast majority of lawyers, it is difficult to say whether the proceeding accurately reflects the truth about what occurred when it concludes. As Professor Luban noted, "A trial is not a quiz show with the right answer waiting in a sealed envelope. We can't learn directly whether the facts are really as the trier determined them because we don't ever find out the facts."¹¹

References to "truth" tend to obfuscate rather than clarify the role of the lawyer. The core of the lawyer-client relationship is trust, protected by the attorney-client privilege that prevents an attorney from being compelled—with limited exceptions—to reveal what a client communicated in the course of the representation. That privilege, of course, frustrates the search for the truth because the lawyer ordinarily may not reveal what has been learned during the representation of the client, even after the client's death.¹² Dedication to the truth cannot be the lawyer's paramount goal when every attorney is equally compelled to keep the truth hidden, at least if it is in the client's interest and

10. See John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93 (1999), stating:

Lawyers can either be trusted or they cannot. The regrettable fact is that lawyers, on the whole, can *not* be trusted. The reason is not merely that some lawyers sometimes do not tell the truth. The problem is far more systematic and pervasive. The reason lawyers cannot be trusted is that, on the questions that ultimately matter, most lawyers do not even purport to present the objective truth.

Id. at 94.

11. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 93 (David Luban ed., 1983).

12. See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

there is no basis to avoid the protection afforded client communications.

It is interesting that the rules of the profession do not require that lawyers produce the truth when representing a client. The Model Rules of Professional Conduct, the leading regulations followed at least in part by most states, do not directly reference truth in the provisions that establish the precepts for the proper practice of law.¹³ Certain rules discuss the requirement that lawyers not introduce false evidence,¹⁴ mislead a third person,¹⁵ or act deceptively or fraudulently;¹⁶ yet nowhere do they instruct a lawyer—even one representing a client in an adjudicatory proceeding—to ensure that the result of the legal representation reflect what actually happened in the transaction that is the substance of the dispute.¹⁷

Even in the limited context of adjudication of a dispute, to assert that a trial is a search for the truth does not define the extent of the lawyer's role in the process. A criminal defense lawyer is charged with defending even the guilty client,¹⁸ and that defense could result in an acquittal if the government—for whatever reason—does not meet its burden of proof. If the role of the lawyer is not to produce a truthful result in every represen-

13. The title of Model Rule 4.1 is "Truthfulness in Statements to Others," but the text of the Rule does not use the term "truth" and only prohibits false statements or failure to disclose information if it assists a client in committing a criminal or fraudulent act. See MODEL RULES OF PROF'L CONDUCT R. 4.1 (2003).

14. *Id.* R. 3.3.

15. *Id.* R. 4.1.

16. *Id.* R. 8.4(c).

17. See W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation,"* 44 S. TEX. L. REV. 53, 60–61 (2002) ("[W]hile lawyers must *tell* the truth, they are not required to *seek* the truth or to aid in the search. Instead, they are often required by their roles to work to *obscure* inconvenient truths and to *prevent* the truth from coming out."). It is not only lawyers who are not required to seek the truth in a judicial proceeding. The legislature can prevent the ascertainment of the truth in a legal proceeding by adopting a conclusive presumption regarding a particular fact, even if the falsity of the presumption could be shown. See *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (upholding a California statute creating a conclusive presumption that when a husband and wife are living together at the time of a child's birth the husband is the child's father; "A conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate.").

18. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.").

tation, then how can the professional rules operate to establish acceptable norms for the conduct of attorneys?¹⁹

At the outset, it is important to understand that the rules adopted in every state to regulate the conduct of lawyers are just one set of guidelines for the practice of law. Discovery rules, malpractice claims, appellate review of lower court decisions, the inherent power of the courts to punish for contempt, and even the criminal law provide constraints on how lawyers should operate when representing clients. For example, courts may reverse a criminal conviction if the prosecutor acts improperly, a high cost for society to pay for the misconduct of the government's representative. In looking at these different sources of norms for lawyers, the relationship of truth to the lawyer's role in representing the client as an advocate is no better reconciled than in the professional responsibility rules. Indeed, these different sources of rules for the practice of law mirror the competing pressures on the lawyer to act as an advocate and, simultaneously, as an independent officer in a judicial system seeking the truth.

Finding the truth is the object of the judicial system, but it is not the governing principle for the lawyer.²⁰ Instead, the focus for the lawyer should be *honesty* in dealing with clients, opponents, and the system. The principle of honesty governs the attorney in all forms of representation, not just when he is acting on behalf of a client in the course of an adjudication. As Judge Rubin wrote in 1975: "[T]he profession should embrace an affirmative ethical standard for attorneys' professional relation-

19. See Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics*, 49 EMORY L.J. 87, 91 (2000) ("Research often reveals that case law around the country on various ambiguous points in the ethics rules is remarkably inconsistent, and the scholarly literature can present even more disagreement. . . . Who are the knuckleheads who have led the profession to this pitiable condition?").

20. Judicial rulings that exclude evidence affect the search for the truth, but a court cannot simply allow in every piece of information a lawyer considers important to determining the truth. A lawyer can be sanctioned for trying to avoid court orders excluding certain evidence and references to it, even if the lawyer believes that evidence is important to the proper decision of the case. In *Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005), the Ninth Circuit upheld the imposition of monetary sanctions on defense counsel in a products liability trial whose statements about the plaintiff being intoxicated at the time of the accident had been excluded by the trial court. The plaintiff had been injured in an accident, and the fact that he was intoxicated when it occurred would seem to be relevant to the determination of the truth regarding the cause of the accident. The Ninth Circuit upheld the sanctions, finding that "in light of [counsel]'s own statements about the deliberateness with which he crafted his opening statement, the district court did not commit clear error in holding that this was a deliberate bad faith violation." *Id.* at 1115.

ships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith.*"²¹

While truth and honesty are certainly related, they are not identical. I use honesty to cover assertions—both verbal and non-verbal—by the attorney on behalf of a client, such as expressions of fact, legal argument, or a negotiating position. While truth is focused more on determining the existence of an historical fact, honesty focuses on the accuracy and authenticity of the lawyer's current assertions on behalf of the client. An attorney's honesty will assist a tribunal in ascertaining the truth, yet that is not the core function of the lawyer acting on behalf of a client. Whenever a lawyer communicates—whether it is to the court, to an opposing party or attorney, or even to a client—that communication must be honest.

In this Article, I will consider how honesty has been applied by courts as a principle for regulating the conduct of lawyers when representing clients. Part I explains how truth—and lying—are inadequate measures for examining the propriety of a lawyer's conduct. I offer instead the notion of honesty as a better means of understanding how lawyers should act, and I show how the professional regulations reflect a requirement of honesty rather than ascertaining the truth. Parts II through V review situations involving the professional responsibility rules and other sources of authority that regulate the conduct of attorneys in order to demonstrate how requirements that a lawyer act honestly in dealing with the courts, opposing counsel, and third parties can help explain, at least in some ways, the resolution of the clash between the demand that attorneys aid the judicial search for the truth and the duty of loyalty that attorneys owe to their clients. I do not offer honesty as a heretofore unrevealed agenda in the professional responsibility rules or as a curative measure for resolving every conflict among duties a lawyer can face in practice. Instead, the idea that lawyers must be honest when they offer information or take a position can provide a guide to understanding how to resolve some of the difficult issues in practicing law. Lawyers do not operate in a vacuum, and the professional responsibility rules and other guidelines that regulate attorneys provide only limited assistance in resolving difficult issues. The principle of honesty, rather than truth, can provide a further means, in addition to the lawyer's own ethical judgment, to accommodate the dual roles of the attorney as an advocate for a client and an officer of the court.

21. Alvin B. Rubin, *A Causeurie on Lawyers' Ethics in Negotiations*, 35 LA. L. REV. 577, 589 (1975) (emphasis added).

I. HONESTY AND TRUTH

Commentators have argued that the lawyer's responsibility as an officer of the court imposes a duty to ensure that the outcome of a proceeding be truthful. Judge Frankel recommended a new disciplinary rule that would "compel disclosures of material facts and forbid material omissions rather than merely proscribe positive frauds" by attorneys engaged in litigation.²² Professor Subin argued for a rule that, in a criminal trial, a defense lawyer should not be permitted to offer a false defense by disputing a fact that the attorney knows to be the truth.²³

On the other hand, others argue that the Sixth Amendment right to counsel can be read to require that the lawyer seek the acquittal of the defendant by any means short of a violation of the law, even if the lawyer knows the defendant is guilty of the crime.²⁴ Therefore, any discussion of truth in the context of a criminal trial is misguided, at least for the defense lawyer.²⁵ Similarly, Professor Pepper argued that lawyers are not morally accountable for carrying out the wishes of their clients if those goals are lawful, even if that may not result in discovery of the truth.²⁶

For legal representations that involve the filing of a claim requiring some adjudicatory proceeding, the vast majority of the cases are settled through negotiations between attorneys for the two sides. Does truth play the same role in the context of negotiations? Professor White argued that "a careful examination of

22. Frankel, *supra* note 5, at 1057.

23. Subin, *supra* note 5, at 149.

24. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3.1, at 579 (1986) ("A lawyer may not commit a crime in behalf of a client, for example. But it is widely expected that a lawyer will stand ready to perform any service for a client that is appropriate for the advancement of the client's legal rights so long as it violates no law.").

25. See John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339, 345 (1987) ("But in a trial there are no such things as facts. There is only information, lack of information, and chains of inferences therefrom.").

26. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614. Pepper explains: Once a lawyer has entered into the professional relationship with a client, the notion is that conduct by the lawyer in service to the client is judged by a different moral standard than the same conduct by a layperson. . . . As long as what lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer.

Id. But see David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 647 ("[T]he amoral role is not defensible . . .").

the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. . . . To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation."²⁷ Judge Henry Friendly recognized that the lawyer's role is not necessarily to facilitate the prompt resolution of a dispute: "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty."²⁸

Even outside the context of litigation, Charles Curtis famously made the point that, "I don't see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client A lawyer is required to be disingenuous."²⁹ Much has been made of the seeming contradiction of lawyers who would lie to further the interests of their clients in a judicial system apparently dedicated to the truth. Professor Bok has noted that "lying in court has traditionally been more abhorred than other lying. How is it, then, that it has come to be thus defended, albeit by a minority of commentators? Defended, moreover, not just as a regrettable practice at times excusable, but actually as a *professional responsibility*?"³⁰

Simply asserting that "lawyers should not lie" as a professional standard is problematic as a workable guideline for legal practice.³¹ The definition of what constitutes a lie is as imprecise as declaring what is the truth. Some definitions are limited to affirmatively false representations, while others go further to include a failure to disclose. For example, Bok's definition of a lie is "any intentionally deceptive message which is stated," a subcategory of deception.³² Professor Wetlaufer offers a more encompassing definition of lying: "to include all means by which one might attempt to create in some audience a belief at vari-

27. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-28.

28. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1288 (1975).

29. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951).

30. SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 159 (3d ed. 1999) (emphasis in original).

31. See Hodes, *supra* note 17, at 69 ("But is conveying a false message always the same thing as 'lying,' or is there a difference between 'real lies' and various forms of misdirection?").

32. See BOK, *supra* note 30, at 13. Bok distinguishes her narrower definition, which only encompasses statements, from "deceptive messages." *Id.* at 15.

ance with one's own."³³ Paul Ekman's definition incorporates both false statements and withholding truthful information as constituent parts of lying: "There are two primary ways to lie: to *conceal* and to *falsify*. In concealing, the liar withholds some information without actually saying anything untrue. In falsifying, an additional step is taken. Not only does the liar withhold true information, but he presents false information as if it were true."³⁴

Trying to define what constitutes a lie, and then proscribing it, is a negative rule that tells lawyers what they should not do, rather than directing conduct toward what should be done in representing a client. Such a rule encourages finding loopholes—such as the claim that a statement was technically true even if misleading—rather than how to act appropriately in a variety of settings. Moreover, if a definition of lying includes withholding information, that would be problematic in light of the attorney-client privilege, which requires attorneys to maintain the confidentiality of client communications by not revealing them absent client permission. Any definition of lying that prohibits concealment of information except when it is permitted is hardly a workable guide to attorney conduct.

More importantly, focusing on truth and lying as the benchmark for appropriate attorney conduct comprehends only a narrow range of the work attorneys perform for clients. Issues of truth and falsity arise predominantly in the context of litigation, in which there are clearly established procedures for exchanging information and offering evidence that will be evaluated by a neutral factfinder. Most legal representation does not involve

33. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1223 (1990).

34. PAUL EKMAN, *TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE* 28 (1985). Also, Professor Stuart Green offered the following analysis:

Lying, as we shall see, involves asserting what one believes is literally false. When A lies to B, A gets B to place his faith in him, and then breaches that faith. Merely misleading, by contrast, involves a quite different dynamic. When A merely misleads B, A invites B to believe something that is false by saying something that is either true or has no truth value. Any mistaken belief that B may draw from A's misleading statement is, at least in part, B's responsibility, and (other things being equal) A should be regarded as less fully culpable than if she had lied. This postulate, which I refer to as the principle of caveat auditor, or "listener beware," helps to explain much about the differences between lying and other forms of deception.

Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 159–60 (2001).

any specific ascertainment of what is historically true but rather requires an attorney to create appropriate legal structures to accomplish certain goals, such as the acquisition or delivery of goods and services, transferring wealth between generations, or securing government approval of a project. Any discussion of “truth” is largely irrelevant in these contexts, except insofar that the lawyer’s representations to clients and third parties must be truthful, i.e., honest.

Despite their detail, the Model Rules provide little specific guidance to attorneys for dealing with the obligation to the truth. When lawyers stand up in the courtroom, the devotion to the client’s interests—the zealous advocate—is the principal feature of the proceeding. The lawyer acts as the “champion” of the client’s interests, limited only by the rules that prevent a lawyer from using false evidence or perjurious testimony. Model Rule 3.3 is entitled “Candor Toward the Tribunal,” and it prohibits not only false statements but also a failure “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.”³⁵ The lawyer’s conduct as an advocate cannot include the use of dishonest means that affect the court’s ability to oversee a search for the truth, but no specific duty to pursue the truth is imposed on counsel for the parties.

Model Rule 3.3 is limited, however, because the object of this duty of candor is only the court, and the prohibition on making false or misleading statements extends just “to the conclusion of the proceeding.”³⁶ The Rule does not cover the other participants in the proceeding, most importantly the opposing attorney. Model Rule 3.4 does deal with the relationship between the lawyers by imposing a responsibility of “Fairness to Opposing Party and Counsel.”³⁷ The Rule provides that a lawyer may not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value,” nor can the lawyer “falsify evidence.” While this Rule sounds comprehensive, it contains obvious limitations on a lawyer’s responsibility, most importantly that any obstruction must be “unlawful.” Unlike Model Rule 3.3, there is no express prohibition on a lawyer who fails to disclose information to the opposing party and counsel, and the Rule only reaches positive acts. So long as the lawyer does not physi-

35. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2003).

36. *Id.* R. 3.3(c).

37. *Id.* R. 3.4.

cally alter or destroy evidence, or fabricate it, then the Rule has not been violated.

There are two Model Rules that deal explicitly with the lawyer's statements in a broader context outside of litigation. Model Rule 4.1 prohibits lawyers from making "a false statement of material fact or law to a third person" and failing to disclose information if it will prevent the client from engaging in a criminal or fraudulent act.³⁸ This latter duty of disclosure is tempered by the requirement that the lawyer not disclose information protected by the confidentiality rules, including privileged communications. While the title of Model Rule 4.1 is "Truthfulness in Statements to Others," the provision is hardly a requirement of truthfulness, much less of honesty. The provision only covers statements of fact, which are susceptible to a narrow interpretation. The comment to the Rule further limits its applicability by stating that "[a] lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."³⁹ Non-disclosure violates the Rule only if it assists the client in a crime or fraud, which covers a fairly narrow range of conduct by the client.

Model Rule 8.4(c) contains a general prohibition directing lawyers to not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."⁴⁰ There is no attempt to define any of the terms in the Rule, apparently on the theory that they are self-explanatory. Other more specific Rules, such as Model Rules 3.3 and 4.1, provide a bit more precision and may be specific iterations of the broader exhortation to act honestly. Not surprisingly, the Rules provide little real guidance to lawyers in representing clients, which leaves it to the courts and the disciplinary authorities to work out the details of how attorneys should put into practice the exhortation to be honest.

What does it mean to describe a person as honest? Importantly, the term is not the same as truth, which contains an objective—and often historical—character, referring to a specific past or present state of affairs or course of conduct. Honesty is more a personal characteristic, referring to the nature of the person's expressions and actions that reflect integrity and trustworthiness. While it is fair to say that an honest person speaks the truth, hon-

38. *Id.* R. 4.1.

39. *Id.* R. 3.4 cmt. n.1.

40. *Id.* R. 8.4(c).

esty is not limited to descriptions of past or present fact.⁴¹ It incorporates the quality of an individual's personal interactions and the perceptions created by that person's words and conduct. In the context of legal representation, honesty is not owed to any one party more than another, while the "search for the truth" is primarily an aspect of the adjudicative process. Honesty applies in every context in which the lawyer acts in representing a client—and perhaps even outside that professional role. Professor Hazard offered the position that lawyers should strive to be "trustworthy," which, he says:

[I]s not simply the moral virtue of veracity but is an amalgam of moral virtue, market sense, and physiological and political discernment. It is the ability to understand what truth is, to understand when the truth is called for, and to instill in others confidence that one has such understanding.⁴²

* * *

An honest lawyer is one who can be trusted. For the purposes of analyzing the rules that govern a lawyer's conduct, I define honesty to mean that an attorney's expressions and conduct are both *accurate* and *authentic*. An accurate statement is one that is truthful and does not intentionally deceive or mislead another person. Accuracy deals with the problem of the techni-

41. In determining whether an attorney had been dishonest, and hence subject to discipline, for tax evasion, the D.C. Court of Appeals stated:

Given the "technically true" nature of respondent's answers to questions posed by revenue agents, and his abstinence from actual false statements or affirmative acts of concealment, we decline to describe his financial arrangements and his parsimonious dissemination of information as either fraudulent, deceitful, or misrepresentative, which all describe degrees or kinds of active deception or positive falsehood. We deem this issue a close one, however, and thus experience no difficulty in characterizing these arrangements as evincing a lack of integrity and straightforwardness, and therefore dishonest.

In re Shorter, 570 A.2d 760, 768 (D.C. Cir. 1990).

42. Geoffrey C. Hazard, Jr., *The Lawyer's Obligation To Be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181, 183 (1981). While Professor Hazard argued in favor of trustworthiness as the goal of the legal profession, he concluded that the professional responsibility rules "cannot go much further than to proscribe fraud" and could not compel lawyers to be trustworthy. *Id.* at 196. That conclusion is not correct if trustworthiness is understood as a product of lawyers being honest. While the rules do not impose an obligation to ensure that the truth be established, they do require that the lawyer be honest with clients, courts, and third parties, including opposing counsel, and violations of those rules can result in sanctions. The rules governing lawyers are much broader than a mere prohibition on fraud.

cally true but misleading statement or failure to disclose information that the listener would consider important. A deceptive statement would be inaccurate and therefore dishonest. At the same time, a lawyer's statements will be accurate even if they do not fully disclose the truth about a situation. The attorney-client privilege, for example, may restrict what a lawyer can state to third parties, and accuracy requires that the lawyer not mislead while he also is maintaining the confidences protected by the rules of confidentiality.

An authentic expression is one that comprehends fairly the lawyer's (and in certain circumstances the client's) intentions. Even if the lawyer can argue that statements were accurate in the terms described above, the lawyer has a further obligation to ensure that the representation of the client is fair both to the client and to others, including courts and opponents.⁴³ Not all expressions are factual, or at least their accuracy cannot be easily measured, so that a requirement of authenticity in the lawyer's representation covers a broader array of conduct than just assertions that can be checked for their accuracy. For example, bombastic comments in a legal brief attacking the integrity of the judge may be correct statements of the lawyer's opinion, and hence accurate, but they are not honest statements because their

43. A good example of a lawyer acting inauthentically is presented in *In re Dale*, No. 00-O-14350, 2005 WL 1389226 (Cal. Bar Ct. May 6, 2005), in which the California Bar Court upheld a sanction against Joshua Dale for his conduct in dealing with an imprisoned arsonist whose statements about his crime would be helpful to Dale's clients, residents of the apartment building burned by the arsonist. As summarized by the Bar Court:

[Dale] compromised the integrity of the criminal justice system when he systematically befriended and then cajoled Darryl Geyer, an incarcerated 22-year-old with a 10th grade education, into giving a confession about an arson fire at an apartment building. Geyer had previously confessed to the police about the fire, and the voluntariness of that confession was the key issue upon which he was appealing his second-degree murder conviction. Respondent, who was representing the tenants in a negligence lawsuit against the apartment owner arising from the same fire and was facing the owner's summary judgment motion, needed Geyer's statement about the condition of the premises when he set the fire.

Id. at *1. The statement Dale obtained ultimately had no effect on Geyer's appeal, and Dale settled the civil case without having to introduce it at trial. Despite the lack of any harm or tangible benefit from the misconduct, the Bar Court found that Dale breached a fiduciary duty owed to Geyer, a non-client, and that his conduct constituted moral turpitude. The best way to view Dale's violation of the professional rules is that he was dishonest in his dealings with Geyer by acting unfairly in their contacts, a point shown by Dale terminating all contact as soon as he had what he needed from Geyer. The lawyer cannot simply use a person for the benefit of the client.

authenticity is open to question in the context in which the remarks are made. A lawyer's statements and positions can be authentic while favoring the position of the client—indeed, that is required by the fiduciary relationship of the lawyer to the client. Authenticity does not mean achieving a result that is less than what the client seeks, so long as the lawyer has not acted dishonestly.

While this description of honesty takes account of the moral aspect of legal representation, my principal focus is on how the rules that regulate lawyers can be understood as expressing this requirement of honesty in the representation of clients. To say that a lawyer is an officer of the court means that in every context the demand to be honest must be fulfilled, but it does not mean the lawyer must ensure that the truth be revealed at any cost. Criticisms of the morality of lawyers that focus on whether a lawyer ensures that the truth is somehow ascertained—or vindicated—are misguided because they do not fairly reflect the competing requirement that the lawyer represent the interests of the client. Honesty, and not simply truth, is the better way to view how the lawyer should operate when representing a client.

The following sections of this Article will consider how the regulation of lawyers reflects this concept of honesty in legal representation and will discuss limitations on the extent to which honesty can be used to determine how lawyers should represent clients. I do not claim that this concept of honesty is a cure-all that will harmonize the competing requirements of truth and zealous representation. It is, instead, a tool to analyze why lawyers can rightfully be criticized—and sanctioned—for their conduct.

II. DEALING WITH OPPOSING COUNSEL

A. *Discovery*

A trial is the infrequent end to a very complex process by which the lawyers gather information and organize it into formats—both documentary and oral—that will be available in court to support their position. Most cases are not brought to conclusion in an actual trial but rather are resolved through a negotiated settlement or other pretrial resolution of the case, such as a grant of summary judgment. Even then, the discovery process is crucial to the judicial system, and it is one that occurs largely away from the scrutiny of judges or other neutral arbiters. The professional rules have little to say about discovery beyond the prohibition in Model Rule 3.4 forbidding a lawyer to obstruct access to evidence or tamper with it. Courts have, instead, filled

in this blank in the professional conduct rules by creating a modest duty of honesty in the discovery process, approaching it as an adjunct to the duty of candor to the tribunal without identifying clearly the source of this duty.⁴⁴

One of the earliest cases recognizing a duty of honesty owed by lawyers to opposing counsel was *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*,⁴⁵ involving the settlement of a personal injury action. After a mediation panel evaluated Virzi's claim at thirty-five thousand dollars, he died from causes unrelated to the injuries at issue in the litigation. A short time later, counsel for the parties agreed to settle the case for thirty-five thousand dollars, the value determined in the mediation, but Virzi's lawyer never told opposing counsel about his client's death. After placing the settlement on the record before the judge, "as both attorneys were walking out of chambers to the elevator together, plaintiff's attorney, for the first time, informed defendant's attorney that plaintiff had died."⁴⁶ The defendant sought to void the settlement on the ground that Virzi's attorney had an obligation to disclose his client's death, asserting that defense counsel's "sole reason for recommending acceptance of the mediation award was that plaintiff would have made an excellent witness on his own behalf if the case had gone to trial."⁴⁷ Virzi's attorney argued that he had not done anything unethical, because Virzi was alive when the mediation statement was submitted to the panel, and he never made any false or misleading statements during the negotiation or settlement.

The district court rejected the argument and voided the settlement. The court found that counsel violated Model Rule 3.3 by failing to disclose to the court the status of his client, which was a material fact. The court went on to find that Virzi's counsel also violated his disclosure obligation to opposing counsel, which was a more tenuous proposition. "Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel, even though counsel did not ask whether the client was still alive."⁴⁸ The court did not identify the source of this duty either in the professional regulations or in the discovery rules. Virzi's attorney did not make a false statement, and his client's

44. Cf. *Pye*, *supra* note 1, at 939 ("There should be occasions, and there are, as in response to a demand for discovery, when counsel is obligated to act in a way that reduces his client's chances for acquittal.").

45. 571 F. Supp. 507 (E.D. Mich. 1983).

46. *Id.* at 508.

47. *Id.*

48. *Id.* at 512.

death was of questionable relevance to the outcome. Although defense counsel asserted that his client would not have entered into the settlement if he had known about Virzi's death, this assertion is unsupported and indeed is rather suspicious. Assuming the plaintiff's claim had a reasonable value of thirty-five thousand dollars—a proposition neither the defendant nor the court ever questioned⁴⁹—then that value would not have been affected by the plaintiff's death. The mediation process is done on a paper record, without live testimony, and is an objective analysis that is not contingent on the credibility of the witnesses. It is certainly possible that defense counsel may have seized on the nondisclosure to reopen negotiations and obtain a smaller settlement with the plaintiff's estate.

Although Virzi's attorney did not make a false statement, nor did he actively mislead defense counsel, his conduct certainly was not honest. Even if defense counsel overstated the significance of Virzi's death, a client's status is clearly an important fact in a personal injury action that an honest attorney should disclose to opposing counsel because of the effect it may have on the case. The court's assertion that "[t]here is an absolute duty of candor and fairness on the part of counsel to both the court and opposing counsel"⁵⁰ raises the requirement of honesty for an attorney dealing with opposing parties and attorneys to the level established in Model Rule 3.3 in dealing with a court.

What is the source of this duty, if it cannot be located clearly in the professional rules? In *Kentucky Bar Association v. Geisler*,⁵¹ the Kentucky Supreme Court faced a situation similar to *Virzi* in which counsel did not disclose the death of her client before reaching a settlement. The case involved a sanction against the attorney for violating her professional obligation, and the court concluded, "It should be noted that this Court fails to understand why guidelines are needed for an attorney to understand that when their client dies, they are under an obligation to tell opposing counsel such information. This seems to be a matter of common ethics and just plain sense."⁵² The Kentucky Supreme

49. See *id.* at 511 ("[P]laintiff's death was not caused by injuries related to the lawsuit, and did not have any effect on the fairness of the \$35,000 mediation award.").

50. *Id.* at 512.

51. 938 S.W.2d 578 (Ky. 1997).

52. *Id.* at 580. The attorney received a public reprimand for failing to disclose to opposing counsel the death of her client, which occurred shortly before she initiated settlement discussions. Interestingly, although opposing counsel learned about the plaintiff's death before completing the settlement, he entered into the agreement anyway and sent an order of dismissal to the trial court, which dismissed the case. Only after the settlement did opposing coun-

Court relied on *Virzi*, and its conclusion is one that stresses the essential requirement of honesty in all legal representation.⁵³

Another source of the obligation to inform opposing counsel of any changed circumstances is Federal Rule of Civil Procedure 26(e)(1), which was not adopted until ten years after *Virzi*. The rule imposes on litigants and their counsel a duty to correct prior discovery:

A party is under a duty to supplement at appropriate intervals its disclosures . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.⁵⁴

This Rule covers many situations in which evidence has been withheld or in which newly-discovered information makes a prior disclosure misleading, but it likely would not reach the situation in *Virzi* or *Geisler* where the possibility that a party had died simply never occurred to opposing counsel and was not the subject of any discovery requests. The duty to correct in the Federal Rules of Civil Procedure reflects a demand that lawyers be honest during a crucial phase of litigation, effectively creating a profes-

sel file a complaint with the bar authorities about the failure to disclose. Unlike the situation in *Virzi*, there was no misstatement to the court, simply a dismissal of the action, so the ethical violation focuses solely on the lawyer's responsibility to opposing counsel and not to the court under Rule 3.3.

53. In *In re Forrest*, 730 A.2d 340 (N.J. 1999), the New Jersey Supreme Court rejected the lawyer's argument that the failure to disclose his client's death and the service of unsigned answers to interrogatories with his client's name on them was simply a negotiation tactic to get his client's estate the best possible settlement. The court dismissed the lawyer's defense rather emphatically, stating:

Respondent's deception of his adversary and the arbitrator is inexcusable, and the contention that it occurred because of a sincere but misguided attempt to obtain a permissible tactical advantage in a lawsuit strains our [credulity]. Misrepresentation of a material fact to an adversary or a tribunal in the name of "zealous advocacy" never has been or ever will be a permissible litigation tactic.

Id. at 345.

54. FED. R. CIV. P. 26(e)(1). The Rule also provides for updating responses to interrogatories and requests for admission if they are incomplete or incorrect. FED. R. CIV. P. 26(e)(2). Rule 26(e)(2) states:

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Id.

sional obligation for lawyers through procedural rules. Yet, it is also limited in its scope because it is only triggered by litigation and does not apply outside the context of the exchange of information between parties to a lawsuit.

Rule 26(e) was controversial because of the conflict with the lawyer's duty to the client. Justice Scalia criticized the Rule for imposing a corrective disclosure duty that may compromise the lawyer's duty of zealous advocacy:

By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary.⁵⁵

Justice Scalia's approach makes the lawyer's duty to the client superior to the "search for the truth" by divorcing discovery from the adjudication of the matter. Under this analysis, the discovery rules place a premium on each party's lawyer, framing the requests for information in such a way as to trigger responses that will assist the party in gathering evidence for use at trial. There would be no duty to disclose information if the opposing lawyer failed to properly word the request for information.⁵⁶

The view of discovery as an opportunity to avoid disclosure while staying within the technical requirements of the rules came before the Mississippi Supreme Court in *Mississippi Bar v. Land*,⁵⁷

55. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 511 (1993) (Scalia, J., dissenting).

56. Even before the adoption of Federal Rule of Civil Procedure 26(e), the Eleventh Circuit held that discovery abuses in the name of zealous advocacy were improper. In *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir. 1993), the court found that a default judgment against the defendant automaker was "richly deserved," because the company's lawyers withheld information and participated in a cover-up of relevant information. *Id.* at 1542. The court stated:

Unfortunately, the American Bar Association's current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. . . . Too many attorneys, like defense counsel, have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client.

Id. at 1546–47.

57. 653 So. 2d 899 (Miss. 1994).

which concerned an attorney's failure to disclose documents related to a different theory of liability for his client. In the underlying personal injury action, Billy Ray Stevens was driving past the home of Jack Guthrie when he was struck in the left eye by a flying object. Stevens believed that he saw a lawn mower being operated on Guthrie's property at the time, and he surmised that a rock thrown from the mower had struck him. Stevens filed a lawsuit against Guthrie for negligent operation of the lawn mower and sought discovery on the operation of the lawn mower. Unbeknownst to Stevens, Jack Land, Guthrie's attorney, contacted the insurance company that conducted an investigation of the incident and received information that Guthrie's son and a friend were firing a BB gun at passing cars at the time Stevens was struck. Land never disclosed two pictures of the BB gun or an insurance report discussing the son's conduct, noting in a file, "Gun does not relate to civil action as worded in Complaint! Do not produce."⁵⁸ It was only when a runner in Land's office mistakenly gave the file with the BB gun information to Stevens' counsel that the real cause of the injury came to light.

The Mississippi Bar brought a disciplinary complaint against Land for violating Rules 3.3, 3.4, and 8.4(c) for not disclosing the information about the correct theory of liability and instead allowing Stevens to operate on the incorrect view that a lawn mower caused the injury. Guthrie had a good defense to the lawn mower claim, because it was not being operated at the time of the incident, and Land defended his client against the claim filed by the plaintiff and responded to discovery requests about the operation of the lawn mower.⁵⁹ Land asserted that the report and photographs about the BB gun were privileged and argued that the Bar's complaint sought to turn a discovery dispute into an ethical violation.

Land is certainly correct that his notation about not having to turn over the photographs was protected attorney opinion work product, and his answers to the interrogatories were truthful to the extent that they only discussed the plaintiff's lawn mower theory of injury. Land's interrogatory responses were also clearly disingenuous, to say the least, and misleading. For example, the answer to one interrogatory states that Guthrie had no

58. *Id.* at 903.

59. Stevens also considered filing a lawsuit against the lawn mower manufacturer for products liability and sought information from Guthrie to identify the manufacturer. It was at this time that the insurance company investigated the incident and determined that the son may have caused the injury by shooting the BB gun. *Id.* at 902.

"personal knowledge of any written report" about the incident, which was true except that Land had a copy of the insurance company's report about the BB gun.⁶⁰ Similarly, the response to an interrogatory about Guthrie's conclusions about any investigation of the incident stated that he had "no information that convinces him that the alleged incident occurred."⁶¹ That is certainly true, if by "incident" one means the lawn mower theory, but it is hardly an honest answer. The Mississippi Supreme Court found that, "Land knowingly concealed potentially significant facts and evidence in his possession. Deceit of such magnitude demonstrates a clear and convincing violation of the rules of professional conduct."⁶²

The Mississippi Supreme Court could not point to a false statement by Land, relying instead on the "impression conveyed" by the interrogatory responses and statements of Land that were "calculated to deceive."⁶³ The discovery failure was caused, at least in part, by opposing counsel, who was operating under the same misunderstanding about the cause of the injury as his client and had framed his discovery requests accordingly. Does a lawyer have a duty to tell opposing counsel that he had the facts wrong and therefore is asking the wrong questions? Recall that the comment to Model Rule 4.1 states that a lawyer does not have an "affirmative duty to inform an opposing party of relevant facts."⁶⁴ Land withheld documents from opposing counsel that were highly relevant, but the plaintiff never asked about a BB gun, only a lawn mower.

Making discovery a game to be played by wordsmiths who will exploit every real and imagined ambiguity is not consistent with the lawyer's responsibility to be honest.⁶⁵ The Mississippi

60. *Id.* at 903.

61. *Id.*

62. *Id.* at 910.

63. *Id.* at 908.

64. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. (2003).

65. A dissenting opinion asserted that "[t]he Mississippi Bar's position rewards those that draft broad, vague and sweeping discovery requests and punishes the attorney who interprets those broad discovery requests narrowly." *Land*, 653 So. 2d at 910 (Lee, P.J., dissenting). This criticism of the holding in *Land* views the discovery rules in the same way as Justice Scalia does: they are rules for playing the litigation game and unrelated to the professional responsibility of lawyers. Requiring an attorney to respond honestly to a discovery request does not mean that every piece of potentially incriminating evidence be turned over absent a request. Moreover, Model Rule 3.4's prohibition on concealment should not be interpreted as requiring complete disclosure, and the discovery rules provide important parameters for the process of gathering information. At the same time, discovery is an aspect of the lawyer's representation of the client, and responding to discovery is a communication that requires

Supreme Court effectively defined concealment in Rule 3.4 by measuring whether the lawyer's response was honest and not whether the lawyer physically removed evidence. Land's discovery responses were truthful, to the extent that one limits truth to the plaintiff's lawn mower theory, but they certainly were not an authentic reflection of the scope of the defendant's knowledge or position.⁶⁶

Responding to discovery by taking a narrow or literal approach is nothing new, and courts have had to draw lines at responses that are literally true but misleading. In *Washington State Physicians Insurance Exchange v. Fisons Corporation*,⁶⁷ the Washington Supreme Court held that the defendant and its attorneys should have been sanctioned for their failure to produce documents during discovery. In a medical malpractice suit in which the doctors claimed a drug manufacturer had not warned them about the side-effects of the drug at issue, the doctors sought the production of all documents regarding the drug, but their requests referred specifically to the drug and not an ingredient of the drug. The company did not disclose two items, dubbed rather ominously as the "smoking gun documents," because they fell outside the requested information, construed as narrowly as possible by its counsel. The court stated:

[W]e cannot perceive of *any* request that could have been made to this drug company that would have produced the smoking gun documents. Unless the doctor had been somehow specifically able to request the June 30, 1981, "dear doctor" letter, it is unlikely that the letter would have been discovered.⁶⁸

B. *Inadvertent Disclosure of Confidential Information*

The demand for honesty by lawyers during the process of discovery is even more apparent in a situation that involves too

honesty. The majority opinion in *Land* looks at the meaning of the responses and not simply whether they were technically truthful or did not contain an explicit misstatement of fact.

66. In *Miss. Bar v. Mathis*, 620 So. 2d 1213 (Miss. 1993), the Mississippi Supreme Court faced a different type of discovery abuse. An attorney sought to obstruct an autopsy of his client's dead husband and permitted his client to testify at a deposition that an autopsy had not been conducted when in fact one had been done, but his client did not know it at the time of the deposition. The court held that "Mathis' deliberate misrepresentations and admitted concealment of the autopsy reflect adversely on his fitness to practice law . . ." *Id.* at 1220.

67. 858 P.2d 1054 (Wash. 1993).

68. *Id.* at 1084.

much disclosure of information—rather than too little—through an inadvertent revelation of information protected by the attorney-client privilege and the work product doctrine. Increasingly complex litigation, combined with technological advances that make the creation, storage, and transfer of computer files and documents much quicker and easier, have made the likelihood of an accidental disclosure of confidential information greater.⁶⁹ Cases in this area present a lawyer's worst nightmare, as illustrated by *Resolution Trust Corporation v. First of America Bank*,⁷⁰ involving a rather commonplace, if glaring, error at one lawyer's firm. An assistant at the defense counsel's firm inadvertently mailed to plaintiff's counsel a seven-page letter addressed to a senior vice president at the defendant bank setting forth the facts of the case and, more importantly, the defense strategy.⁷¹ The district court noted that "[t]he letter was clearly labeled on its face '*PRIVILEGED AND CONFIDENTIAL*'"⁷² Defense counsel moved for a protective order seeking the return of the document and disqualification of opposing counsel.

In ordering the plaintiff's counsel to destroy the document and all its copies and to remove all references to the letter, the district court relied on two American Bar Association (ABA) ethics opinions as support for its order.⁷³ First, in Formal Opinion 92-368, the ABA took the following position:

69. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. No. 730 (2002) ("[R]esort to fax machines and e-mail creates a risk of inadvertent disclosure of privileged information, and non-discovery of one's own inadvertence, that differs in degree from that which attends more traditional modes of communication."); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Material: Attorney Responsibility as the Governing Precept*, 47 FLA. L. REV. 159, 160 (1995) ("With the growth of complex litigation, inadvertent disclosure of privileged materials is an increasingly common problem, particularly in cases involving the production of large amounts of material.") (citations omitted). E-mails sent from law firms routinely have a statement at the end admonishing the recipient if the message was sent in error. A typical one reads something like:

CONFIDENTIALITY NOTICE: This email message and any attachments to it, is intended only for the individual or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

70. 868 F. Supp. 217 (W.D. Mich. 1994).

71. *Id.* at 218.

72. *Id.*

73. The court denied the request to disqualify counsel. That sanction hardly seems appropriate when the plaintiff's counsel was not responsible for

[A] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them.⁷⁴

The opinion based its analysis on the duty of lawyers to maintain the principle of confidentiality and on the law of bailments for misdelivered property, but not on any specific provision of the Model Rules. Neither basis provides a strong underpinning for the Formal Opinion's conclusion about the lawyer's duty because the duty of confidentiality is owed to one's own client, while an opposing party has no obligation to an opponent. The law of bailments is at best a weak analogy because the issue is not about returning the particular document but the knowledge that is gained from the opposing lawyer's review of its contents.

The district court also relied on Formal Opinion 94-382, which dealt with a different situation in which a lawyer received material that clearly was privileged or confidential from a third party and not the opposing counsel. The rule here was hedged a bit, stating that the lawyer "either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court."⁷⁵ Formal Opinion 94-382 notes that, unlike in the case of inadvertent disclosure by opposing counsel, when a third party provides the information, the receiving lawyer is the intended recipient and "the law may recognize some right to the use of the materials despite the fact that the sender had no authority to transmit them."⁷⁶ The ABA made no effort to ground its position on any particular Model Rule, relying only on "relevant public policy considerations and case law"⁷⁷ The "public policy

the disclosure and promptly notified defense counsel upon seeing the letter. The question of disqualification is more one of remedy rather than the initial professional obligation of the lawyer facing the inadvertent disclosure of confidential information. *Id.* at 219-21.

74. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

75. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994) [hereinafter ABA Formal Op. 94-382].

76. *Id.*

77. *Id.* While Formal Opinion 94-382 refers to "case law" as a guide for its decision, it discusses only one decision that specifically addresses the issue: *In re*

considerations" include "general considerations of common sense, reciprocity and professional courtesy" in addition to the concerns about confidentiality and the law of bailments identified in Formal Opinion 92-368.⁷⁸

Echoing the approach of the ABA Formal Opinions, the district court in *First of America Bank* stated that "common sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the plaintiff's attorneys to notify defendant's counsel of his office's mistake."⁷⁹ The court essentially relied on an intuitive sense of fairness: lawyers should not take advantage of an opponent's mistake—one that could be made by any attorney.

The ABA's approach to the lawyer's professional duty when receiving a confidential document has been followed by some state and local bars. The Utah State Bar takes the position that "Rule 8.4(d) places an obligation upon every lawyer to take steps to preserve the attorney-client privilege in order to effect the orderly administration of justice." The attorney must "either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed"⁸⁰ The Oregon State Bar Association states, "Professionalism, the fundamentals underlying the Disciplinary Rules and good sense all support the conclusion that the correct course for [the receiving lawyer] is to avoid reviewing the document, inform [opposing counsel], and return the document."⁸¹ The California Court of Appeals took the same approach when considering a disqualification motion against the attorney who received the confidential information:

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the

Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992), *amended and reconsidered on other grounds*, 143 F.R.D. 73 (E.D. La. 1992).

78. ABA Formal Op. 94-382, *supra* note 75.

79. Resolution Trust Corp. v. First of America Bank, 868 F. Supp. 217, 220 (W.D. Mich. 1994).

80. Utah State Bar Ethics Advisory Opinion Comm., Op. 99-01 (1999).

81. Or. State Bar Legal Ethics Comm., Formal Op. 1998-150, at *3 (1998). The Opinion notes that returning the document to opposing counsel, "does not impair [the receiving lawyer]'s obligation of zealous representation." *Id.* at *2.

materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged.⁸²

The New York County Lawyers' Association takes the same approach, stating that "a lawyer has an ethical obligation to refrain from reviewing inadvertently disclosed privileged information."⁸³

Interestingly, some states take a very different approach to inadvertent disclosures of privileged material.⁸⁴ The Maine Professional Ethics Commission stated that the receiving attorney could use the information to the extent permitted by the rules of evidence and procedure but should notify opposing counsel of receipt of the document.⁸⁵ The Commission noted that ABA Formal Opinion 92-368 does not cite any specific provision of the Model Rules in support of its position and that "[w]e are not free to read into [the Maine Bar Rules] limitations on conduct that have not been stated expressly."⁸⁶ Similarly, the Ohio Board of Commissioners on Grievances and Discipline issued an opinion rejecting the ABA's position by asserting that a lawyer who obtains a privileged document while conducting a public records search need not refrain from reading the document or inform-

82. *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807 (Cal. Ct. App. 1999).

83. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, *supra* note 69, at *4.

84. See Phila. Bar Ass'n Prof'l Guidance Comm., Op. No. 94-3 *1 (1994) (noting that when opposing counsel inadvertently faxes a document that was protected work product, "Our opinion is that there is no violation of the rules of professional guidance to decline to return the document. Similarly, there is no ethical inhibition on [an attorney] seeking to admit the document at time of trial."); Md. State Bar Ass'n Comm. on Ethics, Op. No. 89-53 (1989) ("A lawyer who receives from an unidentified source copies of documents belonging to an opposing party has no obligation to reveal the matter to the court or to the opposing party."); Va. Legal Ethics Op. No. 1076 (1988) (suggesting that, if an unknown person sends documents from an opponent's file, "there is nothing within the Code of Professional Responsibility which would obligate you to return the materials to the opposing attorney or which would prohibit you from reading the materials or using it in your client's benefit . . ."); Mich. Bar Ethics Op. CI-970 (1983) (stating that an attorney who receives an "internal evaluation document of the opposing party" would not violate the Code of Professional Responsibility by using the report at trial if it is admissible).

85. Me. Prof'l Ethics Comm'n of the Board of Overseers of the Bar, Op. 146 (1994). The Commission based the notification requirement on a provision of Maine law making it a crime to exercise control over property a person knows has been lost or mislaid, or delivered by mistake. ME. REV. STAT. ANN. tit. 17, § 356 (2004).

86. Me. Prof'l Ethics Comm'n, *supra* note 85.

ing the client.⁸⁷ The Ohio Commissioners noted, however, that counsel has a duty to inform opposing counsel of the availability of the document “for to do otherwise is *dishonest* and misleading”⁸⁸

The District of Columbia Bar found that it is improper for an attorney to examine a document only when it is clearly confidential and the lawyer knows that it was disclosed inadvertently before reviewing it; if the confidential nature was not clear or the lawyer did not know it was sent inadvertently, then the lawyer can use the information.⁸⁹ The caveat that the lawyer know of the inadvertent disclosure before reviewing the document rests on the rule of per se waiver of the privilege applied in the District of Columbia.⁹⁰ If there is no privilege, then the lawyer can use the materials to the fullest extent. Yet, the District of Columbia Bar required that the lawyer *not* examine documents if he knows in advance that they are privileged, thereby avoiding the automatic waiver rule which an attorney could use otherwise to the advantage of the client. The Bar found that a lawyer who examines a document, knowing it contains confidential information and was sent inadvertently, would engage in a “*dishonest act*” in violation of Rule 8.4(c).⁹¹

87. Supreme Court of Ohio Board of Comm’rs on Grievances and Discipline, Informal Op. 93-11 at *4 (1993).

88. *Id.* at *3 (emphasis added).

89. D.C. Bar, Op. 256 (1995). The same prohibition applies to privileged documents received from a client or third-party when the confidential nature of the document is clear and counsel knows that it came from a source not authorized to waive the protections afforded the information. D.C. Bar, Op. 318 (2002). This is not the rule in other jurisdictions, which do not automatically find a waiver when a privileged document is sent accidentally to an opponent. *See, e.g.,* *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982). *See generally* Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1335–57 (2001) (reviewing different approaches to waiver through inadvertent disclosure).

90. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (“[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels.”).

91. D.C. Bar, Op. 256, *supra* note 89 (emphasis added). The Opinion analogizes the inadvertently disclosed document to a wallet found on the street, which the finder knows does not belong to him, but from which he takes the contents nevertheless. Of course, this is not the same situation, because there is no theft of property, only review of a document that was sent to the recipient voluntarily, if mistakenly. The point is that at its core, these are both fundamentally dishonest acts, and the desire to represent a client zealously does not absolve the lawyer from the essential requirement to act honestly in the course of representing a client. *See id.*

The ABA took a half-hearted step toward resolving the issue of the receiving lawyer's responsibility when confidential information is inadvertently disclosed by adding Model Rule 4.4(b), which provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."⁹² This new notification provision reflects the position of the various states that have considered the problem, including even those that do not find an ethical violation for reviewing and using the inadvertently disclosed information, requiring the receiving lawyer to notify opposing counsel. The basis for such an obligation is unclear, however, and the commentary to Model Rule 4.4(b) does not contain any explanation for why this duty is imposed.⁹³ With respect to the states that do not find an ethical violation from use of the information: Virginia described the notification requirement as one of "professional courtesy;"⁹⁴ Maine stated that advising opposing counsel was the "prudent course;"⁹⁵ while Ohio determined that attorneys have an ethical obligation to disclose the receipt of the information under the dishonesty prohibition in Rule 8.4(c).⁹⁶

The commentary to Model Rule 4.4(b) limits its application to those situations in which the information comes from an opposing party, but not where a third party or the client provides the documents. The commentary states, "[T]his Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."⁹⁷ The Rule also does not address whether the lawyer can review the information, share it with the client, or return the document (and all copies) to opposing counsel.⁹⁸

92. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

93. *Id.* at cmt.

94. Va. Legal Ethics Op. No. 1076 (1988).

95. Me. Board of Overseers of the Bar Prof'l Ethics Comm'n, *supra* note 85.

96. Supreme Court of Ohio Board of Comm'rs on Grievances and Discipline, *supra* note 87.

97. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) cmt. 2 (2002).

98. The commentary to Model Rule 4.4(b) states:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

MODEL RULES OF PROF'L CONDUCT R. 4.4(b) cmt. 3 (2002). The referenced rules do not address this question, and simply leaving the decision to the law-

Notification of opposing counsel is just the starting point for determining whether a lawyer's response to inadvertently disclosed confidential information is honest. To keep the inadvertent disclosure secret from the opponent puts the lawyer in the position of misusing information that never should have been communicated and rightfully should not have been available. Even those states that find no direct obligation for the receiving lawyer cannot get around the fact that failing to disclose its receipt is inherently improper, although they have a hard time locating a rationale for such a notification requirement while denying there is any further professional duty owed by the lawyer. References to "professionalism" and "common sense" are a way of avoiding finding that the requirement that lawyers be honest encompasses the inadvertent disclosure of confidential information.

The ABA's new Model Rule 4.4(b) avoids the hard issue of how far the obligation of honesty should be extended. The ABA interpreted new Model Rule 4.4(b) narrowly in 2005 in Formal Opinion 05-437 by finding that the only obligation was to notify opposing counsel, and that even instructions to return the document could be ignored.⁹⁹ The opinion also withdraws Formal Opinion 92-368 because it conflicts with the more restrictive requirement, which means that the attorney is free to examine the document without violating the professional rules even if it contains privileged material or work product. The notification requirement allows the agencies responsible for administering the professional regulations to throw the issue to the courts by deferring questions regarding privilege and remedy to a judicial determination. Yet, the courts look to the professional regulations for guidance on remedy and, finding nothing there, apply their own views of fairness. The District of Columbia Bar noted that "once read, the inadvertently disclosed information becomes part of the body of knowledge residing in the mind of the receiving lawyer, who may wish to use it to further the interest of that lawyer's client."¹⁰⁰ That is certainly correct, but the fact that a

yer's discretion provides no real guidance to attorneys. Similarly, the Restatement of the Law Governing Lawyers states, "The receiving lawyer may be required to consult with that lawyer's client about whether to take advantage of the lapse." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. m (2000).

99. ABA Formal Ethics Op. 05-437. The opinion states, "Rule 4.4(b) thus only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."

100. D.C. Bar, Op. 256, *supra* note 89.

lawyer will gain knowledge of the opponent's case, perhaps to that party's detriment, cannot support permitting the use of that information because it will help the receiving attorney's client. That line of reasoning makes the notification requirement a hollow gesture. If the information can be disclosed to other attorneys on the same side and the client, then any benefit from notifying the other side and permitting it to seek a judicial remedy is meaningless.

The requirement that lawyers deal with opponents honestly requires that, pending a judicial determination of the continuing confidentiality of the information, the receiving lawyer should not review documents reasonably believed to be confidential.¹⁰¹ Further, the attorney cannot reveal the contents of the documents to anyone else, including the client. An inadvertent disclosure is a mistake that should not affect the outcome of the proceeding, and lawyers who use or communicate the information are not acting authentically by taking advantage of the lapse. The notion that an attorney's duty to zealously advocate on behalf of the client does not mean that any means short of an outright lie is permissible.¹⁰²

It is noteworthy that the justification for a rule requiring the attorney not to review further or disclose the confidential information cannot be based on an appeal to the truth-seeking function of the judicial process because preserving the confidentiality of information—perhaps most importantly communications protected by the attorney-client privilege—thwarts the determination of the truth. If the inadvertently disclosed information were to reveal a different theory of liability or transactions thought unrelated to the conduct at issue, then that disclosure would aid the determination of the truth. The value of preserving the *honesty* of attorneys by requiring them to notify their opponent and refrain from reviewing (and spreading) the information inadver-

101. See Gloria Kristopek, *To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel*, 33 VAL. U. L. REV. 643, 682 (1999) (proposing an additional Model Rule of Professional Conduct to regulate conduct of attorneys who receive inadvertently disclosed confidential information that would require the lawyer to "stop examining the documents upon realizing that the documents were not intended for the receiving attorney . . .").

102. See Joshua K. Simko, Note, *Inadvertent Disclosure, The Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 ALASKA L. REV. 461, 485 (2002) ("Such disclosures are not the norm, so the assumption that asking an attorney not to read an inadvertently disclosed document also asks her to ignore her duty of zealous advocacy does not recognize that advocacy encompasses more than reading confidential documents from the opposing side.").

tently disclosed may override the search for the truth in this instance.

Most inadvertent revelations are revelations of the attorney's strategy or assessment of witnesses and evidence—typical work product in any litigation. The revelation of this information may give a tactical advantage to the opposing party, which could skew the court's search for the truth by disadvantaging one side. Honesty provides a compelling rationale for both a notification requirement and, more importantly, a limit on the use of the information. This is a reverse-discovery rule, in effect, but the principle remains one of requiring the attorney to ensure that the response is honest in the circumstances presented. In much the same way that the zealous advocacy duty does not permit a lawyer to keep the death of a client quiet or withhold relevant information from discovery, neither does it permit the lawyer to exploit information inadvertently disclosed by opposing counsel simply for the sake of advancing a client's case.

III. CANDOR TO THE TRIBUNAL

While the professional rules give lawyers some leeway in dealing with opposing parties, counsel's representations to the court are held to a higher standard. Model Rule 3.3(a), "Candor Toward the Tribunal," provides:

A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) 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
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.¹⁰³

Signaling the importance of the disclosure obligation owed to the court, Model Rule 3.3(c) states that this duty applies "even

103. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2003).

if compliance requires disclosure of information otherwise protected by" the confidentiality requirement of Model Rule 1.6.¹⁰⁴

The prohibitions on false or misleading statements and offering false evidence are obviously necessary if the trial court's truth-seeking function is to have any meaning. Courts have invoked this Rule even in situations where the misstatement has not affected the outcome of the proceeding, or is at least tangential to it.¹⁰⁵ Model Rule 3.3(a)(2), however, is different because it does not relate to evidence presented to the court and covers information that is equally available to all the parties to the proceeding. The comment to this portion of the Rule states that "[l]egal argument based on a knowingly false representation of law constitutes *dishonesty* toward the tribunal."¹⁰⁶ It is certainly dishonest to misrepresent the state of the law, but the text of the

104. *Id.* R. 3.3(c). The comment to this Rule explains the rationale as preserving the integrity of the adjudicative process:

A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Id. R. 3.3 cmt. 2.

105. See *In re Discipline of Wilka*, 638 N.W.2d 245, 247, 249 (S.D. 2001) (involving an attorney who submitted a drug test report of a client and then told the court "[t]hat's what I was provided by the hospital, Your Honor" when he had asked the lab technician to leave out results of a positive test for one drug, although he ultimately disclosed the full report "with no apparent harm being done to either party"; "[w]hile Wilka may not have directly lied to the court, he intentionally evaded the plain and understandable questions of Judge Severson. In doing so, he misled the court and misrepresented the evidence as being more than it was."); *In re Kalil's Case*, 773 A.2d 647, 648-49 (N.H. 2001) (involving a lawyer who told a debtor after a hearing that, if the debtor violated the court's order, he would "rip his face off" and then twice denied that he had spoken with the debtor when questioned by the court; "[n]ot only did [the attorney] act unprofessionally by attempting to intimidate a *pro se* litigant outside the courtroom, he abandoned his oath by lying about his conduct when questioned by the judge"). In *In re Discipline of Ortner*, 699 N.W.2d 865 (S.D. 2005), the lawyer representing the husband in a divorce action misled the judge as to whether the non-custodial parent had an obligation to pay child support. While the final decree provided for child support, the divorcing parents had a secret agreement drafted by the lawyer that relieved them of any obligation for child support. When the agreement came to light, the lawyer was suspended from practicing for nine months because of his deceit to the court and dishonesty, even though it was in fulfillment of his client's wishes.

106. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 4 (2003) (emphasis added).

rule does not discuss misstatements about the law, only the failure to disclose adverse legal authority. A factually incorrect statement would be covered by Rule 3.3(a)(1) prohibiting a "false statement of . . . law."¹⁰⁷ Adverse legal authority, unlike evidence presented at trial and conclusions drawn from that information, is available to all, particularly judges and their staff. Moreover, there is an attorney on the other side who will present his client's position and, presumably, submits controlling legal authority in support of the client's position to permit the court to ascertain the governing legal principles.

Unlike a factual misrepresentation, the comment to the Rule notes that "legal argument is a *discussion* seeking to determine the legal premises properly applicable to the case"¹⁰⁸—but it is not an evidentiary or factual determination. While the prohibitions in (a) and (c) of Model Rule 3.3 preserve the court's truth-seeking function, the requirement of disclosing adverse legal authority in Rule 3.3(b) is better understood as enforcing a rule of honesty for the attorney. For example, in *Tyler v. State*,¹⁰⁹ the Alaska Court of Appeals sanctioned Eugene Cyrus because he "knowingly failed to cite a decision of the Alaska Supreme Court that was directly adverse to his contention that this court had jurisdiction to decide the appeal."¹¹⁰ What made the case particularly objectionable was that "Mr. Cyrus plainly knew of the supreme court's decision in *McGhee*: he was the attorney who represented McGhee in the supreme court."¹¹¹ While the Alaska Court of Appeals noted that "advocacy invariably includes a process of separating wheat from chaff, of deciding which arguments and legal authorities are important to a case,"¹¹² it is difficult for an attorney to justify leaving out a decision that is clearly on point and is one he argued in the recent past. The court sanctioned Cyrus by imposing a two hundred and fifty dollars fine even though he had cited the opinion in another part of his opening brief on a different issue.¹¹³ The state's attorney failed to cite the precedent in support of the government's position, and the court ultimately located and applied

107. *Id.* R. 3.3(a)(1).

108. *Id.* (emphasis added).

109. 47 P.3d 1095 (Alaska Ct. App. 2001).

110. *Id.* at 1097.

111. *Id.* at 1102.

112. *Id.* at 1107.

113. See Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 323 (2004) ("Many lawyers would consider mere citation to the case to be 'disclosure' for purposes of the rule. Isn't the court obligated to read the case for itself once it is cited?").

the controlling precedent to reach the presumably correct decision.¹¹⁴

Even the presentation of information to a court can violate the attorney's duty to ensure that a communication with the court is honest, regardless of whether the information is readily available to the judge. In *Committee on Legal Ethics of the West Virginia State Bar v. Farber*,¹¹⁵ the West Virginia Supreme Court upheld the suspension of an attorney who accused an appellate judge of misconduct in a motion to disqualify in which the attorney paraphrased a statement contained in an affidavit by putting in ellipses to edit out parts that were unhelpful to his position. While the quotation was misleading, the attorney attached the complete affidavit with the motion, making it readily available. Nevertheless, the court found the attorney's statement in the motion a violation because "a judge must be able to take a quotation as a quotation. We recognize that lawyers will choose their quotations carefully. However, to select carefully various words and phrases from an affidavit, and assemble them into a block 'quotation' is seriously to misrepresent the substance of the affidavit."¹¹⁶ The West Virginia Supreme Court gave short shrift to the attorney's argument that his filing was not misleading, stating that he "appears to view the practice of law as a game without any rules and seems to think that he can lie to a judge as long as the judge has the material with which to catch him in his lie."¹¹⁷

The use of an ellipsis caused similar problems for an attorney in *Precision Specialty Metals, Inc. v. United States*,¹¹⁸ although the misquoted statement was from a Supreme Court decision and not an item in the record that would usually come within the particular knowledge of counsel. A Department of Justice attorney—from whom more was expected by the court—quoted from a dissenting opinion by Justice Thomas that discussed the meaning of the term "forthwith" and used an ellipsis to remove a limitation in the opinion "thereby making Justice Thomas' statement seem broader than it actually was."¹¹⁹ The court upheld Rule 11

114. See *Tyler*, 47 P.3d at 1111 (stating, on Cyrus' petition for rehearing, "[t]he fact that Mr. Cyrus cited *McGhee* on a different point in his opening brief may be an interesting coincidence, but it is not relevant to our decision to impose the fine.").

115. 408 S.E.2d 274 (W.Va. 1991).

116. *Id.* at 281.

117. *Id.*

118. 315 F.3d 1346 (Fed. Cir. 2003).

119. *Id.* at 1349. In addition to editing out the limitation, the Federal Circuit noted that the attorney "also left out his citation to *Dickerman*," a case that undermined the argument on the meaning of "forthwith," and "she failed to state 'emphasis added' for the quoted material in bold face" *Id.*

sanctions against the attorney, finding that “she distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them.”¹²⁰

Of course, opinions and the record of a proceeding are equally available to the court and opposing counsel, and distortions usually are easily noticed; it is hard to believe that judges could not locate and apply relevant precedent on the meaning of a term or the jurisdiction of a court. But that is not the point behind decisions like *Precision Specialty Metal*, *Farber*, and *Tyler*, or Model Rule 3.3(a)(2). Unlike fabricated evidence or false testimony, which undermine the function of the court to ascertain the truth, the conduct of counsel misleading the court reflects on the honesty of the attorneys—and their trustworthiness. A court can locate relevant opinions or review the record in a case as well as any attorney, but the *functioning* of the judicial process—not its result—depends on the lawyers being honest in their representations. It is neither expertise, nor just the use of judicial resources, but the role of the attorney as an honest advocate for the client that permits the system to operate with some degree of efficiency. As the court noted in *Farber*, “As a practical matter, judges, particularly trial judges, cannot read and verify every word on every scrap of paper that is put before them, and if a brief or motion contains a quotation, that quotation must be accurate.”¹²¹

IV. CAN TELLING THE “TRUTH” BE DISHONEST?

The lawyer’s dealings with the court usually involve the introduction of evidence and legal argument regarding the proper resolution of a dispute. Model Rule 3.3 requires that the lawyer assist in the judiciary’s truth-seeking function, even at the expense of client confidentiality. But the attorney’s honesty is equally important, and courts will sanction lawyers for dishonest acts that have no effect on the determination of the truth. In *Iowa Supreme Court Board of Professional Ethics and Conduct v. Lane*,¹²² the Iowa Supreme Court upheld the sanction imposed on a lawyer who submitted a brief containing eighteen pages taken verbatim from a legal treatise. Finding that the lawyer acted dishonestly, the court stated succinctly, “Plagiarism itself is

120. *Id.* at 1357.

121. 408 S.E.2d at 281.

122. 642 N.W.2d 296 (Iowa 2002).

unethical.”¹²³ The court decided this despite the fact that it was not misled, as the plagiarized statements came from a leading treatise, so presumably the content was truthful.

A lawyer’s opinion about a judicial decision, especially from the losing end of a case, can trigger outlandish claims about the fairness or integrity of the judges, and these statements can cause lawyers to be disciplined.¹²⁴ Model Rule 8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.¹²⁵

This provision is rather narrow, requiring either knowledge of the statement’s falsity or reckless disregard for its truth, and it must concern the integrity of the judge. That lawyers will respond with a bit of vitriol when a decision goes against them should not be surprising, and judges can be a bit thin-skinned in responding to criticism. Lawyers will see corrupt decisions and, occasionally, conspiracies against their clients. In 1894, Horace W. Philbrook made the following statement that drew the ire of the California Supreme Court, which considered whether he should be disbarred:

But if this secret transaction of September 6, 1890, is not declared illegal and void, upon the rules and principles declared in *Egerton v. Earl Brownlow*, then all to whom knowledge of the case shall come will no longer merely suspect or even think that the courts may be corrupted; they will know it. They may point to the decision here as full proof of it, for it will be established that such practices are permissible, and, if permissible, they are sure to have effect.¹²⁶

Approximately twenty years later, Philbrook did not appear to have learned his lesson when he was disbarred by the Bar Association of San Francisco for the following:

[S]aid Philbrook had specifically charged that several of the present judges of the superior court of the city and county of San Francisco and of several other counties of

123. *Id.* at 300. The attorney responded to the magistrate judge who noticed the plagiarism by stating, “I borrowed liberally from other sources.” *Id.* Eighteen pages seems to be a bit more than a liberal borrowing.

124. See Richmond, *supra* note 113, at 304 (“Hell has no fury like an appellate advocate who loses a case he thinks he should have won.”).

125. MODEL RULES OF PROF’L CONDUCT R. 8.2(a) (2003).

126. *In re Philbrook*, 38 P. 511, 511 (Cal. 1894).

the state, together with certain specified members of the bar and other designated persons, had confederated in a wicked and criminal conspiracy against the plaintiff in said action, with the design and purpose of having rendered a false and corrupt judgment¹²⁷

While Philbrook's comments would appear to violate Model Rule 8.2, consider whether the statement of Michael Wilkins, in a brief seeking transfer of the case to the Indiana Supreme Court and criticizing the intermediate appellate court's decision, would violate the same provision: "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."¹²⁸ The Indiana Supreme Court determined:

[The footnote] does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible advocacy. The footnote goes further and ascribes bias and favoritism to the judges . . . and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome.¹²⁹

By reading into Wilkins' statement an assertion of judicial "bias and favoritism," the court found that the statement was false because Wilkins had no evidence of such bias and therefore his statement was made with a reckless disregard for its truth, in violation of Rule 8.2. It was only by finding that Wilkins accused the judges of misconduct that a determination could be made that it was a false statement, the trigger for a violation of the rule.

While the footnote was certainly intemperate, and Wilkins apologized for including it in the brief, its assertion regarding the appellate court's opinion being a result-oriented justification may have been true. The Indiana Supreme Court could not find anything incorrect with the factual assertion in the footnote, which was Wilkins' view on the rationale for the decision. Lawyers can let their zeal get the upper-hand, and the use of hyperbole in legal argument is nothing new. We are accustomed to politicians fervently attacking one another, and it is understood

127. *Bar Ass'n of San Francisco v. Philbrook*, 170 P. 440, 440 (Cal. Dist. Ct. App. 1917).

128. *In re Wilkins*, 777 N.E.2d 714, 715–16 n.2 (Ind. 2002).

129. *In re Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003). The court initially imposed a thirty-day suspension on Wilkins, and it reconsidered the sanction and reduced it to a public reprimand. *Id.* at 987.

that not all such statements need be entirely truthful. Should a lawyer be sanctioned because of intemperate statements about judges that only express opinions, which do not raise plausible questions regarding the propriety of the judicial process?

In *Office of Disciplinary Counsel v. Gardner*,¹³⁰ the Ohio Supreme Court sanctioned a lawyer for discourteous conduct and making false accusations about a judge in a brief in a criminal case. The decision against his client led to an extended attack by Gardner on the fairness of the judges, including the following:

Wouldn't it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel's desire to achieve a particular result upholding a wrongful conviction of a man who was unquestionably guilty of an uncharged offense—necessarily justify its own corruption of the law and truth? Doesn't an oath to uphold and follow the law mean anything to this panel?

....

Perhaps, if this panel is not strong enough to admit its obvious prosecutorial bias in its opinion, it will discover the internal fortitude to certify this matter to the Ohio Supreme Court under Rule IV of the Rules of Practice of the Supreme Court of Ohio.¹³¹

The Ohio Supreme Court found that Gardner's accusation of judicial bias and corruption was unsupported by any evidence and, therefore, was a false statement about the appellate judges, resulting in a six-month suspension.

But were Gardner's comments false? Like *Wilkins*, the Ohio Supreme Court had to read into Gardner's factual allegations

130. 793 N.E.2d 425 (Ohio 2003).

131. *Id.* at 427–28. Among other statements, Gardner “went on to accuse the panel of having ‘distorted the truth’ and having ‘manufactured a gross and malicious distortion.’” *Id.* at 427. Gardner expressed some measure of repentance, although not enough for the Ohio Supreme Court:

Respondent also recognized during the hearing that his response to the court of appeals’ opinion was neither appropriate nor professional. However, while respondent professed to understand the need to challenge judicial decisions only in an appropriate manner, he confirmed his continued belief that the court of appeals during his client’s appeal had skewed and ignored the facts, disregarded honesty and truth, and violated their oaths to decide cases fairly and impartially.

Id. at 428. In other words, Gardner did not admit he was wrong about his earlier views of the appellate panel’s decision.

about corruption and judicial bias when Gardner's whole point was that the judges were not following the law. There was no hint of any claimed pay-offs, and his claim of institutional bias in favor of the police and prosecutors—and not some secret predilection to aid family or business associates—could not be more clear. While much more verbose—and crass—than Wilkins' rather mild footnote, Gardner made the same point about the fairness of the judicial process and not a claim that the judges were corrupt in any classic sense of selling their decision for personal gain.

In a similar case, *Ramirez v. State Bar of California*,¹³² the California Supreme Court upheld the sanction imposed on Glenn Ramirez for “falsely maligning” an appellate panel in a brief filed with the Ninth Circuit.¹³³ Ramirez stated that the appeals court “acted ‘unlawfully’ and ‘illegally’ and had become ‘parties to the theft’ of property belonging to [Ramirez’s] client.”¹³⁴ He escalated his attack by asserting that “[m]oney is king, and some judges feel they are there to see that it doesn’t lose [The opposing party] by its power and influence and money was able to induce the defendant judges to act in an unlawful manner”¹³⁵ The court upheld the sanction because the brief violated Ramirez’s duty as an attorney to “maintain the respect due to the courts of justice and judicial officers” and “[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”¹³⁶

Ramirez sought to explain away his comments about the influence of money by arguing that he did not intend to accuse the appeals court judges of accepting actual bribes but “to point out the inequity between the treatment of poor litigants and those with substantial financial resources.”¹³⁷ The inequities in the judicial system are obvious, and while the comments could be read to mean that the opposing party had paid off the judges, that is hardly an accusation that would be made in a federal court brief seeking review of a state court judgment. In that regard, Ramirez—a self-styled “poor persons’ lawyer”—was asserting a

132. 619 P.2d 399 (Cal. 1980).

133. *Id.* at 399.

134. *Id.* at 400.

135. *Id.* at 401.

136. CAL. BUS. & PROF. CODE § 6068(b), (d) (West 2003).

137. *Ramirez*, 619 P.2d at 403.

position shared by many lawyers and perhaps even a few judges.¹³⁸

The comments of attorneys can reach beyond just assailing the fairness of the judge by rising to the level of a threat—not physical, but legal. In *In re Disciplinary Action Against Garaas*,¹³⁹ the North Dakota Supreme Court sanctioned Jonathan Garaas after he said to the trial judge at a status conference that the judge “would be placing himself ‘at risk’ if he continued with the proceedings and ordered Garaas’s client to sign the deeds.”¹⁴⁰ The court noted that this was “a clear threat to sue the judge personally,” and held that his conduct violated North Dakota law providing that every attorney “shall . . . [m]aintain respect for courts of justice and judicial officers.”¹⁴¹ Unlike the courts in *Wilkins*, *Gardner*, or *Ramirez*, this court did not have to determine that the comment was untrue, because it was a veiled threat that could disrupt the judicial process. But why should Garaas be sanctioned for threatening to pursue a legal remedy that is available to his client if, in fact, the judge acted improperly? Garaas’s statement may well have been a correct articulation of his view of the propriety of the judge’s action, and if the judge is beyond reproach, then the threat is an empty one and not worthy of consideration, at least from a legal standpoint.

In these cases, the lawyers defended themselves by asserting that they were acting as zealous—and perhaps as overzealous—advocates on behalf of their clients, or were just exercising their right to criticize courts. The zealous representation argument got a stinging rebuke in *Garaas* when the North Dakota Supreme Court stated:

138. In *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441 (Pa. 2000), the attorney accused a judge of “fixing” a case and had a long history of animosity toward judges of the Pennsylvania courts because of what he perceived as corruption in the system. In upholding a five-year suspension, the Pennsylvania Supreme Court noted that the accusation of “fixing” a case was unsupported by facts available to the attorney, and therefore his comment violated Rule 8.4(c) as reflecting dishonesty. *Id.* at 447. The court stated, “[a]n attorney proceeds recklessly when he presents assertions without any indicia of the accuracy of those assertions, or without a minimal effort to investigate the accuracy thereof.” *Id.*

139. 652 N.W.2d 918 (N.D. 2002).

140. *Id.* at 921–22.

141. N.D. CENT. CODE § 27-13-01 (2004). Garaas did not direct his comments only to the judge, having accused opposing counsel of being a liar on several occasions and a particularly contentious colloquy with the court at a hearing in which the judge threatened to have Garaas removed. *Garaas*, 652 N.W.2d at 921–22.

Civility is not too much to expect in a civilized society's alternative to brute force, stealth, and deception. In the final analysis, we will not allow this lawyer to drag to a new low the baseline of acceptable courtroom conduct. Garaas's conduct went beyond acceptable zealous representation and constituted violations of the disciplinary rules.¹⁴²

The California Supreme Court took the same approach in *Ramirez*, holding that "[p]etitioner's zealous representation of the [client] cannot excuse the breach of his duties as an attorney."¹⁴³ In *Gardner*, the Ohio Supreme Court rejected the First Amendment argument that Gardner was merely exercising his free speech right, because "we reject respondent's contention that his attacks against the court of appeals represented any sort of 'rhetorical hyperbole' or 'imaginative expression' for which he might escape sanction."¹⁴⁴

Courts seeking to sanction lawyers for their comments about the judges who rendered decisions adverse to their clients run the risk of appearing overly sensitive to criticism. Statements made in political campaigns—the type of speech that receives the greatest protection under the First Amendment—are far worse than the comments at issue in *Wilkins*, *Gardner*, *Ramirez*, or *Garaas*.¹⁴⁵ In searching for a basis upon which to discipline the attorneys, rather than create a restriction on the right to criticize, the courts have labored to read into the lawyers' utterances some type of misstatement—that what they said was untrue or at least misleading—so that the comments would be sanctionable.

The focus on the truthfulness of the statements misses the more important point that the comments by these lawyers were made purportedly on behalf of clients and should be evaluated within the context of that representation. Assailing the fairness of the judge causes positive harm to the legal interests of the client by venting the lawyer's frustration without any realistic possibility that there will be a benefit to the client. The footnote at issue in *Wilkins* probably was not false, except through the type of crabbed interpretation offered by the Indiana Supreme Court,¹⁴⁶

142. *Garaas*, 652 N.W.2d at 927.

143. *Ramirez v. State Bar of Cal.*, 619 P.2d 399, 406 (Cal. 1980).

144. *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 430 (Ohio 2003); see also *Garaas*, 652 N.W.2d at 924 ("The First Amendment does not preclude sanctioning a lawyer for intemperate speech during a courtroom proceeding.").

145. See *supra* text accompanying notes 122–50.

146. See *Richmond*, *supra* note 113, at 334–35 ("[I]t was unreasonable for the [Indiana] supreme court to equate the footnote with a suggestion that the

but it is dishonest as a service to the client. Even if accurate, Wilkins did not make an authentic statement in his client's interest, instead offering a statement that would, at a minimum, offend the panel. Representation of a client requires the attorney to persuade the decision-maker, and the most basic understanding of the judicial process should include the knowledge that an *ad hominem* attack on judges will not be persuasive absent evidence of actual bias or corruption. Similarly, portraying oneself as a "poor people's lawyer" as Ramirez did is fine for public relations purposes, but it should have a more circumspect role when advocating on behalf of clients if it involves attacking the decision-maker as inherently biased.

The comments by the lawyers are dishonest, not because they may or may not be true in any verifiable sense, but because they are not made for the benefit of the client and in fact often harm the client's legal position. Whether the system is biased against the poor—and I do not take any position on that question—is not relevant to the rhetoric the lawyer chooses to advance the client's interest. In that sense, the zealous representation defense to the imposition of discipline is misguided because of the positive harm caused by the lawyer's words. Similarly, while lawyers should be able to criticize judges, even by assailing their bias in favor of or against certain types of parties, the First Amendment should not protect the lawyer from being sanctioned for harming a client's interests by obstructing the proceeding or attacking the judge when the statements are made in the course of a specific representation.¹⁴⁷

Regardless of whether the lawyer's statement is true or simply a rhetorical flourish, the lawyer must be honest in the representation of the client. Undermining the viability of a case (or appeal) is a form of dishonesty because the lawyer's conduct makes it less likely that the client will receive a favorable result or perhaps even a fair hearing on the matter. In *Welsh v. Mounger*,¹⁴⁸ the Mississippi Supreme Court sanctioned Dana Kelly

court of appeals was motivated by a criminal purpose, and to state that the footnote effectively accused the court of appeals judges of having 'unethical motivations.'").

147. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."); *Richmond*, *supra* note 113, at 328 ("The First Amendment generally does not exempt a lawyer from discipline for intemperate speech in court or for inappropriate statements in pleadings or briefs.").

148. 912 So. 2d 823 (Miss. 2005).

for comments made in a motion seeking the recusal of a Supreme Court Justice. Kelly's motion included the following language as a ground for recusal:

As the *Clarion Ledger* has noted, "[o]ur judicial elections have become highest-bidder exercises. It has to stop or the public will lose all faith in the system." As the Chief Justice recently noted, "[t]rue or not, most people believe that too much money corrupts" In this sense, one of the two Defendants in this case was the highest bidder in the election campaign of Justice Dickinson.¹⁴⁹

Kelly defended his statement by asserting that he was not accusing the justice of actually being bribed, only that campaign contributions have tainted the fairness of the process. The Mississippi Supreme Court rejected that argument, finding that the lawyer breached his duty to his client: "[W]e must ask how, then, did Kelly's repeated, knowingly false comments serve first, the interests of his client to the best of Kelly's ability? We conclude they did not serve his client's interests."¹⁵⁰

Attacking the fairness or propriety of the judge will have a natural effect on the judge to look less positively, at least subconsciously, on the party's position.¹⁵¹ The harm is not to the judicial system because judges understand the meaning of the rhetoric used by lawyers and will hardly think that a footnote in a brief is meant to reveal a case of provable bias or corruption. The client's position is hardly advanced, and may well be harmed, by such language chosen by the lawyer. The lawyer may be distracted from the representation if the possibility of sanctions is raised, further harming the client's case. The lawyer is not being honest in the representation of the client by challenging the propriety of the judges and not the legal basis of the decision, which warrants the type of discipline imposed in cases like *Wilkins*.

149. *Id.* at 825.

150. *Id.* at 826. The court found that Kelly's statement regarding the identity of the largest donor to the justice's campaign was incorrect, yet he persisted in that assertion and therefore made false statements to the court. Notwithstanding the truth of Kelly's claim about the amount of the campaign contributions, his comments were dishonest because they betrayed the client's interests.

151. See Richmond, *supra* note 113, at 334 ("To be sure, the language [in *Wilkins*] with which the court took issue was poor advocacy. Both the passage in the body of the brief and the footnote were more likely to make the court defensive than they were to persuade it to accept transfer.").

IV. PROSECUTORS AND HONESTY

Any discussion of lawyer honesty and the truth-seeking function of the judicial system must touch on criminal prosecutions. The criminal justice system is the most visible aspect of the law, and the roles of prosecutors and defense attorneys are common staples of any discussion of legal ethics. The constitutional protections afforded criminal defendants—particularly the Fifth Amendment privilege against self-incrimination and the due process requirement of proof of guilt beyond a reasonable doubt—often work to thwart rather than to advance the search for the truth, but that is a price society has been willing to pay to ensure that only the guilty are convicted.¹⁵² While a prosecutor has significant advantages in pursuing a conviction, there are also substantial institutional impediments to obtaining a conviction that he must overcome.

The prosecutor occupies a special role in the system, described as having “the responsibility of a minister of justice and not simply that of an advocate.”¹⁵³ At the same time, as a lawyer representing the sovereign, the prosecutor has a responsibility to present the client’s case in the best light possible by seeking a conviction. The Supreme Court famously summarized the dual roles of the prosecutor in *Berger v. United States*:¹⁵⁴

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. *But, while he may strike hard blows, he is not at liberty to strike foul ones.* It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁵⁵

In other words, do right but not by doing anything wrong—hardly a clear guide for prosecutors.

152. *Coffin v. United States*, 156 U.S. 432, 456 (1895) (“[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer.” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES 358)).

153. MODEL RULES OF PROF’L CONDUCT R. 3.8, cmt. 1 (2003).

154. 295 U.S. 78 (1935).

155. *Id.* at 88 (emphasis added).

Certainly society should expect that the prosecutor will be devoted to the truth and not simply seeking a favorable outcome.¹⁵⁶ If society is willing to accept some not-guilty verdicts when the person is factually guilty, then it is difficult to determine the prosecutor's role in ascertaining the truth and seeking justice. Simply asserting that the prosecutor secures justice even when the defendant is found not guilty does not provide any guidance on what types of limitations should apply to prosecutorial conduct in seeking the conviction of a person who is reasonably believed to be guilty. Not every acquittal is a just result. If the prosecutor knows—or at least claims to know—the truth about who committed a crime, then is the prosecutor acting as a minister of justice even if he uses dishonest tactics designed to have the jury return a guilty verdict?

A. *Is Avoiding Perjury Enough?*

Consider the prosecutorial tactic employed in *Hayes v. Brown*.¹⁵⁷ Hayes was charged with murdering a hotel manager, and the government's key witness was James, who had a criminal record and, at the time of trial, had outstanding criminal charges awaiting prosecution. When the government obtains the assistance of a cooperating witness by offering a plea bargain, sentence reduction, or dismissal of charges, that presents a powerful basis for defense counsel to challenge the credibility of that witness, who may be testifying falsely, or at least incompletely, to gain favor with the prosecutor. It is a well-established principle of due process that the prosecutor must turn over to the defendant evidence of any agreement with a witness, because that is considered exculpatory evidence that can be used to impeach the witness' testimony.¹⁵⁸ The prosecutor and James' attorney reached an agreement to dismiss the outstanding criminal charges against James after the trial of Hayes but did not reveal the agreement to James so that he did not perjure himself when he testified that he had not made a deal in exchange for testifying against Hayes. Needless to say, the prosecutor did not reveal this secret agreement—it would no longer have been hidden from the defense and the jury—despite the constitutional obligation to disclose exculpatory evidence.

156. Gershman, *supra* note 6, at 313 (“[T]he prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth.”).

157. 399 F.3d 972 (9th Cir. 2005).

158. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

The evidence of Hayes' guilt was fairly strong, and James was subject to cross-examination about an agreement that was revealed, which granted him immunity for all crimes in connection with the death of the victim. The Ninth Circuit, in an en banc decision, reversed the conviction because the government introduced false evidence at trial, i.e. the testimony of James. Prior Supreme Court decisions have found due process violations when the government introduces perjured testimony¹⁵⁹ or permits a witness to testify falsely and does not correct the misstatement or omission.¹⁶⁰ In *Hayes*, the witness did not commit perjury, but the court held that the failure to disclose the secret agreement resulted in the introduction of false evidence by the prosecutor, despite the fact that what the witness said was true, at least in his own mind at the time. Indeed, as the dissent in *Hayes* pointed out, James' testimony could not have been tainted by an agreement providing him with an incentive to slant his testimony when he did not know about it.¹⁶¹

Hayes challenged his conviction in a habeas corpus petition to the federal court and, in order to grant relief, the court had to find that the prosecutor introduced false evidence—not just perjured testimony—to qualify as a due process violation. By finding James' testimony false, despite his being truthful, the court stated that “[i]t is reprehensible for the State to seek refuge in the claim that a witness did not commit perjury, when the witness unknowingly presents false testimony at the behest of the

159. See *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935).

160. See *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942).

161. *Hayes*, 399 F.3d at 991 (Tallman, C.J., dissenting in part). Tallman noted:

[A]ny motivation James may have had to testify differently for the prosecution because the pending felony charges against him would later be dismissed was nullified because he did *not* know of that term of the deal. The testimony James offered simply could not have been influenced by a deal he knew nothing about. Thus, the wafer-thin likelihood that the jury would have been affected by James's uncorrected statement vanishes altogether.

Id. The dissent also pointed out that James received transactional immunity for any crimes he committed related to the murder of the victim and subsequent larceny from his office and hotel room. That grant of immunity was revealed to the defense, and the defense cross-examined James on his possible bias. James also testified that he faced the criminal charges that were the subject of the secret agreement, so the jury could infer that his cooperation by testifying against Hayes could help him resolve those charges favorably. *Id.* The dissent argued that while the prosecutor's failure to disclose was wrong, it did not affect the weight of the evidence supporting the conviction. *Id.* at 992.

state.”¹⁶² That falsity is not in the mind of the witness but of the prosecutor who knows that the witness has not provided complete information. The effect of the secret agreement is that it gives a patina of truthfulness to the testimony, that James was a more compelling witness because he thought he was telling the truth. The court noted:

The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less.¹⁶³

Hayes is not about whether the prosecutor violated the professional rules governing lawyers, but the conduct clearly was dishonest and should be the subject of discipline by the appropriate bar authorities. The fact that the prosecutor sincerely, and quite likely correctly, believed the defendant was guilty of murder does not affect the analysis. While the Ninth Circuit needed to find that the lawyer introduced false evidence for a due process violation, the disciplinary authority need not go down that road. The prosecutor’s conduct in *Hayes* should not depend on whether it affected the truth-seeking function of the trial; James was not tainted by the secret agreement, was subject to impeachment on other grounds, and the government’s evidence of guilt was strong. Determining whether truthful, or at least non-perjurious, testimony constitutes false evidence under Model Rule 3.3(a) would be a wasted effort. The prosecutor was dishonest when he crafted a means to permit a witness to avoid perjury by providing incorrect information while telling what, in his mind, was the truth. Simply avoiding perjury cannot fulfill the responsibility of a lawyer—especially a prosecutor—to be honest in dealing with the court and other parties.

B. *Vouching*

The highlight of most legal dramas is the closing argument of the opposing lawyers, the orations that sway a jury to reject one side and favor the other. In actual cases, courts routinely admonish juries that the arguments are not evidence, and the final determination of the facts is the sole province of the jurors. Yet, the arguments of the opposing lawyers provide the framework for the final decision, and as one of the last things heard by the jury, the statements often carry special weight. Lawyers will

162. *Id.* at 981.

163. *Id.*

comment on the weight of the evidence and invite jurors to use their common sense to find that the assertions of the opponent could not be the truth about what really happened or what was in a party's mind. Courts usually are careful to limit inflammatory arguments—a particular foible of many lawyers—and to correct any misstatements of the facts. The persuasive power of the lawyers requires that arguments be monitored to ensure that they do not mislead the jurors.

Although arguments are not evidence for the jury, and a lawyer cannot misstate the evidence, can a truthful statement be a problem? In criminal prosecutions, the government's representative plays a special role as the representative of society, a position usually invested with great trust. While there are many expressions of mistrust about the conduct of the government, most agree that in a criminal case, the prosecutor is viewed as a particularly credible representative because his role is to protect the people from miscreants and to seek retribution for misconduct. A prosecutor's description of the evidence, and inferences that may be drawn from that evidence, will often resonate over the claims of a defendant who seeks, quite naturally, to avoid the imposition of any punishment. While the prosecutor gains nothing personally from a guilty verdict, the defendant has much to lose, and jurors view the defense skeptically in many cases.

The power of the prosecutorial office had led the courts to limit the practice of vouching for the government's witnesses, not because it would be untruthful, but because of its particularly persuasive power with a jury. In *United States v. Young*,¹⁶⁴ the Supreme Court explained:

The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.¹⁶⁵

While the first concern is not with usurping the jury's role, the second is more important for the lawyer's role in the process.

164. 470 U.S. 1 (1985).

165. *Id.* at 18–19.

By asserting a witness is telling the truth, the prosecutor is communicating his view of the truth to the jury based on the role of the different participants in the proceeding. The claim that the government witnesses are telling the truth is, in fact, an accurate reflection of the prosecutor's view, and so the lawyer is not asserting a position that is untruthful. But vouching is not an authentic assertion of the government's position, because it uses the authority of the prosecutor's office—its "imprimatur," to use the Supreme Court's religious connotation—to establish the veracity of the witnesses based not on their credibility but on their relationship with the government. The message is dishonest, because it turns the issue into one of whether the government should simply be trusted to know what really happened, making the trial little more than a rubber stamp for the decisions of the prosecutor's office.

In *United States v. Weatherspoon*,¹⁶⁶ the prosecutor's vouching shows that the assertions were probably entirely true, and eminently logical, but dishonest in their use of the power of the prosecutor's office. The defendant was charged with being a felon-in-possession of a firearm, and the issue was whether the defendant had actual physical possession of the gun found under the front passenger seat of a car in which he was riding. Two defense witnesses provided statements about the defendant's possession of the weapon but recanted them by asserting that two police officers put undue pressure on them to make the statements. The officers denied improperly pressuring the witnesses, and the trial turned on whether the jury believed the officers or the recanting witnesses. The prosecutor's closing argument drew a contrast between the motivations of the competing witnesses:

They had no reason to come in here and not tell you the truth. And they took the stand and they told you the truth. I guess, if you believe Mr. Valladeres [defense counsel], they must have lied at the scene there; they came into this court and they lied to you; they lied to this judge; they lied to me; they lied to my agent, Agent Baltazar. I guess they lied to the dispatcher when they called it in. These are officers that risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of that if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury. Doesn't make sense because they came in here and told you the truth, ladies and gentlemen.¹⁶⁷

166. 410 F.3d 1142 (9th Cir. 2005).

167. *Id.* at 1146.

The point is certainly a logical one, and the jury is likely to draw the same conclusion in weighing which side to believe. The Ninth Circuit overturned the conviction, not because the prosecutor's comments were untruthful, but because the comments compromised the defendant's right to a fair trial.¹⁶⁸ The closing argument shifts the case from one about the credibility of the witness statements before the jury into a swearing contest in which the jury must guess which side is more likely to lie—a contest the defendant is sure to lose in almost every case. The argument does not reflect fairly the role of the lawyer, particularly the prosecutor, to respect the roles of the different participants in the adjudicatory process.

A similar type of misconduct arose in *United States v. Combs*,¹⁶⁹ when the court overturned a defendant's conviction because the prosecutor asked the defendant whether the government agent who investigated the case "was lying when he testified earlier," and the trial judge ordered the defendant to respond.¹⁷⁰ The Ninth Circuit held that it was "fundamentally unfair to compel Combs to impugn the veracity of agent Bailey's testimony, pitting Combs's credibility against agent Bailey's."¹⁷¹ The prosecutor's question certainly is the ultimate one the jury will have to decide because the issue was whether or not the defendant made a statement about manufacturing methamphetamine to the agent during an interrogation. The prosecutor made it clear that this was a swearing contest by asserting in her closing argument that the agent would be fired for committing perjury and that no agent would risk their career by doing so.¹⁷² The prosecutor's statement is not false, but it is dishonest in its representation that the government would not commit misconduct to achieve a conviction. Relying on the "imprimatur" of the prosecutor's office to achieve a conviction is not an honest representation of the interest of society in imposing punishment after a fair proceeding.¹⁷³

168. *Id.* at 1152 ("[P]rosecutorial statements that vouch for the credibility of witnesses and that encourage the jury to act based on considerations other than the particularized facts of the case pose a real danger to the defendant's right to a fair trial.").

169. 379 F.3d 564 (9th Cir. 2004).

170. *Id.* at 567.

171. *Id.* at 573.

172. *Id.* at 575.

173. Impugning the defendant and counsel for concocting a "story" that essentially accuses them of perjury is similarly improper for prosecutors, even if one reasonably believes the defendant's testimony or defense is spurious. In *United States v. Holmes*, the court reversed the conviction for the prosecutors remarks, holding:

C. Prosecutorial Consistency

Another demand of honesty for prosecutors affects the presentation of the government's evidence of guilt when more than one defendant is responsible for the crime. In *In re Sakarias*,¹⁷⁴ the California Supreme Court dealt with the situation in which the prosecutor offered inconsistent theories regarding the liability of two defendants for the underlying criminal offense. Sakarias and Waidla were convicted in separate trials of murder perpetrated by a hatchet and knife and sentenced to death. At their separate trials, the same prosecutor offered evidence that one defendant and then the other struck three blows to the victim's head that killed her. The court held that Sakarias' due process rights were violated when the prosecutor "intentionally and without good faith justification argu[ed] inconsistent and irreconcilable factual theories in the two trials, attributing to each [defendant] in turn culpable acts that could have been committed by only one person."¹⁷⁵ Similar to *Hayes*, in order to find the due process violation, the California Supreme Court had to find that the government had introduced false evidence, although the prosecutor did not in fact present anything strictly untruthful at the trial. Nevertheless, the court determined that "the prosecutor's use of inconsistent and irreconcilable factual theories to convict two people of a crime only one could have committed" meant that "the state has necessarily convicted or sentenced a person on a false factual basis."¹⁷⁶

We think that these various comments referring personally to Mr. Moss and the necessity for Mr. Moss to "get his stories straight," taken as a whole and in the context of the rebuttal argument, show that the government attorney was accusing defense counsel of conspiring with the defendant to fabricate testimony. These types of statements are highly improper because they improperly encourage the jury to focus on the conduct and role of Mr. Holmes's attorney rather than on the evidence of Mr. Holmes's guilt. Such personal, unsubstantiated attacks on the character and ethics of opposing counsel have no place in the trial of any criminal or civil case.

413 F.3d 770, 775 (8th Cir. 2005). The fact-finder makes the determination of which story to believe or reject; asserting that because the government's story must be true the opponent must be lying usurps the jury's role in the same way that vouching for witnesses does. *Id.*

174. 106 P.3d 931 (Cal. 2005).

175. *Id.* at 942.

176. *Id.* at 947. The distinction between the due process analysis and a determination of whether the prosecutor was honest was shown in *Shaw v. Terhune* when the Ninth Circuit found that, even if the prosecutor sought to convict two men with the same evidence even if only one could have committed the crime, there was not a "substantial and injurious" effect in that case. 380 F.3d 473, 480 (9th Cir. 2004). The prosecutor's improper conduct does not necessa-

The falsity was not the evidence at trial but the fact that a single prosecutor asserted positions that could not be supported if advanced at the same time. The problem was not so much the prosecutor's introducing false evidence but rather his dishonest presentation of the evidence when he put forth a theory that portrayed each defendant as more culpable than the other. Regarding the prosecutor, the California Supreme Court stated that "[f]or the government's representative, in the grave matter of a criminal trial, to 'chang[e] his theory of what happened to suit the state' is unseemly at best."¹⁷⁷ It is more than unseemly, however, because the prosecutor in *Sakarias* acted dishonestly in presenting two factually irreconcilable positions that, while supportable by the evidence individually, could not be an accurate depiction of what occurred when taken together. That type of dishonesty should be subject to professional sanction, regardless of whether it is labeled as a presentation of "false" evidence or as a violation of a defendant's due process rights.¹⁷⁸

Sakarias does not stand alone in condemning this type of prosecutorial misconduct as a due process violation. In *Thompson v. Calderon*,¹⁷⁹ the Ninth Circuit reversed a defendant's conviction when "[t]he prosecutor presented markedly different and conflicting evidence at the two trials," attributing to each defendant "the only motive" to kill the victim.¹⁸⁰ The court noted that "little about the trials remained consistent other than the prosecutor's desire to win."¹⁸¹ In *Smith v. Goose*,¹⁸² the Eighth Circuit

rily result in a defendant receiving a remedy, but it should be viewed as professional misconduct subject to sanction, regardless of the harm to a defendant.

177. *Sakarias*, 106 P.3d at 944 (quoting *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring)).

178. But see Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423, 1432 (2001). Poulin argues:

One can argue that a prosecutor who knowingly adopts inconsistent positions in separate proceedings without adequate justification acts unethically because she knows that at least one of those positions is wrong and therefore lacks a good faith belief in one or both of the positions. Nevertheless, the ethical rules do not clearly condemn the conduct and do not state whether a prosecutor may ethically defer to the jury to resolve uncertainties in the proof

Id.

179. 120 F.3d 1045 (9th Cir. 1997).

180. *Id.* at 1056.

181. *Id.* at 1059. In a dissenting opinion, Judge Kozinski raised the question of the prosecutor's ethics in pursuing a prosecution of two defendants for the same crime when only one could be guilty of it:

[T]here is surely something troubling about having the same sovereign, particularly acting through the same prosecutor, urge upon two juries a conviction of both A and B, when it is clear that the crime was

reversed the defendant's conviction when the same prosecutor argued in the trial of one defendant that a statement by another participant in the crime was true, and then in the trial of a second defendant he argued that a different statement by that participant was the truth, even though the two statements were contradictory. The prosecutor did not introduce the inconsistent statement in either trial. In reversing the conviction for violating due process, the court noted, with regard to the propriety of the prosecutor's tactics:

[E]ven if our adversary system is "in many ways, a gamble," that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth.¹⁸³

Whether the prosecutor's conduct in advancing inconsistent theories of liability should trigger a remedy for the defendant

committed by either A or B. To begin with, it raises the suspicion that the prosecutor may have presented testimony he knows, or has reason to believe, is false. If that be the case, the breach in prosecutorial ethics consists of putting on the tainted testimony, not in pursuing the inconsistent verdicts.

Id. at 1070–71 (Kozinski, C.J., dissenting). The question of truth or falsity should not be the main focus when the issue concerns the lawyer's professional responsibility, because it is difficult to determine exactly what is the truth in this circumstance, i.e., which defendant is guilty or culpable. The prosecutor's pursuit of irreconcilable theories of guilt or culpability, absent a good faith basis for the inconsistency, is a dishonest representation of the state, the client, in seeking vindication of its interests.

182. 205 F.3d 1045 (8th Cir. 2000).

183. *Id.* at 1051 (quoting *Payne v. United States*, 78 F.3d 343, 345 (8th Cir. 1996)). The Sixth Circuit faced a similar situation in *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004), *rev'd on other grounds sub nom. Bradshaw v. Stumpf*, 125 S.Ct. 2398 (2005), in which the prosecutor alleged that different defendants shot the victim in separate proceedings. In reversing the conviction, the Sixth Circuit found that "the state did not take that opportunity to advocate that all the available evidence be presented to the sentencing panel." *Id.* at 616. The Supreme Court granted certiorari to decide two questions, one regarding the voluntariness of the plea, and the second: "Does the Due Process Clause require that a defendant's guilty plea be vacated when the State subsequently prosecutes another person in connection with the crime and allegedly presents evidence at the second defendant's trial that is inconsistent with the first defendant's guilt?" Petition for Writ of Certiorari, *Mitchell v. Stumpf*, 125 S.Ct. 2398 (2005) (No. 04-637), 2004 WL 2569701. The Court did not reach the second question, finding that "it would be premature for this Court to resolve the merits of *Stumpf's* sentencing claim, and we therefore express no opinion on whether the prosecutor's actions amounted to a due process violation, or whether any such violation would have been prejudicial." *Bradshaw*, 125 S.Ct. at 2408.

does not affect the determination that such conduct is dishonest.¹⁸⁴ Each defendant may be guilty, although perhaps not to the degree portrayed by the prosecutor, and the evidence will often be contradictory and subject to interpretation regarding the culpability of each. As a lawyer, the prosecutor is bound by the requirement of honesty to present a consistent position that is an accurate reflection of the facts known at the time. For the same prosecutor to use the evidence in such a way as to portray first one defendant as having a certain level of culpability and then a second defendant with the same culpability, when only one of them could be held responsible for the conduct, is dishonest regardless of the underlying truth of the assertions. The fact that one defendant is guilty is not a license to try to hold both equally accountable when only one can be liable. Determining the truth may be an exercise in futility and does not affect the analysis as to whether the prosecutors in cases such as *Hayes*¹⁸⁵ and *Sakarias*¹⁸⁶ violated their professional responsibility as lawyers. Whether the defendant receives a remedy is irrelevant to the violation of duty practiced by these lawyers in representing their client, the state.

184. The Eleventh Circuit's decision in *Stephens v. Hall*, 407 F.3d 1195 (11th Cir. 2005), highlights the distinction between the professional responsibility of the prosecutor and the availability of a remedy for a particular defendant. The prosecutor, who is now a media commentator, failed to disclose to the defendant, who was charged with murder, that arrest warrants had been obtained by the police for other suspects, although defense counsel did know the police investigated others for the shooting and cross-examined police officers on this issue. At trial, three witnesses identified the defendant as the shooter, and other witnesses testified about the defendant's presence at the scene of the killing. At trial, the prosecutor elicited testimony from an officer that all other suspects had been eliminated, which was not true. A magistrate judge, considering the defendant's habeas petition, found that the officer's testimony "appears to be false," and "it is difficult to conclude that [the prosecutor] did not knowingly use this testimony." The Eleventh Circuit agreed with this assessment and similarly concluded that the prosecutor "'played fast and loose' with her ethical duties . . ." *Id.* at 1206. Yet, the court granted no relief because the decision of the Georgia Supreme Court that the errors were harmless was not an unreasonable application of clearly established federal law, the standard of review on habeas petitions of a state court's conclusion. Regardless of the relief available to the defendant, a prosecutor who plays "fast and loose" by permitting an officer to testify falsely and failing to turn over material that is obviously exculpatory, all in the name of winning the case, is dishonest and should be disciplined.

185. See *supra* notes 157–63 and accompanying text.

186. See *supra* notes 174–78 and accompanying text.

V. PROBLEMS OF CRIMINAL DEFENSE: PERJURY, MISIDENTIFICATION, AND FALSE INFERENCES

A. *Perjury*

Criminal prosecutions present some of the most difficult professional challenges for lawyers, because the stakes are so high. For the criminal defense lawyer, the client may lose his freedom, and even his life, if a jury returns a guilty verdict. The defendant may have little interest in seeing the court fulfill its truth-seeking function, and the prospect of a substantial punishment creates a powerful incentive to take any avenue to avoid a conviction, even lying, obstructing justice, or creating false evidence. Depending on the extent to which the defense lawyer gets caught up in seeking the client's acquittal by any means available, regardless of its propriety, the attorney may become the subject of a separate criminal prosecution.

While the prohibition on prosecutorial use of perjury is clear, the issue becomes much more complicated when a criminal defense lawyer faces the prospect of client perjury. Balancing the client's interest in seeking a not-guilty verdict with the demand that the lawyer be honest can place the attorney in the difficult position of trying to determine his proper role in the trial. In *Nix v. Whiteside*,¹⁸⁷ the Supreme Court stated:

[U]nder no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.¹⁸⁸

But the rule may not be as clear as *Nix* makes it out to be. Model Rule 3.3(a)(3) prohibits a lawyer from knowingly "offer[ing] evidence that the lawyer knows to be false" but goes on to offer a caveat that, "[a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."¹⁸⁹

The distinction between knowledge and belief is a rather fine one, a chasm in which any reasonably intelligent person could find shelter. The commentary to the Model Rule tries to address the issue, stating that "[a] lawyer's knowledge that evi-

187. 475 U.S. 157 (1986).

188. *Id.* at 171.

189. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003).

dence is false, however, can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood." The issue is whether the lawyer will be honest, not with the client or court, but with himself or herself, in deciding whether the testimony is false. It is easy to assert that one never "knows" anything, relying on a type of sophistry that can give solace to a guilty conscience but is certainly less than honest.¹⁹⁰ Equating knowledge with certitude is absurd if it allows a lawyer to avoid being honest about the nature of the testimony.

Even when the lawyer knows the client will commit perjury, some states permit the attorney to call the client to testify in a narrative format. The attorney remains passive, aside from calling the defendant to testify, and, more importantly, he may not use the defendant's testimony—which is presumably false evidence—in closing argument (or in other parts of the trial) to seek an acquittal.¹⁹¹ The California Supreme Court took this approach in *People v. Johnson*,¹⁹² holding:

[T]he narrative approach represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role.¹⁹³

190. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004). The authors state:

One method of coping with the problem created by *Nix* is through the disingenuous use of the standard of 'knowing.' That is, the lawyer has no obligation to reveal client perjury unless she 'knows' that the client is going to commit perjury. All one has to do to nullify *Nix*, then, is to define 'knowing' in such a way that the obligation virtually never arises.

Id. at 191 (citation omitted); Subin, *supra* note 5, at 138 ("The argument that the attorney cannot know the truth until a court decides it fails. Either it is sophistry, designed to simplify the moral life of the attorney, or it rests on a confusion between 'factual truth' and 'legal truth.'").

191. See *People v. Johnson*, 72 Cal. Rptr. 2d 805 (Cal. Ct. App. 1998).

Under the narrative approach, the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange. Instead, the attorney permits the defendant to testify in a free narrative manner. In closing arguments, the attorney does not rely on any of the defendant's false testimony.

Id. at 813.

192. *Id.* at 805.

193. *Id.* at 817.

How can the introduction of perjured testimony co-exist with the court's truth-seeking function? The professional rules clearly prohibit lawyers from introducing false evidence, so the lawyer's conduct may well be subject to sanction. At the same time, a criminal defendant has a constitutional right to testify,¹⁹⁴ and the lawyer is obliged to abide by the client's decision whether to testify.¹⁹⁵ Moreover, while the Model Rules authorize a lawyer to disclose client perjury even if the information is confidential—which it almost certainly will be—that disclosure will undermine the trust between the lawyer and client, particularly if the attorney is appointed rather than retained. When *Johnson* justified adopting the narrative approach as a means to accommodate the lawyer's "ethical obligations," it was not endorsing the introduction of false evidence. Instead, the California Supreme Court acknowledged the inevitability of client perjury and adopted a means to preserve the defense attorney's obligation to be honest, even at the expense of the truth. The lawyer can continue to represent the defendant while remaining honest by not using the perjured testimony beyond its introduction through the client's narrative discourse.¹⁹⁶ The lawyer's honesty is maintained, at a cost to the defendant that the testimony likely will be of little use to the trier of fact because the lawyer cannot use it in argument or otherwise, remaining honest in the representation of the perjurious defendant. The harm to the defendant is a result of the decision to testify falsely and not of what the attorney did or did not do.¹⁹⁷

194. See *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("There is no justification today for a rule that denies an accused the opportunity to offer his own testimony.").

195. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2004) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

196. See *People v. Andrades*, 828 N.E.2d 599, 603 (N.Y. 2005) (lawyer did not render ineffective assistance of counsel in suppression hearing when he did not question his client whom he concluded was committing perjury and did not use the client's testimony in seeking suppression of a confession); see also *People v. DePalo*, 754 N.E.2d 751, 753 (N.Y. 2001) (After defense counsel elicited defendant's testimony in narrative form, "[d]uring summations, defense counsel did not refer to defendant's trial testimony.").

197. The narrative approach to potential client perjury has been criticized as providing no real protection to the client while having the same practical effect as the *Nix v. Whiteside* approach of revealing that the client will commit perjury. See Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 421 (1994) ("In fact, the narrative approach represents an attempt to compromise based on the universal but invalid view of the client perjury issue as a clash between the interest of truth and crime-control on one hand and the integrity of the adversarial

Both the narrative approach and the disclosure rule of *Nix* permit the attorney to be honest in representing the client in the face of false evidence offered by a client whose constitutional rights include the right to testify while being represented by counsel. The Sixth Amendment right to counsel requires that the attorney advocate the client's cause, but the Supreme Court in *Nix* recognized:

[The defense lawyer's] duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.¹⁹⁸

B. *Misidentification*

The old adage that things are not always as they seem is especially true regarding a person's identity, because identities can be hidden easily, at least for a short period. When a lawyer at trial sits at counsel's table, the person next to him is presumably the client. Similarly, when a person states that she is a lawyer there to provide assistance, that assertion usually is accepted at face value. Identity can be quite important in legal proceedings, because in most instances, the law only holds individuals responsible for their own acts, not those of others. By playing on

process on the other."'). See also Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477 (1966), stating:

A solution even less satisfactory than informing the judge of the defendant's guilt would be to let the client take the stand without the attorney's participation and to omit reference to the client's testimony in closing argument. The latter solution, of course, would be as damaging as to fail entirely to argue the case to the jury

Id. If the only two considerations were the duty of zealous advocacy on behalf of the client and the truth-seeking function of the judicial system, then it may well be that the narrative approach is unacceptable. But that is not the only requirement in the circumstance involving client perjury because the defense lawyer is the facilitator of that perjury. The lawyer's *separate* responsibility to be honest in the representation of a client who seeks to be dishonest requires that the lawyer's participation in the client's misconduct be minimized. That harm to the client from either the narrative approach or requiring disclosure to the court is hardly a basis to assert that the rule is unfair because the client brings the harm on himself by choosing to commit perjury. Legal representation is not a license for the attorney to perform any act that the client would like to see done.

198. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

assumptions about identity, lawyers can seek to benefit their clients without making any explicit misstatements.

In *People v. Simac*,¹⁹⁹ David Sotomayor set up a rather elaborate plan to sow confusion about the identity of his client, who had been charged with traffic violations arising from an auto accident. The trial took place nine months after the incident, and the sole witness for the prosecution was the officer who wrote the accident report at the scene. Next to himself at the defense table in the courtroom, Sotomayor seated a clerical worker with a similar appearance to the defendant and had the defendant sit among the spectators.²⁰⁰ The testifying officer identified the clerical worker as the defendant, apparently assuming that the person seated next to defense counsel was in fact the defendant. As the Illinois Supreme Court noted, “[Sotomayor] did not inform the court of the misidentification at this time or reveal that defendant was seated elsewhere in the courtroom.”²⁰¹ Sotomayor scrupulously avoided referring to the clerical worker as his “client” or the “defendant” and, after the close of the government’s case, had the clerical worker testify as to his identity. Sotomayor then moved for a directed verdict of acquittal based on the officer’s misidentification and asserted that “no fraud was perpetrated on the court, for defendant was in open court as required.”²⁰²

Although the trial court dismissed the charge against the client, it held Sotomayor in contempt for failing to inform the court of the plan to have someone other than the defendant sit next to counsel, a place usually occupied by the defendant. The Illinois Supreme Court found that Sotomayor’s “subversive tactics impeded the court’s ability to ascertain the truth,” but that was the whole point, and indeed is the criminal defense attorney’s goal, within limits. Impeding the search for the truth by a criminal defense lawyer cannot be grounds for sanctions, at least standing alone. The contempt was appropriate, however, because the attorney was not honest in using the assumptions of the court, prosecutor, and witness to create the misidentification. The trial court ritual—familiar to lawyers and viewers of popular criminal justice television programs—is to have the defendant sit at a particular table or location, next to defense counsel, and following that ritual certainly communicates information about

199. 641 N.E.2d 416 (Ill. 1994).

200. The extent of Sotomayor’s plan included having the clerical worker wear a white shirt with blue stripes and the defendant wear a white shirt with red stripes. *Id.* at 418.

201. *Id.*

202. *Id.*

the person sitting next to the attorney. By having a stand-in appear, Sotomayor's subterfuge worked by having the court and prosecutor rely at least in part on the attorney's communication, which was intentionally inaccurate. As the court stated, "[Sotomayor] clearly knew that the court was laboring under a misconception as to the identity of the defendant, yet he took no action to correct the court's mistaken impression."²⁰³

Misidentification outside the courtroom also has been sanctioned when the lawyer seeks to shield his identity and connection to a legal matter. The Oregon Supreme Court upheld the discipline of an attorney in *In re Gatti*²⁰⁴ when a lawyer identified himself as a chiropractor to obtain information for a lawsuit by his client. The court held that, while the misrepresentation did not cause any direct harm to persons deceived, the lawyer committed misconduct because "[a] lawyer owes the public a duty of honesty and personal integrity."²⁰⁵ In *In re Ositis*,²⁰⁶ a lawyer had

203. *Id.* at 422. *Simac* is not the only example of lawyers taking steps to hide their client's identity or create a situation for a misidentification of the client, although the planning and care with which counsel approached the case is uncommon. See *In re Gross*, 759 N.E.2d 288, 289 (Mass. 2001) ("Because his client and the alibi witness were somewhat similar in appearance, the respondent concocted a plan to have the alibi witness impersonate the defendant at second call, hoping thereby to confuse the victim and prompt a misidentification at trial."); *United States v. Sabater*, 830 F.2d 7, 9 (2d Cir. 1987) ("Counsel's substitution of Sabater's sister for the defendant, in which counsel had the sister don the blue-striped blazer that Sabater had worn during Officer Rosado's direct examination, was a trick, which misled the court, opposing counsel, and the witness, as well as the jury."); *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981). In *Thoreen*, the Ninth Circuit noted:

Throughout the trial, Thoreen made and allowed to go uncorrected numerous misrepresentations. He gestured to Mason as though he was his client and gave Mason a yellow legal pad on which to take notes. The two conferred. Thoreen did not correct the court when it expressly referred to Mason as the defendant and caused the record to show identification of Mason as Sibbett.

Id. at 1336; see also *Miskovsky v. State*, 586 P.2d 1104, 1106 (Okla. Crim. App. 1978) ("The contemptuous conduct occurred during the course of a preliminary hearing . . . when the appellant seated his client in the gallery and seated a substitute at the counsel table.").

204. 8 P.3d 966 (Or. 2000).

205. *Id.* at 977. The Oregon Supreme Court's decision caused significant consternation among prosecutors because the prohibition on deception would prohibit prosecutors from assisting in undercover and sting operations, which depend on deceiving the other participants in the misconduct about the true identity of police or cooperators. After *Gatti*, Oregon changed its professional regulations to permit government attorneys to participate in legitimate law enforcement operations:

Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), it shall not be professional misconduct for a lawyer to

a private investigator introduce himself as a journalist to gather information from a potential opposing party. The investigator was in fact also a reporter for a news service, so his statement to the person was true.²⁰⁷ In upholding the sanction, the Oregon Supreme Court described the lawyer's conduct as a "ruse" designed to mislead the potential party by failing to disclose the real reason for the questions or the investigator's connection to a potential adverse legal action. Neither the attorney nor the investigator lied, but the attorney was sanctioned for the misleading conduct of another person because it was dishonest, even though no lawsuit had been filed at the time of the conversation.²⁰⁸

Perhaps the most challenging decision in this area was the Colorado Supreme Court's admonition of a prosecutor who told a triple-murderer that he was a defense lawyer to persuade the murderer to release a captive and turn himself in to the authorities. In *In re Pautler*,²⁰⁹ William Neal had brutally murdered three women and gave instructions to a fourth woman he had abducted to have the police page him, after which Neal left. Mark Pautler, a Deputy District Attorney, arrived at the crime scene and the police contacted Neal by telephone. Neal described in detail how he committed the murder and stated he would not surrender without first talking to a defense lawyer. Pautler testified in the disciplinary proceeding that he did not

advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules.

OREGON CODE OF PROF'L RESPONSIBILITY DR 1-102(D). This change in the Oregon rules permitting government lawyers to participate in undercover and sting operations does not violate the broader requirement discussed here that lawyers be honest. Any deception does not impact a client or the court, and the participant engaged in criminal conduct has no legitimate claim that the deception caused the crime, unless there is evidence of entrapment. Unlike dishonesty during the course of legitimate legal representation, the criminal can hardly claim that the *failure* to disclose the fact that a government lawyer is orchestrating an undercover operation somehow harms the lawyer's representation of the client or thwarts the court's truth-seeking function. The harm to the defendant from participating in criminal conduct is self-inflicted.

206. 40 P.3d 500 (Or. 2002).

207. See *id.* at 501 ("Stevens' statement that he worked for International News Service technically was true: International News Service was the assumed business name that Stevens used when he worked as a freelance news reporter—a sideline to his private investigating business.").

208. The Oregon Supreme Court relied on its decision in *Gatti* that a lawyer may not misrepresent his identity to obtain information from a person for use in a subsequent legal proceeding. See *id.* at 502.

209. 47 P.3d 1175 (Colo. 2002).

trust any attorneys in the public defender's office because he believed a lawyer would "advise Neal not to talk with law enforcement."²¹⁰ Pautler then spoke with Neal and identified himself as a public defender named "Mark Palmer." Pautler and Neal discussed conditions under which Neal would surrender, and Pautler assured him that the police would abide by them, after which Neal surrendered without further incident.²¹¹ Pautler did not inform Neal of his true identity even after the arrest, and Neal's defense lawyer stated that "he had difficulty establishing a trusting relationship with the defendant after he told Neal that no Mark Palmer existed within the [Public Defender]'s office."²¹²

Pautler's conduct defused a potentially life-threatening situation and permitted the police to arrest a dangerous felon without any further violence, yielding a significant benefit to society. Yet the Colorado Supreme Court found that Pautler violated Rule 8.4 because his statement to Neal was dishonest. The court rejected Pautler's justification defense, because he had other options aside from being dishonest and because his mistrust of the public defender did not vindicate his misstatements to Neal. The court stated, "Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish."²¹³

What Pautler did was morally justifiable, at least from a utilitarian view that the benefit to society far outweighed any harm to an admitted murderer who posed a continuing threat of violence.²¹⁴ The Colorado Supreme Court was admonishing a *lawyer*, and not judging the morality of Pautler's conduct in light of a broader societal standard. The court was correct that Pautler was not honest in a situation in which he was acting as an attorney and that his conduct had an effect on a party to a legal proceeding. The fact that the recipient of Pautler's misidentification was a murderer does not change the analysis, although it is certainly incongruous to assert that the requirement of honesty includes

210. *Id.* at 1177.

211. *Id.* at 1177-78. Among other things, Neal requested cigarettes and to be isolated from other prisoners, which the authorities fulfilled.

212. *Id.* at 1178.

213. *Id.* at 1179.

214. See Hodes, *supra* note 17, at 73 ("In my view, however, the Colorado Supreme Court, safely removed in place and time from the horrific events, was too cold and antiseptic in its approach. Because there was little danger of starting down too slippery a slope, I would have let Pautler off for 'lying with an explanation.'").

statements made to a cold-blooded killer. If the misidentifications condemned in *Simac*, *Gatti*, and *Ositis* are proper applications of the requirement that lawyers be honest in their representation of clients, then the same holds true in *Pautler*, hard as it may be to say that Pautler did something wrong. These attorneys, acting as representatives of their clients, were not honest in their communications in the course of that representation.

C. *False Inferences*

The most difficult issue in applying the principle of honesty is the criminal trial in which the defense counsel seeks a not-guilty verdict for the client who she knows is guilty. The duty of zealous representation calls for the attorney to use all legal means to obtain a favorable outcome for the client, which can include using tactics that lead a jury to conclude mistakenly that the person is not guilty of the offense, because the government has not met its burden of proof beyond a reasonable doubt. To achieve that result, the defense lawyer may try to have the jury draw a false inference, perhaps by calling into question a witness's credibility or by convincing the jury of an alternate theory of what actually happened—or why—that precludes a finding of guilt. For example, if a defendant is able to convince the jury that he has an alibi and could not have committed the crime, then a not-guilty verdict should be the outcome. Is the lawyer being dishonest in seeking to have the jury draw false inferences?

It is universally accepted that the defense lawyer can put the government to its proof—a process that could well result in a not-guilty verdict if a crucial witness fails to appear or testifies poorly or if important physical evidence is unavailable. While the truth-seeking function of the trial is undermined by a factually incorrect verdict, the lawyer has not been dishonest through any inaccurate or inauthentic communication. The lawyer's knowledge of—or even strong suspicion about—the client's guilt does not change the obligation to represent the client zealously, nor does it affect the requirement of honesty.

The matter becomes more difficult, or at least uncomfortable, when the lawyer cross-examines a witness the lawyer knows is truthful. Professors Freedman and Smith assert that “there is general agreement that a lawyer can properly cross-examine a truthful and accurate witness to make her appear to be mistaken or lying. Indeed, the prevailing view is that the lawyer is ethically *required* to do so”²¹⁵ Depending on the extent to which witnesses may be challenged regarding their memory of an event

215. See FREEDMAN & SMITH, *supra* note 190, at 226 (emphasis in original).

or transaction or their ability to perceive important details of a crime or individual conduct, the lawyer may be able to raise questions regarding the veracity of the testimony as part of a challenge to the government's case.²¹⁶ Can a lawyer try to make the witness appear to be untruthful—a liar—and not just mistaken when the lawyer knows the witness is telling the truth? One emotionally-charged example offered in this regard is the rape victim who is made to appear unchaste and who, the attorney argues, may have consented to the intercourse.²¹⁷

While the cross-examination may subvert the truth-seeking function of the trial, it is a different question whether the attorney is dishonest in questioning the witness. If the lawyer makes statements in the course of questioning that are not accurate, or makes a misleading statement regarding evidence or the testimony of other witnesses, his statements would be dishonest and would violate his duty as a lawyer. To the extent the lawyer may cause a witness to appear confused or inaccurate, the inferences drawn by the jury are based on the response and not any assertion by the lawyer.²¹⁸ Wigmore proclaimed that cross-examination is the "greatest legal engine ever invented for the discovery of truth,"²¹⁹ a truism of the adversary system that is accepted because, as the Supreme Court explained in *Davis v. Alaska*,²²⁰ "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."²²¹ Cross-examination is a process of testing in which the lawyer does not communicate directly with the jury but seeks to raise questions about the client's guilt in the jury's mind. To the extent

216. See Subin, *supra* note 5, at 150 (Proposed rule prohibiting lawyers from offering a false defense "would not prevent the attorney from challenging *inaccurate* testimony, even though the attorney knew that the defendant was guilty.") (emphasis in original).

217. See FREEDMAN & SMITH, *supra* note 190, at 221 ("We agree that the question of cross-examining witnesses known to be telling the truth is most painful in the rape context."); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 152 (1988) ("the cross-examination is morally wrong, even if the victim really did consent to sex with the defendant").

218. See Pye, *supra* note 1.

Counsel should be allowed to ask any questions permitted by the law of evidence in his efforts to test the observation, recollection and credibility of the witness. He fulfills his obligation to the court when he takes care not to ask questions forbidden under the law of evidence. . . . He owes no obligation to the witness except to examine him according to the law.

Id. at 944.

219. 5 WIGMORE ON EVIDENCE § 1367 (J. Chadbourn ed., 1974).

220. 415 U.S. 308 (1974).

221. *Id.* at 316.

the lawyer puts the government to its proof by cross-examining the truthful witness to raise doubts about the strength or completeness of the government's evidence, the lawyer's conduct is not dishonest, even if it might result in the truth being derogated through a not-guilty verdict.²²²

Is there a difference between cross-examining the truthful witness and, when the attorney knows the client committed the crime, advancing a false defense by propounding a different version of the conduct or intent of the defendant which, if accepted by the jury, will result in a not-guilty verdict or a conviction for a lesser-included offense? One important difference is that the cross-examination is of a witness for the government or of a hostile witness who is not cooperating with the party who called the person to testify. Cross-examination is a means to raise questions about the basis of the person's testimony and his or her veracity but is not a direct offer of proof. Advancing an alibi or alternative theory of liability requires the attorney to take the further step of explaining how the evidence should be viewed or perhaps even of offering additional proof to demonstrate that the defendant is not liable for the crime charged. In the context of client perjury, even those jurisdictions that permit the defendant to testify in a narrative fashion prohibit the attorney from making an argument on the basis of the false exculpatory testimony.

Model Rule 3.3(a) forbids the use of false evidence at trial because of its effect on the court's search for the truth. The Rule includes prohibiting the attorney from fabricating a defense for

222. See Mitchell, *supra* note 25, at 347 ("By pushing hard in every case (whether the client is factually guilty or not) and thereby raising 'reasonable doubts' in the prosecution's case whenever possible, the defense attorney helps 'make the screens work' and thus protects the interests of the factually innocent."). The issue of cross-examination of the defense witness whose testimony the prosecutor knows is truthful usually will not present the problem of asking the jury to draw a false inference. Unlike the defense attorney who knows the client committed the charged offense yet seeks to avoid a conviction, the prosecutor has identified the person who is reasonably likely to be the one who committed the crime. The prosecutor's cross-examination would not seek to undermine a truthful witness' testimony because if that witness could fully exonerate the defendant, then the government would have to terminate the prosecution. The presupposition is that the lawyer knows the witness is telling the truth, and the question is how far the lawyer can go in seeking to show that the testimony is not truthful, or at least not reliable. If the witness is providing testimony that is only indirectly exculpatory, then, while the prosecutor can examine the basis of the witness' knowledge and recollection through cross-examination, there is no benefit to trying to make the witness appear untruthful. In that sense, the prosecutor cannot seek to undermine the veracity of the truthful defense witness's testimony consistent with the obligation to pursue only legitimate prosecutions.

the client. In *In re Foley*,²²³ the Massachusetts Supreme Judicial Court imposed a three-year suspension on an attorney who encouraged his client to fabricate a defense to a criminal charge. The client was an undercover agent participating in a federal investigation of corruption in the Boston Municipal Court and was arrested for drunk driving and illegal possession of a firearm. A court clerk suggested that the agent hire Steven Foley, and at their first meeting the agent disclosed facts to Foley indicating that he owned the weapon and knew it was in the vehicle at the time of the arrest. The agent asked Foley about creating a false defense. The opinion explained: "[D]uring a subsequent telephone conversation . . . [Foley] told the agent that he had planted the seeds for a fabricated defense in his initial conversation with the prosecutor, and that he would convey the details of the story to the prosecutor at a later meeting after they were more fully concocted."²²⁴ Unfortunately for Foley, the agent taped this conversation and subsequent conversations in which Foley discussed how they would create a defense based on the agent testifying falsely about the ownership of the gun and his knowledge of its presence. At the same time, Foley also pursued a motion to suppress the gun because of a problem regarding the search at the time of the arrest, a strategy that did not require the agent to testify falsely. Ultimately, the prosecutor dismissed the charges once the agent's identity was revealed, and Foley never had to call his "client" to testify.

The Massachusetts Supreme Judicial Court described Foley's conduct as reflecting a "complete disregard, if not utter contempt, for the fundamental ethical obligations of an officer of the court."²²⁵ His conduct did not violate Rule 3.3(a), however, because the evidence—the agent's false testimony—was not offered to the court.²²⁶ Rule 3.4(b), entitled "Fairness to Opposing Party and Counsel," provides a broader prohibition that, "[a] lawyer shall not falsify evidence, counsel or assist a witness to testify falsely"²²⁷ Even under this Rule, Foley argued that there was no "true harm," because the case never reached the point

223. 787 N.E.2d 561 (Mass. 2003).

224. *Id.* at 563. The court clerk subsequently entered a guilty plea to racketeering. *Id.* at 562–63.

225. *Id.* at 568.

226. The Massachusetts Supreme Judicial Court rejected Rule 3.3(a) as a basis for discipline, because prosecutors are not the same as judges, and because "the rules governing the relationship between lawyers and judges are different from those that govern the relationship between one lawyer and another." *Id.* at 571.

227. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2003).

where the evidence influenced the outcome of the prosecution. The court pointed to the larger problem with the attorney's conduct: "the most significant harm arising from [Foley]'s conduct is its effect on the profession and the public's confidence in its integrity."²²⁸

Foley was dishonest in concocting a defense for his client, regardless of whether evidence was ever offered to the court or submitted to an opposing lawyer. While the title to Rule 3.4 speaks to the relationship between lawyers for parties, in fact this provision regulates the conduct of the attorney in representing the client without regard to whether the falsified evidence is ever transmitted to the opponent, much less whether it is used in court to trigger Rule 3.3(a). This rule prohibits dishonesty in any step of the process, including otherwise privileged communications between a lawyer and client that will, in most cases, never see the light of day. Even if Foley's client had not been an undercover agent, the suggestion to a client that they create a false exculpatory story would be dishonest, regardless of its subsequent disclosure or lack of harm to the court's truth-seeking function.

The harder case involves evidence that, while truthful, is also misleading to the finder of fact and permits the attorney to offer a false defense. *Michigan Informal Ethics Op. CI-1164*²²⁹ addressed the lawyer's responsibility when he knows his client is guilty, but evidence is available to establish an alibi defense based on the victim's mistaken idea about the time at which the crime occurred. In this case, the defendant rendered the victim unconscious and stole his watch, and when the victim spoke with the police afterwards about the attack he mistakenly gave a later time for when the robbery occurred. By happenstance, the defendant was with friends who could testify that he could not have robbed the victim at that hour. The lawyer eschewed, calling the defendant to testify, but he asked the Michigan bar authorities whether he could call the friends as witnesses to testify regarding the defendant's presence at the time the victim said the robbery occurred, i.e., providing an alibi to the crime. The bar authorities responded by saying that, not only could the lawyer present the testimony, but also that it was his obligation to do so because of his duty zealously to represent the client and because "[a] defense lawyer may present any evidence that is truthful." The

228. *In re Foley*, 787 N.E.2d at 571.

229. Mich. Bar Ass'n Ethics Comm., Informal Op. CI-1164 (1987), available at http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1164.html.

Opinion further notes that “[t]he situation with the friends as alibi witnesses . . . does not involve tampering with evidence. *One cannot suborn the truth.*”²³⁰

Even if the attorney will not introduce false evidence, the testimony still cannot be described as true except to the extent that the witnesses will not commit perjury. In *Hayes v. Brown*, the prosecutor avoided telling the cooperating witness about a deal with defense counsel to drop charges in another case so that the witness did not commit perjury, yet the California Supreme Court made it clear that the prosecutor acted dishonestly, even if he technically avoided the introduction of false evidence.²³¹ In *Foley*,²³² the lawyer concocted a story for the client to tell to avoid liability, which was clearly dishonest and, if successful, would have resulted in the introduction of false evidence. Honesty is not limited simply to prohibiting the actual use of false evidence or perjured testimony.

It is a very close question, but I believe the better understanding is that the attorney acted dishonestly in seeking to convince the jury that his client was not guilty by offering the evidence that would create an alibi. The Opinion describes the lawyer’s conduct as resulting from the victim’s own mistake in much the same way that a truthful witness with poor recall or bad eyesight might be impeached on cross-examination. “The victim’s mistake concerning the precise time of the crime results in this windfall defense to the client.”²³³ Yet the testimony is more than simply challenging the perception, recall, or veracity of a witness on cross-examination. It involves the additional step of introducing evidence which, while not false, asks—indeed demands—that the jury find the defendant not guilty, because he could not have committed the offense when it took place, surely a false inference. The defendant’s windfall is not simply the result of the victim’s mistake but is due to the lawyer’s offering evidence that asks the jury to find that the victim could not have been robbed by this client.

Once the alibi witnesses testify, will the lawyer simply argue that the government has not met its burden of proof beyond a reasonable doubt? I believe the fair answer is that the lawyer will take the opportunity to argue much more—that the evidence

230. *Id.* The Opinion focuses on perjury, especially the contention that “[t]he testimony of the friends will not spread any perjured testimony upon the record.” *Id.*

231. See *supra* notes 157–63 and accompanying text.

232. See *supra* notes 223–28 and accompanying text.

233. Mich. Bar Ass’n Ethics Comm., Informal Op. CI-1164, *supra* note 229.

shows the defendant did not commit the crime—a false defense based on truthful information.²³⁴ If the truthful evidence can be introduced, what prohibits the lawyer from arguing the logic of the evidence as supporting an alibi defense? Aside from the requirement that lawyers must be honest in their representation, none of the rules on false evidence, particularly Rules 3.3(a) and 3.4(b), would be violated by the lawyer's presentation of an alibi defense. The lawyer is dishonest, not because any perjury has occurred or because the inference regarding guilt is unsupportable, but because the defense is inaccurate by asking the jury to accept a wrong version of the events. The windfall to the defendant is based on the lawyer's dishonesty in presenting a false defense to the jury.²³⁵ Truth cannot be the sole measure of the lawyer's conduct in this situation, because what each witness believes—that because the defendant was with them at a time when, to their understanding, the defendant could not have committed the crime—is not an accurate reflection of the defendant's conduct.

CONCLUSION

We were probably told by our mothers—or some other sage advisor—that “honesty is the best policy,” usually in a situation when we were caught being dishonest. So too it is for lawyers. Asserting that lawyers undermine the truth or ignore their obligations to ensure that the truth be revealed simply places one

234. Professor Schwartz contends that the lawyer can argue that the prosecution failed to meet its burden of proof but not that the defendant did not commit the robbery, concluding that “untrue testimony should not be exploited for its probative value; it should be used only to show that the prosecution has failed to meet its burden of proof.” Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 Sw. L.J. 1135, 1146 (1988). While that distinction is theoretically possible, the practical distinction is meaningless because the lawyer (and defendant) expect that the evidence will lead the jury to conclude that another person committed the crime, not just that the government did not prove the defendant committed it. The lawyer is introducing evidence not simply to raise doubt, but rather to lead the jury to a factually distinct conclusion that is inconsistent with the lawyer's knowledge. Moreover, I doubt the defense attorney will be able to walk such a fine line, even if there is such a line in this type of case.

235. See *supra* pp. 273–77. The Opinion tries to soften the blow from its analysis by noting that the jury could still reject it: “if the complaining witness gives positive identification of his assailant and if there is other inculpatory evidence, a jury may give very short shrift to the testimony, however true, of defendant's friends.” Mich. Bar Ass'n Ethics Comm., Informal Op. CI-1164, *supra* note 229. This appears to be the “no harm, no foul” approach, that even if the lawyer does present the evidence there is no guarantee it will be successful. That possible result hardly justifies the lawyer's dishonesty. *Id.*

obligation of the attorney above the other, the duty of zealous advocacy. Focusing on the lawyer's honesty, rather than whether the process results in the ascertainment of the truth, better reconciles the competing demands of legal representation.

It is clear that there is no way to translate the lawyer's dueling obligations—his obligation to the judicial system as an officer of the court and his duty to the client as the fiduciary representative—into a precise set of professional rules that will provide guidance on how to respond in particular situations. The principle of honesty focuses on the lawyer in both roles, accepting that certain professional duties, primarily the requirement of client confidentiality, will require the lawyer to stand by when the truth is obfuscated or undermined. So be it, so long as the lawyer is honest in the representation. On the other hand, truth cannot be the measure of the attorney's conduct in representing the client. That a statement is technically truthful or has no truth value—the diatribe or personal attack—does not make it right for the attorney to offer it. The attorney must seek to advance the interests of the client, which means that the fact that a statement is true does not mean that it is proper. Lawyers do not practice law in a vacuum, so their conduct should not be held to a standard, such as truth or zealous advocacy, that is divorced from context.