NEW YORK STATE BAR ASSOCIATION
ANNUAL MEETING 2019

GENERAL PRACTICE SECTION &
COMMITTEE ON PROFESSIONAL DISCIPLINE

PRESENTS:

"THE ETHICAL OBLIGATIONS OF A LAWYER TO LEARN THE *TRUE* FACTS"

JANUARY 15, 2019
10:05 A.M. TO 11:45 A.M.
NEW YORK HILTON MIDTOWN
NEW YORK, NEW YORK

PANEL CHAIR: JOEL COHEN, ESQ.

PANEL MEMBERS:
MONICA A. DUFFY, ESQ.
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THE SEARCH FOR THE TRUTH:

RELEVANT PROVISIONS OF THE NEW YORK RULES OF PROFESSIONAL CONDUCT

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Preamble Provisions

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

Terminology: Rule 1.0

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Other Relevant Rules

Rule 1.1
(Competence)

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Rule 1.2(d)
(Scope of Representation and Allocation of Authority Between Client and Lawyer)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Rule 1.3
(Diligence)

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

....

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

Rule 3.1
(Non-Meritorious Claims and Contentions)

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for 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.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

Rule 3.3
(Conduct Before a Tribunal)

(a) 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 controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use 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.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.4
(Fairness to Opposing Party and Counsel)

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

....

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

Rule 4.1
(Truthfulness in Statements to Others)

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Rule 8.4
(Misconduct)

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

...

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

PROSECUTORS:

THE TRUTH FUNCTION

ARTICLE:

"THE PROSECUTOR'S DUTY TO TRUTH"

The Prosecutor's Duty To Truth

BENNETT L. GERSHMAN*

INTRODUCTION

Years ago, when I became a prosecutor, I was trained to believe that you never put a defendant to trial unless you were personally convinced of his guilt. This was, as I recall, the accepted ethos in our office and, I assumed, in prosecutors' offices generally.[1] I never questioned that precept. Some years later, however, I had an opportunity to test it when I prepared to go to trial in a robbery case. The defendant, a twenty-year-old black man, was accused of robbing at gunpoint a seventy-seven-year-old white man in a housing project. The complainant identified the defendant from photographs and later picked him out from a lineup containing two other persons, one of whom was a police officer known to the complainant. There was no other evidence.

In readying the case for trial, I learned that the defendant had been getting into trouble ever since he had dropped out of high school. He had been arrested several times, but the charges had been dismissed. He had acquired a reputation with the Housing Police, who frequently picked him up for questioning. He had been convicted of robbery two years earlier and had served three months in prison. Several days after he came home, the Housing Police picked him up again in connection with the present robbery. He had been in jail for the past fourteen months awaiting trial.

I was concerned about the reliability of the identification. In addition to the suggestive lineup, the complainant's initial description of the defendant — he told the police that his assailant was about five feet four inches tall — differed markedly from the defendant's actual height of six feet two inches. I interviewed the complainant and questioned him closely. He was an intelligent man who gave a convincing account of the event. A jury, I thought, would probably believe him. I went to the vestibule where the crime occurred; it was well-lit, a circumstance supporting the accuracy of the identification. I talked to the janitor who had initially called the police and to several tenants. I learned nothing useful. The defendant's lawyer protested his client's innocence, but offered no alibi. Lacking

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* Professor of Law, Pace Law School. I would like to thank Adele Bernhard, David Dorfman, Steven Goldberg, Vanessa Merton, John Humbach, Steven Zeidman, and especially Lissa Griffin, for their thoughtful comments.

1. I served as an Assistant in the Office of Frank S. Hogan, District Attorney for New York County, from 1966 to 1972, and as a Special Assistant Attorney General in the Office of Maurice H. Nadjari, Deputy Attorney General for New York State, from 1973 to 1976.

corroboration of the complainant's identification and aware of the inherent dangers of eyewitness identifications, I suggested that the defendant take a lie detector test. He passed.

The day before trial, I asked the complainant to come to my office. I asked him to look at a series of about twenty photographs of similarly appearing males that I spread out on my desk. I had the investigator place two photographs of the defendant in the array. I left my office, asking the complainant to examine the photographs carefully and pick out the man who robbed him. When I returned five minutes later, he had selected a photograph of someone else; he was sure that was the person. I asked him to do it again. Again he picked out someone else. I thanked him. I explained to him that I could not prosecute the case. As I recall, he seemed to understand. My bureau chief concurred. I prepared a motion to dismiss, which the judge, expressing some reluctance, granted.[2]

Some years later, now a law professor, and increasingly exposed to academic perspectives on the ethical responsibilities of "virtuous" prosecutors,[3] I was surprised to learn that several of these commentators believe that it is not the prosecutor's function to make a personal evaluation of the truth; it is the jury's function.[4] Offering a hypothetical one-eyewitness-identification case strikingly similar to my own robbery case, one influential author asked rhetorically how a conscientious prosecutor could ever rationally reach the "extra-judicial judg-

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2. The case is reported in Joel Dreyfuss, *An Innocent Man's 14 Lost Months*, N. Y. POST, June 3, 1971, at 5.

3. *See* H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance From the ABA*, 71 MICH. L. REV. 1145 (1973); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988). *See also* Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607 (1999); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

4. The seminal article is Uviller, *supra* note 3, at 1159 ("[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury"). *But see* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1703 (2000) ("The prosecutor should be assured to a fairly high degree of certainty that he has the right person."). *See also* Fisher, *supra* note 3, at 230 n. 144 ("The prevailing view, at least in the world of practice, surely permits prosecutors to [proceed absent personal belief in the defendant's guilt]."); Zacharias, *supra* note 3, at 94 (suggesting that "prosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts"). For contrary views, *see* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 88 (1975) (criticizing Professor Uviller's approach and maintaining that "[a] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt."); John Kaplan, *The Prosecutorial Discretion - A Comment*, 60 NW. U.L. REV. 174, 178 (1965) (discussing his experience as an Assistant United States Attorney, the author states: "The great majority, if not all, of the assistants felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt."); Whitney North Seymour, Jr., *Why Prosecutors Act Like Prosecutors*, 11 REC. A.B. CITY N.Y. 302, 312-13 (1956) (noting that the "decision [to prosecute] is reached only after we have satisfied ourselves of the defendant's actual guilt").

ment" that the witness is unreliable.[5] The prosecutor's ethical obligations are satisfied, according to this view, if he apprises the court or defense counsel of adverse evidence or defects in the truthfulness of his witnesses.[6]

My unease with this agnostic approach might have remained dormant were it not for recent events and disclosures that invite, if not compel, a re-examination of the question of the prosecutor's obligation to the truth. It has always been my belief that the prosecutor, more than any other government official, possesses the greatest power to take away a person's liberty or life at his discretion.[7] Also, it is

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5. *See* Uviller, *supra* note 3, at 1157-58 ("Indeed, should the conscientious prosecutor set himself the arduous task of deciding whether in this instance the complainant is right? If it is his duty to do so, how does he rationally reach a conclusion? For this purpose, are his mental processes superior to the jurors' or the judge's?").

6. *See id.* at 1159. In this Article, I make no pretense to try to grapple with the epistological meaning of "truth." *See* SISSELA BOK, LYING 5 (1989) ("'Truth' – no concept intimidates and yet draws thinkers so powerfully. From the beginnings of human speculation about the world, the questions of what truth is and whether we can attain it have loomed large."). My reference to "truth" in criminal law includes two separate concepts – the "factual truth" and the "legal truth." *See* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1084-87 (1975) (discussing difference between factual truth, which includes external facts derived from witness's sensory experience and internal facts relating to aspects of defendant's knowledge and volition, and legal truth, which includes the need to assess the external and internal facts in light of the legal appropriate standard). For purposes of my discussion, factual truth includes all of the operative facts probative of the historical criminal event, including external and internal facts; legal truth is the legal consequence of those facts. Neither of these truths, of course, is ever free of ambiguity or obscurity, even in the best circumstances. It is rarely possible for a prosecutor or anyone else to ever know the "whole truth," but a prosecutor should have some degree of confidence in the factual and legal truth of his case before proceeding to trial. The focus of this Article is to assess the level of confidence that a prosecutor should possess before proceeding with a case.

So, for example, in a murder case, factual truth would include all of the facts and circumstances relevant to the defendant's act of killing. Some of these facts may be unknown or disputed, such as whether the defendant had been drinking prior to the encounter, whether he carried a gun with him or went home to retrieve it, and whether the victim attacked him first. The critical factual question would be the defendant's mental state at the moment of the killing: did he kill from rage, from drink, in self-defense, or from a premeditated design? Only an answer to the latter question would determine the legal truth, namely, whether the defendant is guilty of first degree murder, some lesser degree of homicide, or not guilty. The prosecutor's duty to truth embraces both the factual and legal truth.

For recent illustrations of problems encountered by prosecutors in ascertaining the truth, *see* James Sterngold, *Nuclear Scientist Set Free After Plea in Secrets Case*, N.Y. TIMES, Sept. 14, 2000, at A1 (judge accuses prosecution of presenting false and misleading evidence that defendant engaged in conduct that posed threat to national security); Katherine E. Finkelstein, *Prosecutors Detail Evidence Leading to Suspect's Release*, N.Y. TIMES, July 27, 2000, at B3 (noting that despite defendant's confession and two eyewitness identifications, prosecutor claims police arrested wrong man); Kevin Sack & David Firestone, *Tough Times for Prosecutor In an Atlanta Murder Trial*, N.Y. TIMES, June 7, 2000, at A20 (recounting how the prosecution against professional football star Ray Lewis crumbled as witnesses changed stories); Alan Feuer, *Officer's Role in Louima Case Elusive, Even After Verdicts*, N.Y. TIMES, Mar. 8, 2000, at B1 (describing the "frustrating sense that the truth – cold and hard and clean – remains elusive" after two federal trials of three New York City police officers charged with assaulting a prisoner, Abner Louima, and then attempting to cover up their misconduct); *see also* United States v. Volpe, 62 F. Supp. 2d 887 (E.D.N.Y. 1999) (denying motion to set aside verdict in Louima case based on factual insufficiency).

7. *See* Young v. United States, 481 U.S. 787, 813 (1987) ("Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981) ("Giving prosecutors the power to invoke or deny

becoming increasingly clear that the criminal justice system often miscarries, almost always with tragic results.[8] Numerous documented instances of wrongful convictions, particularly in death penalty cases, have heightened concern about the ability of the criminal trial process to produce truthful results.[9] The Governor of Illinois recently called for a moratorium on executions after thirteen men on death row were proven innocent.[10] Of the 6,000 people sent to death row since 1973, eighty-four of them have been exonerated.[11] According to a U.S. Department of Justice report, at least fifty-five defendants who were convicted and incarcerated for lengthy periods have been exonerated by DNA evidence.[12] A

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punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community – racial and ethnic minorities, social outcasts, the poor – will be treated most harshly."). There is a vast amount of scholarship on the prosecutor's exercise of discretion. *See, e.g.*, ABRAHAM GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA (1981); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Charles Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); *see also* Bennett L. Gershman, *A Moral Standard For the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L. J. 513, 513 (1993) ("[N]o subject in criminal law is as elusive as that of prosecutorial discretion in the charging process.").

8. *See, e.g.*, JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (2000) (conducting a massive study of every capital punishment case in U.S. between 1973-1995 that documents that the overall error rate in capital punishment system is 68%, and that 82% of all capital judgments reversed on appeal [247 out of 301] were replaced on retrial with a sentence less than death, or no sentence at all); JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE (2000) (providing a compendium of anecdotal accounts, and legal and social science scholarship, of miscarriages of justice in American criminal trials); *The Death Penalty in 1999; Year End Report*, DEATH PENALTY INFORMATION CENTER 1 (2000) (listing eighty-four inmates on Death Row exonerated since 1973); Marty Rosenbaum, *Inevitable Error: Wrongful New York State Homocide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 809 (1991) (claiming that New York State leads all states in executing the innocent; eight New Yorkers have been executed in error); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36-37, 71 (1987) (claiming that more than 350 people in this century have been erroneously convicted in the U.S. of crimes punishable by death; 116 of those were sentenced to death and twenty-three actually were executed); Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1, 1999, at 68 ("[S]urely the number of innocent people discovered and freed from prison is only a small fraction of those still incarcerated.").

9. *See* Berlow, *supra* note 8. *See also* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 3 (1999) (describing American trial system as structurally flawed by badly overemphasizing winning and losing and undervaluing truth); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95 (1996) (suggesting that trials are just as likely to hide or corrupt truth as to discover truth).

10. *See* Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. Legislation that would halt executions are pending in twelve other states. *Id.*

11. *See The Death Penalty in 1999: Year End Report*, *supra* note 8.

12. *See Recommendations for Handling Applications for Postconviction DNA Testing*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. (Draft Report), at 7 (Feb. 1999) ("[A]t least fifty-five convictions in the United States have been vacated on the basis of DNA results."). *See also* Edward Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. (1996) (evaluating twenty-eight cases in which DNA evidence established post-trial innocence). Congress is presently considering legislation that would mandate free DNA testing on application of a convicted defendant of any biological material in the government's possession related to the prosecution. *See* S. 2073, 106th Cong. (2000). One local District Attorney has begun a policy of offering free DNA testing to prison

recent study reported that convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence suggesting the defendants' innocence or presented evidence they knew to be false.[13] Misidentifications, false confessions, false testimony of informants and jailhouse "snitches," police perjury, and untruthful allegations of child sexual abuse are among the most frequently cited contributors to wrongful convictions.[14]

Curiously, despite extensive documentation of erroneous convictions, widespread prosecutorial abuses that contribute to wrongful convictions, and a plethora of academic literature on the ethical responsibilities of prosecutors,[15] there has been little discussion of the prosecutor's legal and ethical duty to truth.[16] As I hope to demonstrate, the prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth. The courts have explicitly recognized the existence of this duty,[17] and have implicitly recognized

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inmates who claim they were wrongfully convicted and would be exonerated by such testing. *See* James Sterngold, *San Diego District Attorney Offering Free DNA Testing*, N.Y. TIMES, July 28, 2000, at A12.

13. *See* Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10, 1999, at 3.

14. *See* DWYER, NEUFELD & SCHECK, *supra* note 8; Bedau & Radelet, *supra* note 8, at 57 tbl. 6 (listing coerced or false confessions responsible for erroneous convictions in forty-nine out of 350 miscarriages of justice in potentially capital cases); Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2117 n.1 (1996) (claiming that of the thirty child sexual abuse cases that went to trial in the 1980s, more than half of convictions were reversed on appeal for tainted testimony of child witnesses); Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289-92 (1988) (describing a study of more than 200 felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause). The role of prosecutorial misconduct in contributing to miscarriages of justice is also well-documented. *See* LIEBMAN, FAGAN & WEST, *supra* note 8, at 5 (noting that prosecutorial suppression of evidence accounted for 16% to 19% of reversible errors); Armstrong & Possley, *supra* note 13, at 2 (claiming 381 homicide cases were reversed because prosecutors concealed evidence suggesting defendants' innocence or presented evidence known to be false); Rosenbaum. *supra* note 8, at 809 ("[A] substantial number of the wrongful convictions we have found in New York resulted from prosecutorial misconduct."); Bedau & Radelet, *supra* note 8, at 57 (asserting that fifty of the 350 wrongful convictions resulted from prosecutorial suppression of exculpatory evidence or other overzealous prosecution).

A significant contributor to wrongful convictions is the poor quality of defense lawyering. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, 103 YALE L. J. 1835 (1994); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1.

15. A recent Westlaw search turned up 178 law review articles in the last five years about prosecutorial ethics and fourteen law review symposia addressing that subject.

16. *But see supra* notes 3-4 and accompanying text. *See also* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 633 (1998) (inquiring into appropriate standard of proof to guide prosecutors); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 953-57 (discussing attitudes of former federal prosecutors toward truth as "overriding concern" but "elusive"); David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 528-31 (noting failure of Justice Department to assign as a "relevant consideration" in determining whether to enter into plea agreement with defendant the prosecutor's "degree of confidence that the witness will testify honestly," and criticizing academic commentators for largely neglecting discussion of "how prosecutors should exercise the discretion they actually have.").

17. *See infra* note 38.

this duty by reversing convictions when a prosecutor engages in conduct that undermines the search for truth.[18]

The prosecutor's duty to the truth arises from several sources. The most important source is the prosecutor's role as a minister of justice.[19] In this role, the prosecutor has the overriding responsibility not simply to convict the guilty but to protect the innocent.[20] The duty to truth also derives from the prosecutor's constitutional obligation not to use false evidence or to suppress material evidence favorable to the defendant.[21] The duty to truth also arises from various ethical strictures that require prosecutors to have confidence in the truth of the evidence before bringing or maintaining criminal charges.[22] The duty is found as well in the prosecutor's domination of the criminal justice system and his virtual monopoly of the fact-finding process.[23] More than any other party in the criminal justice system, the prosecutor has superior knowledge of the facts that are used to convict the defendant, exclusive control of those facts,[24] and a unique ability to shape the presentation of those facts to the

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18. *See infra* Parts II(A), II(B), and II(C).

19. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("[The prosecutor's] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8, cmt. 1 (1983) [hereinafter MODEL RULES] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) [hereinafter MODEL CODE] ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2(c) (Am. Bar Ass'n 3d ed. 1993) [hereinafter ABA STANDARDS] ("The duty of the prosecutor is to seek justice, not merely to convict.").

20. *See* ABA STANDARDS, *supra* note 19, cmt. at 3-1.2 ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty.").

21. *See infra* Part II(B) and Part II(C).

22. *See infra* notes 164-70 and accompanying text. Some statutes explicitly require that attorneys be truthful. *See, e.g.*, GA. CODE ANN. § 15-19-4 (1982) (noting the duty of attorneys to employ in litigation "such means only as are consistent with truth and never seek to mislead the judges or juries by any artifice or false statements of the law").

23. *See* YALE KAMISAR, WAYNE R. LA FAVE, JEROLD H. ISRAEL, & NANCY KING, MODERN CRIMINAL PROCEDURE 1205 (9th ed. 1999) (describing prosecutor's domination of criminal justice system, including investigative manpower of police, investigative legal authority of grand jury and grand jury's subpoena power, early arrival on scene by police when evidence is fresh, and natural inclination of witnesses to cooperate with police and refuse to cooperate with defense); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 809 (6th ed. 2000) ("[T]he prosecutor has become the most powerful office in the criminal justice system."); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:1 (2D ED. 1999) ("The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution.").

24. Although there is no constitutional right to discovery in a criminal case, *see* Weatherford v. Bursey, 429 U.S. 545, 559 (1977), federal and state discovery statutes allow the defense limited access to information in the prosecutor's possession. *See* FED. R. CRIM. P. 16; N.Y. CRIM. P. L., § 240.20. However, it is commonly recognized that a defendant's access to information in the prosecution's possession is extremely limited. *See* Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal For Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 709-13 (1999) ("Pre-trial discovery in criminal cases is extraordinarily limited."); Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U.L. REV. 651, 652 (1999) ("defendant's criminal discovery is limited").

fact-finder.[25] Finally, the prosecutor, in his role as representative of the government, has a unique power to affect the evaluation of the facts by the fact-finder, who inevitably views the prosecutor as a special guardian and thus a warranter of the facts — an expert who can be trusted to use the facts responsibly.[26]

Part I of this Article discusses the prosecutor's duty to refrain from conduct that impedes the search for truth.[27] A prosecutor may impede the truth-finding process in several ways: (1) distorting the truth by attacking the defendant's character, misleading and misrepresenting facts, and engaging in inflammatory conduct;[28] (2) subverting the truth by making false statements and presenting false evidence;[29] (3) suppressing the truth by failing to disclose potentially truth-enhancing evidence or obstructing defense access to potentially truth-enhancing evidence;[30] and (4) other truth-disserving conduct that exploits defense counsel's misconduct and mistakes[31] and prevents introduction of potentially truth-serving defenses.[32] Part I also discusses the prosecutor's affirmative duty to assist the defense in discovering the truth through discovery rules[33] and by conferring immunity on potentially truthful defense witnesses.[34]

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25. *See infra* notes 198-201 and accompanying text.

26. *See* United States v. Young, 470 U.S. 1, 18-19 (1985) ("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"); *Berger*, 295 U.S. at 88 ("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [to serve justice] which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."); United States v. Modica, 663 F.2d 1173, 1178-79 (2d Cir. 1981) ("The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done . . . [I]t may be difficult for [the jury] to ignore his views, however biased and baseless they may in fact be.").

27. The search for truth is generally regarded as the touchstone for the adversary system. *See* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1372 (1991) ("The theme of accurate adjudication lies at the very heart of the Burger and Rehnquist Courts' vision of constitutional criminal procedure."); Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 4 UTAH L. REV. 799, 804 (1988) ("Simply stated, truth is the sina qua non of justice. If justice is to have meaning beyond that of a hollow shibboleth, it must reflect a wise and fair application of truth."); Gary Goodpaster, *Criminal Law: On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 118 n.1 ("Most adversary system critiques assume that truth-finding is the purpose of the adversary system and challenge it from that point of view."). *But see* Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1134 (1982) ("But if the central goal is truth-seeking, why should the prosecutor, with his greater resources and access to witnesses, not have the responsibility for putting all the evidence on the table, including that which is favorable to the accused?").

28. *See infra* notes 48-56 and accompanying text.

29. *See infra* notes 57-102 and accompanying text.

30. *See infra* notes 103-23 and accompanying text.

31. *See infra* notes 124-35 and accompanying text.

32. *See infra* notes 136-43 and accompanying text.

33. *See infra* notes 144-55 and accompanying text.

34. *See infra* notes 156-61 and accompanying text.

Part II of this Article discusses the source and nature of the prosecutor's duty to prejudge the truth. As explained in Part II, this duty is based on various legal, ethical, and practical considerations that require a prosecutor, in effect, to preempt the jury's determination by making an informal adjudication of the defendant's guilt and the credibility of witnesses.[35] Part II also discusses the methodology used by a prosecutor in making this prejudgment – by examining facts skeptically, rigorously testing the hypothesis of guilt, and having the moral courage to decline prosecution when not personally convinced of the defendant's guilt.[36] Finally, Part II describes how an aggressive commitment to truth, rather than an agnostic approach to truth, will create a prosecutorial culture that is more compatible with the prosecutor's role as a minister of justice.

Part III of the Article concludes that a prosecutor has both a negative duty to refrain from conduct that impedes the search for truth and an affirmative duty to protect and promote the search for truth. A prosecutor who proceeds with a case without being personally convinced of the defendant's guilt violates these duties and creates an unacceptable risk that an innocent person will be convicted.[37]

I. DUTY NOT TO IMPEDE THE TRUTH

The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.[38] That duty has been recognized implicitly in cases where courts have reversed convictions when the prosecutor engaged in

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35. *See infra* notes 162-87 and accompanying text.

36. *See infra* notes 188-226 and accompanying text.

37. *See* FREEDMAN, *supra* note 4, at 88 ("[A] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt.").

38. *See Berger*, 295 U.S. at 88 (noting that a prosecutor has "duty to refrain from improper methods calculated to produce a wrongful conviction"); Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc) (noting that a prosecutor "has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice"), *rev'd on other grounds*, 523 U.S. 538 (1998); United States v. Duke, 50 F.3d 571, 578 n.4 (8th Cir. 1994) (prosecutor has "duty to serve and facilitate the truth-finding function of the courts"); Davis v. Zant, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994) ("prosecutors have a special duty of integrity in their arguments"); United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993) ("lawyers representing the government in criminal cases serve truth and justice first"); United States v. Myerson, 18 F.3d 153, 162 n.10 (2d Cir. 1994) ("the prosecutor has a special duty not to mislead") (quoting United States v. Universita, 298 F.2d 365, 367 (2d Cir. 1962)); Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (prosecutor has "duty not to lie").

By contrast, it is generally agreed that defense counsel's ethical duty to represent his client zealously includes an affirmative duty to impede the search for truth. *See* United States v. Wade, 388 U.S. 218, 256-258 (1967) ("defense counsel has no comparable obligation to ascertain or present the truth . . . . If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.") (White, J., concurring); JAMES KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE? THE MAKING OF A CRIMINAL LAWYER 30 (1983) ("defense attorney's job is to keep the truth from coming out, or to keep the jury from recognizing it if it does."); FREEDMAN, *supra* note 4, at 75 ("[T]here are situations in which it may be proper for the attorney to give the client legal advice even though the attorney has reason to believe that the advice may induce the client to commit perjury."); Goodpaster, *supra* note 27, at 123 n.15 ("Scholars support the

conduct that distorted, subverted, or suppressed the truth. In *Berger v. United States*,[39] the seminal case defining the prosecutor's legal and ethical role as a minister of justice, the Supreme Court implied that the prosecutor's duty to serve justice includes the avoidance of conduct that deliberately corrupts the truth-finding process.[40] The prosecutor's conduct, both in presenting evidence and argument to the jury, was characterized by the Court as an "evil influence" that was "calculated to mislead the jury."[41] The misconduct during the evidence phase included: misstating facts during cross-examination; falsely insinuating that witnesses said things they had not said; representing that witnesses made statements to him personally out of court when no proof of this was offered; pretending that a witness had said something which he had not said and persistently cross-examining him on that basis; and assuming prejudicial facts not in evidence. The prosecutor's closing argument contained remarks that were "intemperate," "undignified," and "misleading,"[42] including assertions of personal knowledge, allusions to unused incriminating evidence, and ridiculing of defense counsel.[43]

The prosecutor's tactics in *Berger* are familiar examples of how a prosecutor can corrupt the fact-finding process. The following sections amplify *Berger*'s critique. They offer a typology of conduct by prosecutors that distort, subvert, suppress, and otherwise impede the search for truth. To the extent that courts view the central function of a criminal trial as deciding the question of the defendant's factual guilt,[44] the courts routinely condemn prosecutors for engaging in conduct that impedes that determination and have reversed convictions when the prosecutor's conduct sufficiently undermined the accuracy

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practitioners' view that the defense attorney's aim is not truth or fairness, but the most favorable outcome possible for his or her client.").

39. 295 U.S. 78 (1935).

40. The Court condemned the prosecutor's commission of "foul blows" that were "calculated to produce a wrongful conviction." *Id.* at 88.

41. *Id.* at 85. The Court reproduced excerpts from the trial record to illustrate the magnitude of the prosecutor's misconduct, and criticized the trial judge for failing to issue a "stern rebuke" or take other "repressive measures." *Id.*

42. *Id.* at 85.

43. Justice Sutherland capped his discussion of the prosecutor's misconduct with this oft-quoted passage on the role of the prosecutor:

> [He] 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.

Berger, 295 U.S. at 88.

44. *See supra* note 27.

of the guilty verdict.[45] On the other hand, courts have tolerated other truth-disserving conduct by prosecutors in order to protect adversarial integrity and prosecutorial discretion.[46] There are also occasions when a prosecutor's duty to the truth includes an affirmative duty to assist a defendant in discovering the truth.[47]

A. DISTORTING THE TRUTH

One way a prosecutor violates the duty to truth is by deliberately distorting the evidence. Prosecutors do this in several ways: attacking a defendant's character without a valid evidentiary purpose; misleading the jury and misrepresenting the facts; and inflaming the passions and prejudices of the jury.

1. ATTACKING DEFENDANT'S CHARACTER

Character proof, as every trial lawyer knows, is one of the most dangerous types of evidence.[48] The capacity of proof of a defendant's criminal past to skew the jury's proper evaluation of the truth has been documented.[49] By insinuating that a defendant's criminal background makes it more likely that he committed the present crime, the prosecutor encourages the jury to find the defendant guilty based on speculative, confusing, and inflammatory considerations.

The danger of this tactic is illustrated in Judge Cardozo's classic opinion in *People v. Zackowitz*.[50] The defendant, a young optician regularly employed with no criminal history, shot a man to death on a Brooklyn street corner who

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45. Truth-impeding misconduct does not necessarily invalidate a guilty verdict. After misconduct has been established, a reviewing court considers the probable impact of the violation on the verdict. The evaluation of prejudice occurs in one of four principal contexts: (1) harmless error analysis for preserved constitutional violations, *see* Chapman v. California, 386 U.S. 18, 24 (1967) (conviction reversed unless prosecutor demonstrates that error harmless beyond reasonable doubt); (2) harmless error analysis for preserved unconstitutional violations, *see* Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) (conviction reversed if defendant demonstrates that error had "substantial influence" on the verdict or leaves one in "grave doubt" whether it had such effect); (3) plain error analysis for both constitutional and unconstitutional violations when the violation was not objected to, *see* United States v. Olano, 507 U.S. 725, 734-35 (1993) (reversal justified only if error is "obvious," "affect[s] substantial rights," and "seriously affect[s] the fairness integrity or public reputation of judicial proceedings."); and (4) collateral review of preserved constitutional violations, *see* Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (unconstitutional *Kotteakos* standard applicable to evaluate constitutional error on habeas corpus review).

46. *See infra* notes 124-43 and accompanying text.

47. *See infra* notes 144-61 and accompanying text.

48. *See* 1 JOHN HENRY WIGMORE, EVIDENCE § 57 (1904) ("The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court.")

49. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160 (1966) (when a defendant's criminal record is known and the prosecution's case has weaknesses, the defendant's chances of acquittal are 38%, compared to 65% otherwise).

50. 172 N.E. 466 (N.Y. 1930).

had insulted his wife. The killing was not disputed. The central question was the defendant's state of mind. From the evidence, the jury was free to choose from a range of culpable mental states. Judge Cardozo explained how the jury's delicate analysis could be (and was) manipulated by prosecutorial overreaching:

> With only the rough and ready tests supplied by their experience of life, the jurors were to look into the workings of another's mind, and discover its capacities and disabilities, its urges and inhibitions, in moments of intense excitement. Delicate enough and subtle is the inquiry, even in the most favorable conditions, with every warping influence excluded. There must be no blurring of the issues by evidence illegally admitted and carrying with it in its admission an appeal to prejudice and passion.[51]

The conviction was reversed because throughout the trial the prosecutor repeatedly sought to portray the defendant as a man of dangerous propensities who, because of those qualities, was more likely to kill with a premeditated design than a man of irreproachable character.[52]

Prosecutors employ a variety of tactics to unfairly impugn a defendant's character.[53] They accomplish this directly through proof of prior criminality,[54] by innuendo during the examination of witnesses about the defendant's crim-

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51. *Id.* at 467.

52. The prosecutor elicited proof that the defendant owned several guns and other weapons, none of which were alleged to have been used in the killing, to suggest that the defendant was a "desperate type of criminal, a criminal affected with a murderous propensity." *Id.* at 468. As in *Zackowitz*, courts are especially sensitive to insinuations of bad character as skewing the fact-finding process, and convictions are often reversed. *See, e.g.*, United States v. Polasek, 162 F.3d 878 (5th Cir. 1998) (prosecutor offers evidence that defendant associated with persons who were convicted of similar fraudulent behavior); United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997) (prosecutor offers evidence of defendant's molestation of stepdaughter); United States v. Sumner, 119 F.3d 658 (8th Cir. 1997) (prior sexual assaults); United States v. Murray, 103 F.3d 310 (3d Cir. 1997) (prior murder); United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996) (prior similar sexual crimes); United States v. Cudlitz, 72 F.3d 992 (1st Cir. 1996) (prior arson); People v. Terry, 728 N.E.2d 669 (Ill. App. Ct. 2000) (prosecutor insinuates that defendant was member of gang that was dealing drugs); Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995) (deviant sexual behavior).

53. This is not to say that evidence of a defendant's criminal past may not be used to prove guilt. Such evidence is often relevant and admissible as an aid in arriving at the truth. Prosecutors have broad leeway to use a defendant's criminal background for a proper purpose, such as impeachment, *see* FED. R. EVID. 608(b), 609, or when relevant to an issue in the case, such as intent, motive, identity, knowledge, opportunity, common scheme or plan, or absence of mistake. *See* FED. R. EVID. 404(b).

54. Common techniques include seeking to impeach the defendant's testimony by asking about prior convictions bearing no relationship to credibility, misrepresenting the nature or seriousness of the convictions, or insinuating that prior guilt is a basis for inferring present guilt. For discussion of the prosecutor's misuse of prior convictions, *see* BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 2-5(c), at 164-66 (1997).

inal past,[55] and by proving that the defendant associates with undesirable persons.[56]

2. MISLEADING AND MISREPRESENTING

Misleading conduct distorts the search for truth by confusing the jury's rational view of the evidence.[57] The potential for a prosecutor to mislead inheres in virtually every phase of the trial, from offering evidence, questioning witnesses, making comments, and presenting arguments.[58] Since the jury is likely to place great trust in the prosecutor as the embodiment of law enforcement, the prosecutor's ability to mislead the jury is greatly enhanced.[59]

Familiar types of misleading conduct include questions that attempt to create in the jurors' minds damaging and prejudicial innuendos without any basis in fact,[60] personal assurances that the witness is telling the truth,[61] allusions to the

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55. Common techniques include eliciting testimony that witnesses identified the defendant from "mug books" in police files, introducing police reports containing the defendant's criminal identification number, proving that the defendant used aliases or variations of his surname to insinuate prior involvement with law enforcement, or eliciting testimony containing the unmistakable inference that the defendant is a prior felon. *See, e.g.,* Dunnigan v. Keane, 972 F. Supp. 709 (W.D.N.Y. 1997) (prosecutor elicits identification testimony from witness who tells jury that he was defendant's parole officer). For discussion of the prosecutor's indirect references to the defendant's character, *see* GERSHMAN, *supra* note 54, § 2-5(d), at 166-67.

56. Prosecutors try to insinuate a defendant's guilt by proving that he associates with other persons who are involved in criminal activity. *See* United States v. Polasek, 162 F.3d 878 (5th Cir. 1998) (prosecutor elicits that defendant who was accused of falsifying odometer readings on vehicle titles had previously done title work for several other car dealers who were subsequently convicted of odometer fraud); People v. Terry, 728 N.E.2d 669 (Ill. App. Ct. 2000) (prosecutor insinuates that defendant was member of gang that was dealing drugs and that shooting occurred on block where there was frequent drug dealing). *See* GERSHMAN, *supra* note 54, § 2-5(b), at 162-64.

57. A prosecutor has "a special duty not to mislead." *See Myerson*, 18 F.3d at 162 n.10 (quoting United States v. Universita, 298 F.2d 365, 367 (2d Cir. 1962)).

58. Misleading conduct is so pervasive that it defies neat categorization. Such conduct can range from using a distorted chart that inaccurately depicts the organization of a drug conspiracy, *see* United States v. Taylor, 210 F.3d 311 (5th Cir. 2000), to "staging" a courtroom identification by coaching witnesses about the seating arrangements in the courtroom, *see* United States v. Oreto, 37 F.3d 739 (1st Cir. 1994), to eliciting on cross-examination that a defense expert had previously testified for the defense in several notorious and highly publicized murder cases, *see* State v. Blasus, 445 N.W.2d 535 (Minn. 1989), to making deliberately false statements to mislead the jury. *See, e.g.,* United States v. Donato, 99 F.3d 426 (D.C. Cir. 1997); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994); *Kojayan*, 8 F.3d 1315; *Walker*, 974 F.2d 293; United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990). For a discussion of a prosecutor's use of false and misleading evidence and misrepresentations, *see generally* GERSHMAN, *supra* note 54, § 2-4, at 143-61.

59. *See supra* note 26.

60. Prosecutors have insinuated without any supporting proof that the defendant has a criminal record, *see* Thompkins v. Cohen, 965 F.2d 330 (7th Cir. 1992), a sordid background, *see* United States v. Hughes, 658 F.2d 317 (5th Cir. 1981), and engaged in criminal conduct similar to the crime presently charged. *See* United States v. Cudlitz, 72 F.3d 992 (1st Cir. 1996). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(2), at 147-48.

61. *See* United States v. Gallardo-Trapero, 185 F.3d 307 (5th Cir. 1999) (prosecutor asks rhetorically whether government agents would risk careers by getting on witness stand and committing perjury); United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275 (3d Cir. 1999) (prosecutor insinuates that he has information confirming that witnesses told the truth); United States v. Francis, 170 F.3d 546 (6th Cir. 1999) (prosecutor insinuates that

validation of a witness's credibility by experts,[62] attempts to bolster a witness's credibility by references to a witness's willingness to take a polygraph test,[63] proof that accomplices or codefendants were convicted,[64] forcing defense witnesses to characterize the testimony of prosecution witnesses as false,[65] references to a witness's prior invocation of a privilege to refuse to testify,[66] and references to withdrawn guilty pleas.[67]

Reversible misconduct also can take the form of comments, questions, and arguments that misleadingly suggest that a defendant's reliance upon his constitutional rights is evidence of guilt. For example, a prosecutor unconstitutionally misleads the jury when he tries to impeach a defendant who has offered at trial an innocent explanation for his conduct by insinuating that the defendant's failure to tell the police the exculpatory account after being given *Miranda* warnings following his arrest suggests that his testimony was a fabrication

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he was not willing to deal with cooperating witness until he believed her story). *See* GERSHMAN, *supra* note 54, § 2-8(c)(1), at 190-91.

62. It is improper to elicit expert testimony that endorses the credibility of the complaining witness, *See* United States v. Charley, 189 F.3d 1251 (10th Cir. 1999) (improper to elicit from pediatrician an unqualified opinion that girls were sexually abused), that expresses an opinion on the defendant's guilt, *see* State v. Leggett, 664 A.2d 271 (Vt. 1995) (opinion that complaining witness was telling the truth), or that the defendant is guilty of abuse. *See* Smith v. State, 674 So.2d 791 (Fla. Dist. Ct. App. 1996) (opinion that defendant is guilty of abuse). *See* GERSHMAN, *supra* note 54, § 5-4(i), at 334-36.

63. It is error to elicit testimony that the defendant failed a lie-detector test, *see* United States v. Brevard, 739 F.2d 180 (4th Cir. 1984), a key witness passed the test, *see* People v. Daniels, 650 N.E.2d 224 (Ill. App. Ct. 1995), a witness was administered the test, *see* State v. Kilpatrick, 578 P.2d 1147 (Kan. Ct. App. 1978), and a witness was willing or unwilling to take the test. *See* United States v. Martino, 648 F.2d 367 (5th Cir. 1981). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(4), at 148-49.

64. *See* United States v. Carraway, 108 F.3d 745 (7th Cir. 1997); *Cudlitz*, 72 F.3d 992; United States v. Blandford, 33 F.3d 685 (6th Cir. 1994); United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993). Courts typically allow prosecutors to introduce testimony of guilty pleas of co-conspirators who testify for the government to explain the context for their cooperation. *See* United States v. Mejia, 82 F.3d 1032 (11th Cir. 1996); United States v. Gambino, 926 F.2d 1355 (3d Cir. 1991). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(6), at 150-51.

65. *See* United States v. Akitoye, 923 F.2d 221, 224 (1st Cir. 1991) ("It is not the place of one witness to draw conclusions about, or cast aspersions upon another witness's veracity. The 'was-the-witness-lying' question framed by the prosecutor in this case was of that stripe. It should never have been posed."). The prejudice is aggravated when a defendant in order to maintain his innocence is forced to characterize the testimony of police officers as lies. United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999); United States v. Fernandez, 145 F.3d 59, 64 (1st Cir. 1998); United States v. Richter, 826 F.2d 206 (2d Cir. 1987). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(7), at 151.

66. Such questions are usually irrelevant, and can distort the jury's evaluation of the witness's credibility by suggesting that the witness was hiding the truth. *See* Grunewald v. United States, 353 U.S. 391 (1957) (improper to ask witness whether he invoked Fifth Amendment privilege before grand jury). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(8), at 151.

67. *See* FED. R. EVID. 410; FED. R. CRIM. P. 11(e)(6). It is usually reversible error for a prosecutor to introduce evidence that a defendant had previously entered and withdrawn a guilty plea in the same case. *See* Standen v. Whitley, 994 F.2d 1417 (9th Cir. 1993). It is improper for a prosecutor to cross-examine a defendant about a previously entered and withdrawn guilty plea. *See* Kercheval v. United States, 274 U.S. 220 (1927). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(5), at 150.

concocted specially for the trial.[68] A prosecutor similarly engages in unconstitutionally misleading behavior when he asks a jury to conclude that a defendant is guilty because he failed to testify.[69] Prosecutors also try to mislead by asking the jury to draw inculpatory conclusions from a defendant's assertion of other rights, such as obtaining an attorney following his arrest,[70] refusing to allow the police to conduct a search,[71] or relying on other rights.[72]

A prosecutor also distorts the jury's analysis of the facts when he deliberately encourages the jury to draw false or exaggerated conclusions by misrepresenting

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68. *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (fundamentally unfair for prosecutors to use a defendant's post-arrest silence after receiving *Miranda* warnings as a basis for impeachment because such silence is "insolubly ambiguous" and it is therefore misleading for a prosecutor to suggest that it shows a guilty mind). However, it is not misleading for a prosecutor to impeach a defendant with his post-arrest silence after the defendant tries to give the jury the impression that he cooperated with the police. *Id.* at 619 n.11. *See, e.g.*, United States v. Reveles, 190 F.3d 678 (5th Cir. 1999) (no violation where prosecutor elicited evidence of defendant's post-arrest silence for purpose of rebutting defendant's claim that he stood ready to cooperate all along). *See also* GERSHMAN, *supra* note 54, § 2-7(a), at 180-83.

69. *See* Griffin v. California, 380 U.S. 609 (1965) (unconstitutionally misleading for prosecutor to ask jury to infer guilt based on defendant's decision not to testify on theory that if defendant was innocent and had nothing to hide he would have testified). Courts closely scrutinize unambiguous references to a defendant's failure to testify. *See, e.g.*, United States v. Hardy, 37 F.3d 753, 757 (1st Cir. 1994) ("They're still running and hiding today. The time has come for them to stop running and stop hiding."). Prosecutors therefore try to suggest the point more subtly, by using words such as "uncontradicted," "unexplained," "undenied," and other rhetorical devices. *See, e.g.*, United States v. Roberts, 119 F.3d 1006, 1015 (1st Cir. 1997) (prosecutor commits "egregious" misconduct by "rhetorical flourishes" designed to focus jury's attention on defendant's failure to testify); United States v. Skandier, 758 F.2d 43, 44 (1st Cir. 1985) (court criticizes U.S. Department of Justice brochure of instructions to United States Attorneys advising that it is proper to tell jury that "evidence is 'uncontradicted' or 'unrefuted' in a nondefense case."). *See also* GERSHMAN, *supra* note 54, § 2-7(b), at 183-84.

70. *See* United States v. McDonald, 620 F.2d 559 (5th Cir. 1980); United States v. Liddy, 509 F.2d 428, 443 (D.C. Cir. 1974); State v. Palenkas, 933 P.2d 1269 (Ariz. Ct. App. 1996); People v. Collins, 528 N.Y.S.2d 41 (N.Y. App. Div. 1988). *See also* GERSHMAN, *supra* note 54, § 2-7(d), at 185-86.

71. *See* United States v. Thame, 846 F.2d 200 (3d Cir. 1988); United States v. Rapanos, 895 F. Supp. 165 (E.D. Mich. 1995), *rev'd*, 115 F.3d 367 (6th Cir. 1997); State v. Palenkas, 933 P.2d 1269 (Ariz. Ct. App. 1996). *But see* United States v. Dozal, 173 F.3d 787, 793 (10th Cir. 1999) (reasoning that the prosecutor properly introduced proof of the defendant's refusal to consent to a search "not to impute guilty knowledge to [defendant], but for the proper purpose of establishing dominion and control over the premises where a large part of the cocaine was found"); United States v. McNatt, 931 F.2d 251 (4th Cir. 1991) (explaining that the prosecutor's comment on the defendant's refusal to consent to a warrantless search of his vehicle was a fair response to the defendant's claim that contraband was planted by police). *See also* GERSHMAN, *supra* note 54, § 2-7(d), at 185-86.

72. *See* State v. Shinn, 704 A.2d 816 (Conn. App. Ct. 1997) (holding that the prosecutor impermissibly burdened the defendant's right to testify by insinuating that the defendant testified only because he believed the government's case was so strong that he had to give the jury a story for otherwise he would have been found guilty); State v. Cassidy, 672 A.2d 899 (Conn. 1996) (holding that the defendant's right of confrontation was violated when the prosecution commented that the defendant's presence at trial allowed him to "doctor up" his testimony after hearing testimony of other witnesses), *overruled by* State v. Alexander, 755 A.2d 868, 874-75 (Conn. 2000) (holding that prosecutor violated no federal constitutional rights by commenting on defendant's presence at trial and accompanying opportunity to fabricate or tailor his testimony). *But see* Portuondo v. Agard, 529 U.S. 61 (2000) (holding that the prosecutor did not violate the federal constitution by arguing to the jury that the defendant's testimony should be disbelieved because his presence at trial gave him unique opportunity to tailor his testimony to that of all the other witnesses).

the evidence,[73] or by alluding to facts claimed to be known by the prosecutor but not revealed during the trial.[74] The potential to mislead is especially enhanced because the prosecutor's prestige and standing as a law enforcement expert make his representations presumptively reliable.[75] Thus, prosecutors have alluded to unproved private conversations with witnesses or the defendant,[76] gratuitously explained why evidence could not be introduced,[77] suggested that facts were already authoritatively determined,[78] and referred to unused inculpatory evidence.[79]

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73. *See, e.g.*, Miller v. Pate, 386 U.S. 1 (1967) (misrepresenting the facts to connect the defendant to the murder of a young girl by arguing that the defendant's undershorts were stained with blood although the prosecutor knew they were actually stained with paint); United States v. Cheska, 202 F.3d 947 (7th Cir. 2000) (explaining that the prosecutor falsely represented that government informant had convicted twenty-three other people); Paxton v. Ward, 199 F.3d 1197 (10th Cir. 1999) (concluding that the prosecutor struck a "foul blow" when he misrepresented that the defendant failed to refute the government's version of events when he knew that the defendant had been officially cleared of charges after he passed a polygraph test). *See also* GERSHMAN, *supra* note 54, §·2-4(d)(2), at 154-55.

74. *See, e.g.*, United States v. Maddox, 156 F.3d 1280 (D.C. Cir. 1998) (describing how the prosecutor told the jury what uncalled witnesses would have said regarding what happened to crucial evidence); State v. Evans, 593 N.W.2d 336 (N.D. 1999) (explaining that the prosecutor bolstered informer's identification by stating, without basis in evidence, that the identification was recorded on tape); State v. Hughes, 969 P.2d 1184 (Ariz. 1998) (stating the prosecutor's argument that the expert changed his opinion after being hired by defense and that another expert fabricated the diagnosis in exchange for money from the defense); Commonwealth v. Kelly, 629 N.E.2d 999 (Mass. 1994) (mentioning the prosecutor's argument that the police officers would not put their pensions on the line by testifying falsely, although there was no evidence to show what impact the false testimony would have on their pensions). Prosecutors occasionally make opening arguments that refer to matters that are not provable or that the prosecutor does not prove. Convictions are reversed when the prejudice is serious and the prosecutor acted in bad faith. *See* United States v. Thomas, 114 F.3d 228, 248-49 (D.C. Cir. 1997)(concluding that the prosecutor's failure to prove an assertion in the opening statement that the defendant committed another murder was severe misconduct and potentially prejudicial but that there was no evidence of bad faith); Alexander v. State, 509 S.E.2d 56 (Ga. 1998) (holding that the prosecutor's false promise in the opening statement to prove a fact without any subsequent attempt to introduce evidence supporting the alleged fact requires a reversal unless the prosecutor makes an affirmative showing of good faith). *See also* GERSHMAN, *supra* note 54, § 2-4(d), at 152-57.

75. *See supra* note 26 and accompanying text.

76. For private conversations with witnesses, *see* United States v. Wiley, 534 F.2d 659 (6th Cir. 1976); United States v. Hoskins, 446 F.2d 564 (9th Cir. 1971). For private conversations with the defendant, *see* United States v. Brown, 699 F.2d 585, 593 (2d Cir. 1983); People v. Vann, 388 N.Y.S.2d 902 (N.Y. App. Div. 1976).

77. *See* United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995) (explaining that the prosecutor made an allusion to evidence that had previously been excluded); People v. Eanes, 350 N.Y.S.2d 718 (N.Y. App. Div. 1973) (stating that the prosecutor explained why a confidential informant could not be found).

78. Prosecutors have been criticized for suggesting that the same evidence produced at trial had previously been presented to a grand jury that returned an indictment, *see* United States v. Lewis, 423 F.2d 457 (8th Cir. 1970), that other trial juries had voted favorably on a witness's credibility, *see Wiley*, 534 F.2d 689, that another trial jury had voted unfavorably on a witness's credibility, *see* United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993), and that if the evidence was insufficient the judge would have dismissed the charges. *See* United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990). *See also* GERSHMAN, *supra* note 54, § 2-4(d)(1), at 152-54.

79. *See* Berger v. United States, 295 U.S. 78, 87 (1935) (explaining that the prosecutor claimed inability to elicit identification proof because "that is the rules of the game, and I have to play within those rules"); Snipes v. United States, 230 F.2d 165 (6th Cir. 1956) (stating that the prosecutor claimed that he could have brought forty counts instead of one count); People v. Emerson, 455 N.E.2d 41, 45 (Ill. 1983) (explaining that the prosecutor stated that "we can't tell you everything [defendant] did after his arrest and he knows it. Maybe when this is over

3. INFLAMMATORY CONDUCT

A prosecutor's appeals to the jury's fears, passions, and prejudices can seriously distort the fact-finding process and produce an erroneous verdict.[80] A jury typically is instructed to analyze facts objectively and not to allow emotional factors to influence its determination. By eliciting inflammatory testimony, presenting gruesome physical evidence, or engaging in unduly impassioned oratory, a prosecutor can manipulate the jury's prejudices and distract them from objectively assessing the proof.[81]

Inflammatory tactics defy neat categorization.[82] Typical instances include namecalling;[83] appeals to law and order;[84] insinuations that the defendant

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I will tell you what he did when he was arrested."); People v. Webb, 417 N.Y.S.2d 92 (N.Y. App. Div. 1979) (stating that the prosecutor asserted that certain witnesses were not called because their testimony would have been repetitive).

Misstatements of law also can lead the jury to draw false conclusions. *See* United States v. Alex Janows & Co., 2 F.3d 716 (7th Cir. 1993) (misstating the law of reasonable doubt); Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990) (misstating the law of presumption of innocence); United States v. Yancy, 688 F.2d 70, 72 (8th Cir. 1982) (misstating the rules of evidence); United States v. Hammond, 642 F.2d 248, 249-50 (8th Cir. 1981) (misstating the law of criminal intent); United States v. Trapnell, 638 F.2d 1016, 1026 (7th Cir. 1980) (misstating the burden of proof); United States v. Berry, 627 F.2d 193, 200 (9th Cir. 1980) (misstating the attorney-client privilege).

Also misleading are prosecutorial comments on the consequences of the jury's verdict. Such comments lessen the jury's sense of responsibility about the seriousness of its verdict. *See* GERSHMAN, *supra*, note 54, § 2-4(d)(3), at 155-57. Prosecutors have referred to potential punishment, *see* Darden v. Wainwright, 477 U.S. 168 (1986) (explaining that the prosecutor told the capital sentencing jury that a life sentence never really means life), the existence of sanctions other than incarceration, *see* Fryson v. State, 301 A.2d 211 (Md. App. 1973) (explaining that the prosecution would place the defendant on probation if found guilty), and the availability of corrective procedures in the event the jury makes a mistake, such as appeals, writs of error, pardons, and executive clemency. *See* Caldwell v. Mississippi, 472 U.S. 320 (1985) (quoting the prosecutor's argument to the capital sentencing jury that any death sentence would be reviewed for correctness by the state supreme court).

80. *See* ABA STANDARDS Standard 3-5.8(c) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.").

81. *See* GERSHMAN, *supra* note 54, § 2-6, at 167-80.

82. *See, e.g.*, United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) (introducing in narcotics trial six photographs depicting graphic evidence of spousal abuse); Territory of Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998) (introducing irrelevant testimony of defendant's reading habits to portray him as a deviant homosexual); United States v. Payne, 2 F.3d 706 (6th Cir. 1993) (referring in postal theft prosecution to the plight of poor children, pregnant women, and diaperless babies; corporate layoffs; and Christmastime); People v. Blue, 724 N.E.2d 920 (Ill. 2000) (displaying the actual bloodied and brain-splattered uniform of a murdered police officer on a headless torso mannequin).

83. *See, e.g.*, Kincade v. Sparkman, 175 F.3d 444, 445 (6th Cir. 1999) (insinuating improperly that the defendant was a "professional burglar"); United States v. Francis, 170 F.3d 546, 552 (6th Cir. 1999) (referring improperly to the defendant as a "liar" and "con man"); United States v. Cannon, 88 F.3d 1495,1502-03 (8th Cir. 1996) (referring to the defendants as "bad people"). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(1), at 170-71.

84. A prosecutor's appeals to law and order distort the fact-finding process by introducing irrelevant, irrational, and inflammatory elements that prevent calm and dispassionate appraisal of the evidence. *See, e.g.*, United States v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997) ("A jury cannot appropriately reason that a particular defendant is guilty based on media reports of rampant drug use coupled with the fact that the defendant is accused of a drug crime. The prosecutor's comment in this case draws upon widespread community fears about drugs, and implies that those fears can or should inform the process of assessing Gainey's guilt. In other words,

threatened witnesses;[85] appeals to racial, ethnic, religious, and national prejudices;[86] appeals to wealth and class biases;[87] and appeals to jurors as parents.[88]

B. SUBVERTING THE TRUTH

In addition to distorting the jury's evaluation of the truth, a prosecutor can subvert the truth through lying outright, presenting false evidence, and allowing false evidence to remain uncorrected.[89] A prosecutor's own false statements are a paradigmatic example of the prosecutor's corruption of the truth-seeking function of a trial.[90] Equally subversive of truth is a prosecu-

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the reference invites the jury to judge the case upon standards and grounds other than the evidence and law of the case, and is thus objectionable and improper."); *Blue*, 724 N.E.2d at 937 (holding that the prosecutor's exhortation to the jury to send a message to all police that the jury supported them, from the "superintendent to the newest rookie," was a transparent play on the jury's sympathy and loyalty to law enforcement). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(2), at 171-73.

85. Insinuating that a witness has been murdered, threatened with harm, or bribed, seriously distorts the fact-finding process by inviting the jury to speculate as to why a witness died, or did not testify, or testified poorly. It also suggests to the jury that the prosecutor's insinuation is based on confidential information in the investigative file that was not introduced in evidence. This type of argument violates ethical rules on several grounds. It "misleads the jury," *see* ABA STANDARDS Standard 3-5.8(b), it constitutes an "argument calculated to inflame the passions and prejudices of the jury," *id.* 3-5.8(c), and it "diverts the jury" by "injecting issues broader than the guilt or innocence of the accused." *Id.* 3-5.8(d). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(3), at 174.

86. Such arguments distort the fact-finding process by appealing to bigotry and base stereotypes. *See, e.g.*, Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000) (discussing the prosecutor's assertion that all Sikh persons are irresistibly predisposed to violence when a family member has been attacked); United States v. Richardson, 161 F.3d 728, 736 (D.C. Cir. 1998) (concluding that the prosecutor's argument that "we don't all look alike" was a blatant use of racial stereotyping to counter the defense counsel's argument on misidentification); *Cannon*, 88 F.3d at 1503 ("[B]y twice calling the African-American defendants 'bad people' and by calling attention to the fact that the Defendants were not locals, the prosecutor gave the jury an improper and convenient hook on which to hang their verdict."); Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987) (indicating that the prosecutor in a highly publicized murder case involving Ruben "Hurricane" Carter argued, without any support in evidence, that killings were racially motivated). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(4), at 175-76.

87. *See, e.g.*, Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990) (faulting the prosecutor for insinuating that the defendant could afford to buy justice through the use of expensive exhibits and multiple defense attorneys); United States v. Stahl, 616 F.2d 30, 32 (2d Cir. 1980) (describing the prosecutor's misleading portrayal of the case involving a businessman charged with bribery as one "about money, tremendous amounts of money" and "Park Avenue offices"). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(7), at 178.

88. The appeal to jurors as parents of young children can seriously distort the fact-finding by suggesting that if the defendant is acquitted, those children might be his next victims. *See* GERSHMAN, *supra* note 54, § 2-6(b)(8), at 178-79.

89. *See* GERSHMAN, *supra* note 54, § 2-4(b), at 144-46.

90. *See, e.g.*, United States v. Donato, 99 F.3d 426 (D.C. Cir. 1996) (falsifying the amount of money that the defendant would have gained from having her car stolen); United States v. Forlorma, 94 F.3d 91 (2d Cir. 1996) (showing that the prosecutor falsely asserted that the suit found in a bag containing heroin fit the defendant); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (explaining that the prosecutor falsely stated that the key government witness had not confessed to the murder); *Kojayan*, 8 F.3d 1315 (prosecutor falsely tells jury that absent witness could have refused to testify); *Walker*, 974 F.2d 293 (prosecutor falsely claims that no line-up had taken place).

tor's deliberate introduction of perjured testimony.[91] In *Mooney v. Holohan*,[92] the Supreme Court held that a prosecutor violated due process when the prosecutor introduced false evidence that a defendant committed a murder. The Court stated: "[D]eliberate deception of court and jury by the presentation of testimony known to be perjured . . . is inconsistent with the rudimentary demands of justice"[93] Truth is corrupted, according to the Court, whether the prosecutor actively solicits the false evidence, or fails to issue a correction after false evidence has been received.[94] Also, truth is corrupted whether the false evidence relates to a substantive issue or solely to a witness's credibility.[95]

Introducing false physical evidence is similarly condemned because it has the same capacity to subvert the fact-finding process. False physical evidence has included paint-stained clothing falsely claimed by a prosecutor to be stained with the victim's blood,[96] a chart falsely depicting the organization of a drug distribution conspiracy,[97] guns falsely linked to an arms smuggling conspiracy,[98] documents falsely purporting to be official records contradicting the defendant's testimony,[99] and other fraudulent physical items.[100]

A prosecutor also subverts the truth-finding process when he takes irreconcilably inconsistent positions to obtain convictions against several defendants for

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91. A prosecutor's use of perjured testimony, although analytically distinct from issues of suppression of evidence, *see infra* notes 103-14 and accompanying text, is frequently discussed as a component of the broader rule of nondisclosure of evidence. *See* United States v. Agurs, 427 U.S. 97, 103 (1976).

92. 294 U.S. 103 (1935).

93. *Id.* at 112. *See* Pyle v. Kansas, 317 U.S. 213 (1942); United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995); United States v. Kelly, 35 F.3d 929 (4th Cir. 1994). *See also* GERSHMAN, *supra* note 54, § 2-4(b), at 144-46.

94. *See* Alcorta v. Texas, 355 U.S. 28, 30 (1957) (indicating that the prosecutor failed to correct witness's false testimony that he was not having affair with the defendant's wife, which allegedly provoked the defendant to kill his wife). A prosecutor's actual awareness of the false testimony is irrelevant if the prosecutor "should have known" about the falsity. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (examining the situation created by the promise of immunity made by a prosecutor in grand jury attributing to the trial prosecutor's unawareness of the promise).

95. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

96. *See* Miller v. Pate, 386 U.S. 1 (1967).

97. *See* United States v. Taylor, 210 F.3d 311 (5th Cir. 2000).

98. *See* United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976).

99. *See* United States v. Steele, 91 F.3d 1046, 1051 (7th Cir. 1996) ("reprehensible" for prosecutor to wave piece of paper while cross-examining witness to falsely suggest that paper was official record contradicting witness's story).

100. *See* McKinnon v. Carr, 103 F.3d 934, 936 (10th Cir. 1996) ("egregiously improper" for prosecutor in rape case to display to jury pair of handcuffs having no connection to case); People v. Canada, 550 N.Y.S.2d 392 (N.Y. App. Div. 1990) (prosecutor seeks to introduce hammer into evidence even though he knew it had nothing to do with case).

the same crime,[101] or changes the theory of the prosecution in the middle of the trial.[102]

C. SUPPRESSING THE TRUTH

Because of early access to crime scenes and other evidence and superior investigative resources,[103] prosecutors have a unique ability to acquire evidence that may be inconsistent with the prosecutor's theory of the case or favorable to the defense.[104] To the extent that a prosecutor has exclusive knowledge and control of such evidence, the prosecutor can obstruct the defendant's access to it and thereby impede the discovery of the truth.[105] For this reason, courts have condemned the prosecutor's suppression of materially favorable evidence, or obstruction of defense access to potentially exculpatory evidence.[106]

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101. *See* Jacobs v. Scott, 513 U.S. 1067 (1995) (finding violation of due process for prosecutor to take inconsistent positions on defendant's role as killer) (Stevens, J., dissenting from denial of certiorari); Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000) (finding a violation of due process for prosecutor to maintain irreconcilably inconsistent theories to secure convictions against two defendants in prosecutions for same offenses arising out of same event); Thompson v. Calderon, 109 F.3d 1358 (9th Cir. 1996) (stating that a prosecutor is forbidden to pursue wholly inconsistent theories of a case at separate trials), *rev'd on other grounds*, 523 U.S. 538 (1998).

102. *See* People v. Calandra, 565 N.Y.S.2d 467 (N.Y. App. Div. 1991) (prosecutor's mid-trial change in theory of the prosecution deprived defendant of due process requirement of fair notice of charges).

103. *See supra* notes 23-25 and accompanying text.

104. The prosecutor's monopoly of information presupposes that police investigators record fully and accurately the information they acquire, and then reveal that information to the prosecutor. To be sure, a prosecutor, "has a duty to learn any favorable evidence known to others acting on the government's behalf in the case, including the police." *See* Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). Nevertheless, there is no correlative duty on the part of the police to impart such information to the prosecutor. *See* Stanley Z. Fisher, *"Just the Facts, Ma'am:" Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. ENG. L. REV. 1, 53 (1993) (maintaining that police operate independently of prosecutors, answer to different constituencies, and may not reveal to prosecutors exculpatory information). *See also* Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 FORDHAM L. REV. 1379 (2000) (proposing amendments to ethics codes to require prosecutors to learn of exculpatory evidence known to police and to provide guidance on implementing responsibility). Needless to say, even the most scrupulous prosecutorial oversight of police record-keeping will fail to uncover police misconduct in framing innocent suspects. *See* Matt Lait & Scott Glover, *Rampart Case Takes on Momentum of Its Own*, L.A. TIMES, Dec. 31, 1999, at A1 (describing police scandal involving fabrication of evidence and framing of innocent suspects).

105. A prosecutor's duty to truth is the same whether he subverts truth by introducing false testimony or other evidence, *see supra* notes 89-102 and accompanying text, or whether he impedes the discovery of truth by preventing the defendant's access to favorable evidence. *See* Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1151 (1982) ("In terms of truth-seeking, there is frequently no real difference between the jury's hearing perjury and its failing to hear significant favorable evidence.").

106. *See* GERSHMAN, *supra* note 23, at §§ 5:1-5:21. The prosecutor's suppression of evidence is among the principal causes of wrongful convictions. *See supra* note 14.

1. NONDISCLOSURE OF POTENTIALLY TRUTH-ENHANCING EVIDENCE

A prosecutor has a constitutional and ethical duty to disclose favorable evidence to the defense that has the potential to illuminate the truth.[107] The constitutional duty was enunciated in *Brady v. Maryland*.[108] The ethical duty requires a prosecutor to make timely disclosure to the defense of all evidence or information that tends to negate the guilt of the accused or mitigate the offense or sentence.[109] The prosecutor's constitutional duty has been interpreted by the courts more narrowly than its ethical counterpart, and consequently affords prosecutors greater leeway to suppress evidence without legal accountability.[110] Under the constitutional rule, a prosecutor is obligated to disclose only evidence that is materially favorable to the defense, meaning evidence whose suppression would seriously impede the search for truth.[111] Moreover, under the constitutional rule, the evidence must be admissible; favorable information that is not admissible ordinarily is not disclosable.[112] Additionally, under the constitutional rule, a prosecutor can safely avoid disclosure if the evidence is cumulative of evidence already disclosed.[113] Finally, a defendant's knowledge of the undisclosed evidence, or ability with reasonable diligence to acquire such evidence, usually relieves the prosecutor of his obligation.[114]

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107. Nonconstitutional discovery rules also impose on prosecutors disclosure obligations independent of the duty under *Brady*. By denying access to potentially truthful evidence through violations of discovery rules, a prosecutor can similarly interfere with the search for truth. *See* GERSHMAN, *supra* note 106, at § 5:22.

108. 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.").

109. *See* MODEL RULES Rule 3.8(d); MODEL CODE EC 7-13(3); ABA STANDARDS Standard 3-3.11.

110. Professional discipline of prosecutors for suppression of evidence is so infrequently invoked that it rarely functions as a credible and meaningful deterrent to misconduct. *See* Armstrong & Possley, *supra* note 13, at 3; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

111. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (nondisclosed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). *See also* Kyles v. Whitley, 514 U.S. 419, 435 (1995) (amplifying *Bagley* standard, stating that the question is not whether the defendant would more likely than not have received a different verdict with the evidence but whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

112. *See* Wood v. Bartholomew, 516 U.S. 1, 5 (1995) (polygraph evidence showing that key prosecution witness lied would not have been admissible and therefore prosecutor not required to disclose information under *Brady*). *But see* Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999) ("inadmissible evidence may be material if the evidence would have led to admissible evidence."); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999) (determining proffers and statements made by accomplice witness while negotiating plea agreement to fall within *Brady* rule as long as information "would have led to admissible evidence.").

113. *See* United States v. Avellino, 136 F.3d 249, 257 (2d Cir. 1998) (deeming undisclosed items of impeachment evidence aimed at government's key witness cumulative and non-material when defendant's character already effectively attacked).

114. *See* Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000) ("no suppression if defendant could have learned of the information through reasonable diligence . . . [n]or can there be suppression when the defendant and the State have equal access to the information."). The extent to which information possessed by other

2. OBSTRUCTING ACCESS TO POTENTIALLY TRUTH-ENHANCING EVIDENCE

Because of the prosecutor's control of the evidence,[115] he has the ability to thwart a defendant's ability to learn about favorable witnesses, or to locate and call such witnesses once they are known.[116] Denying access to potentially favorable witnesses may violate not only the defendant's general due process right to a fair trial but the more specific guarantee contained in the Sixth Amendment's right to compulsory process.[117]

A prosecutor can interfere with a defendant's right to present witnesses in various ways: deporting illegal aliens before a defendant has had the opportunity to interview them;[118] hiding witnesses and frustrating defense attempts to locate them;[119] instructing witnesses not to talk to defense counsel;[120] and threatening defense witnesses with perjury or other substantive crimes if they testify.[121] Prosecutors who have engaged in such conduct have compounded the obstruction

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governmental officials is imputed to the prosecutor is unsettled. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (information possessed by one prosecutor in office imputed to all other prosecutors); United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996) (information possessed by police officers who investigated case imputed to prosecutor); United States v. Wood, 57 F.3d 733, 738 (9th Cir. 1995) (information possessed by other government agencies involved in investigation imputed to prosecutor). *But see* United States v. Morris, 80 F.3d 1151 (7th Cir. 1996) (prosecutor not charged with knowledge of information in possession of government agencies that are not investigative arms of prosecutor and have not participated in investigation); United States v. Moore, 949 F.2d 68 (2d Cir. 1991) (prosecutor not responsible for information possessed by investigative agencies of other jurisdictions, even though such agencies might be part of joint task force investigating same criminal activity).

115. *See supra* notes 23-25 and accompanying text.

116. Aside from denying defense access to witnesses, a prosecutor can also deny access to evidence by failing to preserve potentially exculpatory evidence. Typical examples of unpreserved evidence include erased videotapes, crime scene evidence, clothing worn by the defendant, blood, sperm, and urine samples, and destroyed handwritten notes of police interviews with witnesses. *See* GERSHMAN, *supra* note 54, § 2-2(c), at 131-33.

117. *See* Alan Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974) (arguing that rule of *Brady v. Maryland* is grounded less on general notions of due process fairness than on Sixth Amendment right to compulsory process to obtain exculpatory witnesses). *See also* GERSHMAN, *supra* note 54, § 2-3, at 133-43.

118. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (although prosecutor caused witnesses to be deported before defense counsel had opportunity to interview them, no due process violation shown unless defendant makes "plausible showing" that testimony of deported witnesses would have been "favorable," "material," and "not cumulative," or that prosecutor's conduct in removing witnesses from country was deliberately undertaken to deprive defense of opportunity to interview him).

119. *See* United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999) (prosecutor, in violation of court order, intentionally misleads court and defense counsel concerning knowledge of witness's whereabouts); People v. Avery, 377 N.E.2d 1271 (Ill. App. Ct. 1978) (prosecutor holds witness in custody instead of allowing him to speak to defense counsel).

120. *See* ABA STANDARDS Standard 3-3.1(d) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give."). Convictions have been reversed because prosecutors instructed witnesses not to talk to defense counsel. *See* Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); State v. Burri, 550 P.2d 507 (Wash. 1976); State v. Hammler, 312 So.2d 306 (La. 1975); State v. Harr, 194 S.E.2d 652 (W. Va. 1973).

121. *See* United States v. Golding, 168 F.3d 700 (4th Cir. 1999) (prosecutor threatens to charge witness with weapons possession if he testified); United States v. Vavages, 151 F.3d 1185 (9th Cir. 1998) (prosecutor

to a witness's potentially truth-enhancing testimony by advising the jury that the witness's absence indicates the falsity of the defendant's story,[122] or by calling the jury's attention to the defendant's failure to present exculpatory witnesses.[123]

D. OTHER TRUTH-DISSERVING CONDUCT

Thus far, we have examined a prosecutor's duty to truth in the context of prosecutorial conduct that deliberately impedes the search for truth without any countervailing governmental interest except a desire to win the case. There are other occasions, however, when a prosecutor engages in what appears to be adversarially correct behavior that nonetheless impedes the search for truth.[124] As examples, a prosecutor is allowed to some extent to exploit defense counsel's misconduct and mistakes, and to make legally proper objections to the defendant's presentation of potentially truth-enhancing evidence. The prosecutor's conduct, although adversarially correct, may seriously impede the search for truth.[125]

1. EXPLOITING DEFENSE COUNSEL'S MISCONDUCT AND MISTAKES

There is no clear legal or ethical duty on the part of a prosecutor to assist defense counsel to perform effectively.[126] There are occasions when a prosecutor, in responding to defense counsel's misconduct, or seeking to take advantage of defense counsel's mistakes, may vindicate the interest in adversarialness at the expense of truth.

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threatens to withhold favorable plea bargain if witness testified); State v. Finley, 998 P.2d 95 (Kan. 2000) (prosecutor threatens to charge defendant's girlfriend with felony murder if she testified on defendant's behalf).

122. *See Golding*, 168 F.3d 700 (prosecutor drives witness off stand by threats and then argues that witness's absence indicates falsity of defendant's story).

123. *See Vavages*, 151 F.3d 1185 (prosecutor drives alibi witness off stand by threats of perjury charges and then emphasizes in closing argument defendant's failure to present any witnesses except his small children to support his alibi defense).

124. The adversary trial is the commonly accepted device for discovering the truth. *See supra* note 27.

125. A recent television documentary described how some prosecutors refuse to allow new testing of DNA evidence, even in situations where there exists compelling evidence of the defendant's innocence and the strong probability that DNA testing could prove his innocence. Although the prosecutor's conduct is technically correct from an adversarial standpoint, the conduct is subject to criticism as inconsistent with the prosecutor's role as a minister of justice. *See* FRONTLINE, *The Case for Innocence*, PBS Productions, Jan. 10, 2000. Congress is considering legislation that would require courts to order free DNA testing at a defendant's request despite a prosecutor's objection. *See supra* note 12.

126. *But see* FREEDMAN, *supra* note 4, at 88-89 (arguing that prosecutor has ethical duty to advise court when defendant is denied effective assistance of counsel, as well as duty not to deliberately take advantage of incompetent defense lawyering); Zacharias, *supra* note 4, at 68-74 (suggesting possible prosecutorial options, including prosecuting less effectively, introducing favorable testimony on the defendant's behalf, and encouraging defense counsel "to shore up his performance."). A prosecutor for tactical reasons may decide to assist defense counsel not as an aid in discovering truth but in order to protect his case against a post-conviction claim by the defendant that his counsel was constitutionally ineffective.

Under the "fair reply" or "invited response" doctrines, a prosecutor is allowed to respond to improper conduct by defense counsel in order to equalize the positions of both sides and remedy unethical defense behavior.[127] Although truth may be impeded when a prosecutor attempts to "fight fire with fire," courts typically preserve adversarial fairness by allowing prosecutors considerable leeway to retaliate.[128] But while prosecutors may appropriately neutralize improper defense conduct, courts usually draw the line when prosecutors attempt to rely on the misconduct as a springboard to launch affirmative attacks upon the defendant.[129] Such attacks often take the form of character attacks, distortions of the truth, and inflammatory conduct.[130]

The extent to which a prosecutor should be allowed to exploit defense mistakes, as opposed to deliberate defense misconduct, is less clear. Opening the door to a damaging response is one of the risks of trial litigation. Courts usually allow prosecutors an opportunity to respond when the defense opens the door to a sensitive area.[131] However, courts also find misconduct when the prosecutor's response goes too far and seriously endangers fact-finding accuracy. For example, in *Berryman v. Morton*,[132] a robbery prosecution, defense counsel sought to demonstrate that the police investigation was not thorough by asking the lead detective on cross-examination why he did not try to locate the defendant

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127. *See* United States v. Young, 470 U.S. 1, 11 (1985); United States v. Tasto, 586 F.2d 1068 (5th Cir. 1978); Reynolds v. State, 505 S.W.2d 265 (Tex. Crim. App. 1974).

128. *See* United States v. Robinson, 485 U.S. 25, 32 (1988) (prosecutor's explicit reference to defendant's failure to testify not improper since it was a "fair response" to defense counsel's argument that the government would not let defendant tell his side of the story); Darden v. Wainwright, 477 U.S. 168, 182-83 (1986) ("the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole"; although Darden's trial was "not perfect," neither was it "fundamentally unfair"); *Young*, 470 U.S. at 12, 17, 19 (although not condoning prosecutor's improper response to defense counsel's argument, Court advises lower courts to examine prosecutor's conduct in context, including defense counsel's "opening salvo," the jury's "understanding" of the prosecutor's responsive purpose, and the evidence of guilt).

129. Some courts have interpreted *Young's* discussion of the invited error doctrine to mean that a prosecutor may neutralize improper defense arguments but may not rely on them as a springboard to launch affirmative attacks upon the defendant. *See* United States v. Morgan, 113 F.3d 85 (7th Cir. 1997); United States v. Josleyn, 99 F.3d 1182 (1st Cir. 1996); United States v. Molina-Guevara, 96 F.3d 698 (3d Cir. 1996).

130. *See, e.g.* United States v. Collicott, 92 F.3d 973 (9th Cir. 1996) (defense opens door by improperly impeaching witness with prior consistent statements but prosecutor's response constituted damaging character attack that went well beyond simply meeting impeachment); United States v. Tham, 665 F.2d 855 (9th Cir. 1981) (defense counsel opens door to circumstances of defendant's prior acquittal but prosecutor improperly responds by insinuating that acquittal resulted from corruption); Middleton v. United States, 401 A.2d 109 (D.C. 1979) (prosecutor uses redirect examination to respond to defense counsel's improper insinuation by engaging in gratuitously inflammatory conduct).

131. *See* Brown v. United States, 356 U.S. 148, 157 (1958) ("[B]y her direct testimony [defendant] had opened herself to cross-examination on the matters relevantly raised by that testimony"); United States *ex rel.* Walker v. Follette, 311 F. Supp. 490, 495 (S.D.N.Y. 1970) ("where as a matter of trial strategy a defendant himself decides to open up a sensitive area – whether because he hopes to draw the sting out of the prosecution's case or because he mistakenly believes he has nothing to fear – he cannot expect the same measure of protection from cross-examination as when the prosecution initiates the inquiry.").

132. 100 F.3d 1089 (3d Cir. 1996).

earlier. Seizing the opportunity, the prosecutor elicited on redirect examination that the reason for the detective's inaction was that the defendant was the principal suspect in a separate homicide-robbery investigation.[133] The prosecutor could have corrected defense counsel's false insinuation that the investigation was not thorough in a much less inflammatory fashion.[134] In addition, rather than exploiting defense counsel's imprudent conduct, a responsible prosecutor might have alerted defense counsel or the court to the problem so that gratuitous damage to the truth could have been avoided.[135]

2. OBJECTING TO POTENTIALLY TRUTH-SERVING EVIDENCE

Prosecutors routinely object to alibi evidence where no advance notice has been given,[136] evidence of a rape victim's prior sexual history where no advance notice has been given,[137] and other evidence that although factually relevant is legally incompetent.[138] In contrast to a prosecutor's adversarial conduct that deliberately and unjustifiably impedes the search for truth, the prosecutor's conduct in seeking to exclude potentially truth-enhancing evidence based on a technically correct procedural or substantive ground is

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133. *Id.* The trial court declared a mistrial.

134. The prosecutor could have elicited from the witness the existence of an ongoing investigation, without going into the precise subject matter.

135. Prosecutors have also been criticized for enforcing procedural default rules to prevent defense counsel from raising meritorious claims that counsel through neglect failed to preserve. Such failures by defense counsel are often highlighted in death penalty litigation. The prosecutor's refusal to waive procedural dereliction, while legally correct, is ethically questionable when there exists a serious and potentially meritorious constitutional issue relevant to the defendant's guilt or punishment. *See* Bright, *supra* note 14, at 1872-77.

136. *See* Taylor v. Illinois, 484 U.S. 400 (1988) (courts may exclude alibi testimony as a sanction for willful noncompliance with discovery rules). A prosecutor's objection to alibi evidence for defense counsel's willful noncompliance with discovery rules is more justified than seeking preclusion for defense counsel's innocent noncompliance, particularly when alternative remedies are adequate to protect the government's interests. *See id.* at 413 (preclusion may be abuse of discretion when alternative remedies are "adequate and appropriate"). For cases suggesting that preclusion should not be ordered when defense counsel's discovery violation was not in bad faith, *see* Anderson v. Groose, 100 F.3d 543, 547 (8th Cir. 1996); United States v. Levy-Cordero, 67 F.3d 1002 (1st Cir. 1995); Bowling v. Vose, 3 F.3d 559 (1st Cir. 1993). *But see* United States v. Portella, 167 F.3d 687, 705 n.16 (1st Cir. 1999) (court suggests that preclusion of evidence justified even in absence of willful misconduct); Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995) (no abuse of discretion to preclude defense from calling witnesses for non-willful violation of discovery order); United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992) (bad faith "an important factor but not a prerequisite to exclusion"). *See* GERSHMAN, *supra* note 54, § 5-3(d), at 320-22.

137. *See* Michigan v. Lucas, 500 U.S. 145 (1991) (permissible to exclude evidence based on defense counsel's violation of discovery rule); United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997) (prosecutor's objection to defense use of arguably relevant evidence of past sexual conduct upheld for defense counsel's failure to give timely notice).

138. *See* Green v. Georgia, 442 U.S. 95, 97 (1979) (violation of due process where prosecutor objected at capital sentencing proceeding on hearsay ground to introduction by defendant of witness's exculpatory out-of-court statement, despite "substantial reasons existed to assume [the statement's] reliability," and despite fact that prosecutor considered witness sufficiently reliable to use his testimony to secure death sentence against co-defendant).

legally justified. However, to the extent that a prosecutor also occupies the quasi-judicial role of a minister of justice, his invoking procedural or evidentiary rules to bar potentially relevant evidence is less clear. The issue has received scant commentary. Indeed, cases that discuss the prosecutor's effort to exclude potentially truth-promoting evidence address exclusively the defendant's constitutional right to present a defense.

Thus, in several decisions of the Supreme Court, the prosecutor's invocation of procedural or evidentiary rules to prevent the introduction of potentially exculpatory evidence, although adversarial correct, resulted in a violation of the defendant's constitutional right to fair trial.[139] In *Chambers v. Mississippi*,[140] for example, due process was violated when the prosecutor relied on state evidentiary rules to prevent the defense from introducing compelling proof that another person was guilty of the murder. In *Rock v. Arkansas*,[141] the Sixth Amendment was violated when the prosecutor relied on a state evidence rule to prevent the defendant from giving testimony in her own behalf. And in *Washington v. Texas*,[142] the Sixth Amendment was violated when the prosecutor relied on a state evidentiary rule to prevent one co-defendant from testifying for another defendant.[143]

E. ASSISTING THE DEFENSE IN DISCOVERING THE TRUTH

Quite apart from the negative duty to avoid truth-disserving conduct discussed above, there is the more difficult question of the prosecutor's affirmative duty to advance the search for truth. Does a prosecutor have an obligation to assist a defendant in testing the authenticity of the evidence that the prosecutor plans to use against him? Or, does the prosecutor have an obligation to grant immunity to

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139. This is not to suggest that the prosecutor's conduct is ethically improper. The point, simply, is that the prosecutor's conduct as an advocate disserves the search for truth. This is merely another way of critiquing the role of the adversary system as an effective device to discover the truth.

140. 410 U.S. 284 (1973).

141. 483 U.S. 44 (1987).

142. 388 U.S. 14 (1967).

143. For a more troubling instance of a prosecutor's invocation of rules of evidence to prevent the introduction of arguably relevant proof, *see* United States v. Scheffer, 523 U.S. 303 (1998), where the Supreme Court upheld the exclusion of polygraph evidence that the defense sought to admit to demonstrate the defendant's truthfulness. The prosecutor objected to the admission of the evidence at trial, after he suggested that the defendant submit to a polygraph test to verify his claim of innocence and made the arrangements for the administration of the test. And although the defendant passed the test, the prosecutor argued to the jury that the defendant was a liar. *See* United States v. Scheffer, 44 M.J. 442, 444 (C.A.A.F. 1996) ("He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him."). Moreover, as noted by Justice Stevens in dissent, the prosecutor's contention that polygraph evidence is notoriously unreliable is inconsistent with the government's extensive use of polygraphs to make vital security determinations. *Scheffer*, 523 U.S. at 324 (1998) ("The military has administered hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions.") (Stevens, J., dissenting).

defense witnesses who have potentially material testimony to offer but refuse to testify on grounds of self-incrimination?

1. ASSISTING THE DEFENSE IN OBTAINING EXCULPATORY EVIDENCE

Although a defendant has no right to embark on an investigative fishing expedition,[144] several courts have recognized an obligation on a prosecutor to allow a defendant to test the authenticity of the prosecution's evidence against him.[145] The rationale for this duty has been grounded on the *Brady* doctrine, on the theory that depriving a defendant of access to evidence that might establish his innocence is just as much a suppression as if the exculpatory evidence existed and was suppressed;[146] on fundamental fairness, which forbids a prosecutor from denying a defendant the means necessary to conduct an effective defense and to cross-examine witnesses against him;[147] and on a reciprocal discovery rule, under which a defendant should be allowed the same opportunity to determine the probative value of the prosecution's evidence against him as a prosecutor has in determining its inculpatory character.[148] As a unanimous Supreme Court said in *Wardius v. Oregon,*[149] declaring unconstitutional a state alibi statute that made no provision for reciprocal discovery for the defendant:

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser . . . . We do not suggest that the Due Process Clause of its own force requires Oregon to adopt [discovery] provisions. But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.

In line with these principles, courts have required prosecutors to permit a defendant access to evidence for inspection and testing[150] (and to allow other investigative procedures, such as a line-up[151]) where the defendant shows that the

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144. United States v. Agurs, 427 U.S. 97, 111 (1976).

145. *See* Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975); People v. White, 358 N.E.2d 1031 (N.Y. 1976); Warren v. State, 288 So.2d 826 (Ala. 1973).

146. *See Henderson*, 514 F.2d 744; State v. Koennecke, 545 P.2d 127 (Or. 1976).

147. *See* State v. Boettcher, 338 So.2d 1356 (La. 1976); *Warren*, 288 So.2d 826.

148. *See* Evans v. Superior Court, 522 P.2d 681 (Cal. 1974).

149. 412 U.S. 470, 474-75 (1973).

150. *See Henderson*, 514 F.2d 744 (permitting ballistics tests of murder weapon and bullet); *White*, 358 N.E.2d 1031 (permitting chemical tests of narcotics). *But see* People v. Bell, 253 N.W.2d 726 (Mich. Ct. App. 1977) (no due process right to conduct independent scientific examination of evidence).

151. *See* United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970); Berryman v. United States, 378 A.2d 1317 (D.C. 1977); *Boettcher*, 338 So.2d 1356; *Evans*, 522 P.2d 681. There is no constitutional right to a line-up. *See* United States v. Kennedy, 450 F.2d 1089 (9th Cir. 1971); People v. Calinda, 372 N.Y.S.2d 479 (N.Y. Sup. Ct. 1975).

evidence is material to the outcome of the case and a reasonable likelihood exists that the results will be favorable. Thus, when the outcome of a narcotics prosecution depends upon the identification of a prohibited substance whose nature is subject to differing expert opinions, courts ordinarily permit a defendant, with appropriate safeguards, to test the substance for weight and composition.[152] Similarly, courts will order a prosecutor to permit an independent ballistics examination by a defendant's expert when the defendant can show that items of evidence such as a weapon or bullets are material to the case and that his own examination is necessary to refute the prosecution's expert.[153] Courts have also required prosecutors to provide the defense with other investigative assistance, such as the opportunity to conduct a psychiatric examination of prosecution witnesses,[154] or to aid in locating informants who might provide favorable evidence to the defendant.[155]

2. REFUSING TO IMMUNIZE POTENTIALLY TRUTHFUL DEFENSE WITNESSES

Prosecutors have broad authority to grant immunity to witnesses in exchange for their truthful testimony, and the prosecutor's discretion in using that power is virtually unfettered.[156] The power can be abused, particularly when its use has the effect of seriously distorting the truth-finding process.[157] The prosecutor's immunity-granting power can undermine the search for truth when the defense

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152. *See White*, 358 N.E.2d 1031; *Warren*, 288 So.2d 826.

153. *See Henderson*, 514 F.2d 744; *Koennecke*, 545 P.2d 127.

154. *See* Ballard v. Superior Court of San Diego County, 410 P.2d 838 (Cal. 1966).

155. *See* United States v. Fischel, 686 F.2d 1082 (5th Cir. 1982); People v. Goliday, 505 P.2d 537 (Cal. 1973).

156. Statutes typically authorize a prosecutor's formal grant of immunity to a witness. *See, e.g.*, 18 U.S.C. §§ 6002, 6003 (2000); N.Y. CRIM. P. L. § 50.20. Absent statutory authority, prosecutors have no inherent authority to grant witnesses immunity from prosecution. *See* Munn v. McKelvey, 733 S.W.2d 765, 769 (Mo. 1987) ("[T]he general rule is that a prosecutor is not empowered, solely by virtue of his office, to confer immunity upon a witness."). Immunity is the quid pro quo to compel a witness to answer questions. *See* United States v. Mandujano, 425 U.S. 564 (1976). For Independent Counsel Kenneth Starr's controversial use of immunity, *see* Sklansky, *supra* note 16; David Stout, *Starr Drops All Charges Against Two Women*, N.Y. TIMES, May 26, 1999, at A28.

The extent to which prosecutors may offer other benefits to witnesses in exchange for their testimony has generated considerable attention in the courts and the media. In *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), a panel of the Tenth Circuit found that by entering into such deals, federal prosecutors violated 18 U.S.C. § 201(c)(2), the federal anti-gratuity statute, by "offer[ing] or promis[ing] anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial." Some courts followed the panel's decision. *See, e.g.*, United States v. Lowery, 15 F. Supp.2d 1348 (S.D. Fla. 1998) (finding violation of statute and ordering suppression of witness's testimony). Most courts considering the question strongly disagreed with *Singleton*. *See* United States v. Haese, 162 F.3d 359 (5th Cir. 1998); United States v. Ware, 161 F.3d 414 (6th Cir. 1998). The Tenth Circuit, upon rehearing *en banc*, reversed the panel decision, finding that to apply the statute to the U.S. government acting in its sovereign capacity would be "patently absurd." *See* United States v. Singleton, 165 F.3d 1297, 1300 (10th Cir. 1999) (en banc).

157. *See* United States v. Westerdahl, 945 F.2d 1083 (9th Cir. 1991); Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979); People v. Chin, 490 N.E.2d 505 (N.Y. 1986). *See also* United States v. LaCoste, 721 F.2d 984, 987 (5th Cir. 1983) ("reprehensible

wishes to call a witness who has potentially important testimony to offer but refuses to testify on grounds of self-incrimination, but who asserts that he will testify under a grant of immunity. Although courts typically defer to the prosecutor's refusal, there may be exceptional situations when a prosecutor has a duty to grant immunity.

Where a defense witness is available to testify and the proffered testimony is material, clearly exculpatory, not cumulative, and not available from any other source, some courts balance the prosecutor's interest in maintaining control of his immunity-granting power against the defendant's due process interest in a fair trial and avoiding a wrongful conviction.[158]

Additionally, a prosecutor's one-sided and discriminatory use of the immunity-granting power may so distort the fact-finding process as to require granting immunity to defense witnesses. This suggestion of reciprocal immunity might arise if the prosecutor built his case by securing the testimony of one eyewitness to a crime by granting him immunity but then declining to confer immunity on another eyewitness whose testimony would be favorable to a defense.[159]

Finally, immunity has been used to remedy a prosecutor's distortion of the fact-finding process by threatening to bring criminal charges against witnesses if they testify for the defense. Although it may be difficult to determine whether a prosecutor is acting permissibly or not when he warns potential defense witnesses of the consequences of their testimony,[160] prosecutors may act at their peril when they issue warnings that serve no valid law enforcement purpose other than to disable the defense from securing favorable evidence to prove the truth of the defense.[161]

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conduct" for prosecutor to refuse to stipulate to conversation with potential defense witness who refused to testify).

158. *See* United States v. Chitty, 760 F.2d 425 (2d Cir. 1985) (holding that due process requires granting of immunity to defense witnesses to safeguard defendant's right to essential exculpatory testimony and right to compulsory process); United States v. Turkish, 623 F.2d 769, 778-79 (2d Cir. 1980) (balancing prosecutor's refusal to present claim that witness a potential defendant against defendant's claim that testimony from witness is clearly material, exculpatory, and not cumulative); *Virgin Islands*, 615 F.2d 964 (judicial immunity available when immunity properly sought, witness is available to testify, proffered testimony is both essential and clearly exculpatory, and no strong governmental interests countervail against an immunity grant). *See also* GERSHMAN, *supra* note 54, § 2-3(c)(2), at 141.

159. *See* United States v. Herman, 589 F.2d 1191 (3d Cir. 1978) (prosecutor denies immunity to defense witness with "deliberate intention of distorting the judicial fact-finding process"); Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966) (suggesting that defendant could be deprived of fair trial by prosecutor's uneven use of immunity-granting power); United States v. DePalma, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (prosecutor's denial of immunity to defense witnesses while building case through immunity grants to government witnesses denied defendant fair trial).

160. *See supra* notes 121-23 and accompanying text.

161. *See* United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976) (after prosecutor's threats caused defense witness to withhold testimony, court reversed and directed that upon retrial, a judgment of acquittal would be ordered unless prosecutor conferred immunity on witness); People v. Shapiro, 409 N.E.2d 897, 905 (N.Y. 1980) (after prosecutor's threats drove defense witnesses from stand, court authorized new trial only if prosecutor extended immunity to those witnesses).

II. DUTY TO PREJUDGE TRUTH

A. SOURCE AND NATURE OF DUTY TO PREJUDGE TRUTH

Although not articulated in judicial decisions, a prosecutor's duty to truth embraces a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant's guilt.[162] This duty arises from the same sources as discussed earlier:[163] the prosecutor's role as a minister of justice to protect innocent persons from wrongful convictions; the constitutional rule that forbids the use of false evidence and the suppression of materially favorable evidence; the ethical rules that require a prosecutor to have confidence in the truth of the criminal charge; the prosecutor's superior knowledge and control of the evidence; and the prosecutor's unique power to influence the fact-finder's determination.

The ethical codes require that a prosecutor have some level of confidence in the accuracy of his case before going forward with the prosecution.[164] However, the codes are deficient regarding the degree of confidence and how it should be achieved. The codes employ several different but ultimately insufficient formulations to guide the prosecutor. First, a prosecutor should not institute or continue to prosecute a charge if it is not supported by "probable cause."[165] Second, a prosecutor may decline to prosecute if he has a reasonable doubt that the accused is in fact guilty.[166] Third, a prosecutor should not be compelled by his supervisor to prosecute a case in which he has a reasonable doubt about the guilt of the

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162. A prosecutor's duty to evaluate the truth of his case is distinct from a judgment as to whether a jury is likely to convict. The Justice Department's Principles of Federal Prosecution appear to suggest that the probability of conviction outweighs the prosecutor's personal judgment as to the truth of his case. *See* UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220(B) (1987) (a prosecutor ordinarily may initiate or recommend prosecution "if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction," and "no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty."). *See also* Sklansky, *supra* note 16, at 528 (claiming that Justice Department guidelines appear to encourage the mindset of prosecutors that "it is not their job to judge the truth of testimony, only how it will play in the courtroom.").

163. *See supra* notes 19-26 and accompanying text.

164. *See* MODEL RULES Rule 3.8(a) ("The prosecutor in a criminal case shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); MODEL CODE DR 7-103(A) ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause."); ABA STANDARDS Standard 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.").

165. *Id.*

166. *See* ABA STANDARDS Standard 3-3.9(b)(i) ("The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: (i) the prosecutor's reasonable doubt that the accused is in fact guilty"). Neither the *Model Rules* nor the *Model Code* provide any guidance as to whether a prosecutor may decline to prosecute an existing charge, and the standard for exercising that discretion.

accused.[167] Fourth, a prosecutor should not prosecute a case in the absence of sufficient admissible evidence to support a conviction.[168]

The probable cause standard is not very demanding.[169] As the commentary to the ABA *Standards* explains, probable cause is substantially less than sufficient admissible evidence to sustain a conviction.[170] It allows a prosecutor considerable room for error in bringing a charge. Moreover, the reference in the *Standards* to the reasonable doubt test is ambiguous. Standard 3-3.9(b)(i) allows a prosecutor to decline to prosecute if he entertains a reasonable doubt about the defendant's guilt, but the Standard does not require such action. The commentary to the ABA *Standards* refers to "the obvious reasonable doubt test," but provides no further guidance on the extent to which this test should influence a prosecutor's decision to prosecute.

In practice, the standard of confidence apparently varies widely. Some prosecutors, including many with whom I worked and with whom I have been acquainted over the years, maintain that they would never prosecute a defendant unless they were personally convinced of the defendant's guilt.[171] Other prosecutors contend that even if they are not personally convinced of the defendant's guilt, they would let the jury decide the issue.[172] Several academic commentators, although lacking empirical data to support their claim, have

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167. *See* ABA STANDARDS Standard 3-3.9(c) ("A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."). Neither the *Model Rules* nor the *Model Code* offer any guidance on this issue.

168. *See* ABA STANDARDS Standard 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."). Interestingly, the standards of the National District Attorneys Association are more demanding, stating that a prosecutor is justified in not prosecuting if she has "doubt as to the accused's guilt." *See* NATIONAL PROSECUTION STANDARDS Standard 42.3(a) (Nat'l Dist. Attys. Assoc'n 2d ed. 1991).

169. *See* FREEDMAN, *supra* note 4, at 85 ("Probable cause, of course, may be based upon hearsay and may be satisfied by even less than a substantial likelihood of guilt"); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 680-81 ("An ethical prerequisite of probable cause is essentially meaningless. Probable cause is little more than heightened suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty.").

170. *See* ABA STANDARDS Standard 3-3.9(a) cmt. ("A probable cause standard, which is substantially less than sufficient admissible evidence to sustain a conviction, is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings."). Of course, the commentary neglects to add that under this standard a prosecutor must "know" that the charges are not supported by probable cause, a subjective test that is virtually impossible to prove. *See* FREEDMAN, *supra* note 4, at 86 ("Thus, for practical purposes, there is no ethical limitation imposed upon the prosecutor's discretion under the *Standards*.").

171. Uviller, *supra* note 3 and accompanying text. Professor Uviller opines that adopting such a position "represents a notable modification of our system of determining truth and adjudicating guilt." *See* Uviller, *supra* note 3, at 1157. Professor Uviller begs the question. It is my thesis, and that of others, that our "system of determining truth and adjudicating guilt" in fact assumes the interposition of the prosecutor to lessen the risk of jury error.

172. *See supra* note 3 and accompanying text. Many prosecutors with whom I have been acquainted over the years embrace this position. For a prosecutor's candid reiteration of this view after the exoneration of an innocent man who was wrongfully prosecuted and spent eight years in jail, *see* Jim Yardley, *Man is Cleared In Murder Case After Eight Years*, N.Y. TIMES, Oct. 29, 1998, at B1 (prosecutor defends handling of case, stating:

argued that notwithstanding the ethical mandate to serve justice, a prosecutor is allowed to proceed even though he lacks a personal belief in a defendant's guilt.[173] Some commentators have even argued that if the proof of guilt and non-guilt is in "equipoise" – meaning, I take it, that the prosecutor harbors a substantial doubt of the accused's guilt – the prosecutor should nevertheless let a jury decide the case.[174]

Whatever the prevailing view, there are compelling reasons why a prosecutor should not proceed with a case unless he is personally convinced, beyond a reasonable doubt, of the factual truth of his case – that his witnesses are truthful and accurate – and of the legal truth – that the evidence proves the defendant's guilt of the crime charged beyond a reasonable doubt.[175] First, the prosecutor is much better qualified than the jury at judging the factual and legal truth of a case.[176] The prosecutor knows much more about the case than the jury could ever

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"We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time.").

173. *See supra* note 4 and accompanying text.

174. *See* Uviller, *supra* note 3, at 1159 ("[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before judge or jury"). However, how does a conscientious prosecutor in such a case "fairly lay the matter before the jury?" How does the prosecutor cross-examine defense witnesses? Does the prosecutor vigorously cross-examine the defendant, or his alibi witness, to try to confuse them, or make them appear unsure or indecisive, even though the prosecutor has some reason to believe they are telling the truth? Some witnesses can be easily discredited. Where a defendant presents his mother as his alibi witness, a prosecutor need only ask one question: "Would you lie for your son?" Discrediting a disinterested and believable alibi witness is another matter. A prosecutor should never allow himself to be placed in a position of having to impeach a truthful witness to rehabilitate the testimony of an unreliable witness. Further, how does the prosecutor argue the case to the jury? Does he attempt to persuade the jury that the defendant's guilt has been proved beyond a reasonable doubt even though he himself is not sure? What, in other words, would constitute a fair presentation of the case when the prosecutor is personally doubtful of the defendant's guilt? And, in the end, is manipulating the truth proper behavior for a "minister of justice?"

175. I recognize that in many cases when a prosecutor has a reasonable doubt about a defendant's guilt, or there is some other impediment to a successful conviction, a prosecutor will avoid putting the defendant to trial by agreeing to recommend a guilty plea. The ethical codes do not address this situation. *See* ABA STANDARDS Standard 3-3.9 cmt. (noting "continuing disagreement among prosecutors" on the issue but taking no position). To be sure, a defendant's willingness to admit guilt may remove the prosecutor's personal doubt. *See* Uviller, *supra* note 3, at 1157. However, the potential for prosecutorial abuse is manifest. *See* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968) (referring to a Chicago prosecutor who stated: "When we have a weak case for any reason, we'll reduce to almost anything rather than lose."). In my judgment, it is ethically proper for a prosecutor who entertains a reasonable doubt about a defendant's guilt to entertain a plea agreement that has been voluntarily offered by defense counsel. It is quite another matter for the prosecutor to try to persuade an unwilling defendant to accept a reduced plea to a crime that the prosecutor either doubts the defendant committed, or knows he cannot prosecute because of evidentiary weaknesses. The latter situation is ethically improper.

176. *See* David Kocieniewski, *Attempted Murder Charge Dropped Against Trooper*, N.Y. TIMES, Oct. 25, 2000, at B6 (prosecutor drops charges after two new witnesses came forward to support defendant's claim of self defense, notwithstanding criticism from community that jury should have allowed to decide merits of charge). *But see* Uviller, *supra* note 3, at 1158 ("Indeed, should the conscientious prosecutor set himself the arduous task of deciding whether in this instance the complainant is right? If it is his duty to do so, how does he rationally reach a conclusion? For this purpose, are his mental processes superior to the jurors' or the judge's?").

know. The prosecutor has more information about the background of witnesses and the defendant, and the availability of other admissible and non-admissible evidence. The prosecutor has spent more time studying the evidence than the jury, has more experience than the jury in judging the credibility of particular witnesses,[177] and has acquired an expertise in specialized areas of prosecution that the jury lacks.[178]

A prosecutor's informal adjudication of guilt is more trustworthy than that of a jury for another reason. A prosecutor can maintain a neutral and objective view of the evidence more readily than a jury. Empirical studies suggest that a jury's view of the evidence can be readily influenced by a variety of prejudicial, non-evidentiary factors.[179] Ironically, a prosecutor who entertains a significant doubt

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177. *See, e.g.*, Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 446 (1987) ("There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases."). Juries often are disproportionately affected by graphic evidence or unduly vulnerable to inadmissible or prejudicial evidence. *See infra* note 179. A prosecutor's mindset of neutrality makes him much better suited to analyze facts objectively and impartially. *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM . L. REV. 1695 (2000) (arguing that a prosecutor must possess an open, neutral frame of mind in order to make a careful and objective evaluation of the credibility of witnesses and the reliability of other evidence). *See also infra* notes 188-226 and accompanying text (discussing how prosecutor implements duty to truth). The danger, of course, is that a prosecutor may strongly believe in the defendant's guilt, or succumb to the pressure to win the case, and consequently not evaluate his case with the requisite degree of impartiality and objectivity. *See* Yaroshefsky, *supra* note 16, at 945 (according to a former federal prosecutor: "Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case."); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 554 (1987) ("Instead of being an agnostic on guilt, the prosecutor naturally assumes that defendants are guilty.").

178. Most prosecutors would readily acknowledge that they are far more better qualified than jurors to evaluate the reliability of eyewitnesses, the credibility of cooperating witnesses, the truthfulness of police witnesses, and the suggestibility of child witnesses. For these observations I naturally rely on my own experience as a prosecutor, interviews with former prosecutors and defense attorneys, acquaintance with judges and other personnel in the criminal justice system, as well as familiarity with legal and social science literature on criminal prosecution. The following sources are useful critiques of prosecutors offices and the day-to-day work of prosecutors in both urban and rural settings. These sources often, but not always, support my own hypotheses about a prosecutor's expertise in "sizing up" a case and evaluating the truthfulness and accuracy of his witnesses. *See* MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS (1999); JAMES STEWART, THE PROSECUTORS (1987); JOAN E. JACOBY, THE AMERICAN PROSECUTOR; A SEARCH FOR IDENTITY (1980); LEIF H. CARTER, THE LIMITS OF ORDER (1974); George T. Felkenes, *The Prosecutor: A Look At Reality*, 7 SW. U.L. REV. 98 (1975).

179. *See* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 232 (1983) (inadmissible evidence and stricken testimony has impact on jurors' decision-making); Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEHAV. 471 (1999) (juries exposed to improper prosecutorial statements in closing argument recommended death penalty significantly more often than those not exposed to statements); Thompson, *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453 (1981) (finding jury more likely to consider inadmissible evidence favoring defense than prosecution); Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in Simulated Criminal Trial*, 11 J. APPLIED SOC. PSYCHOL. 301 (1981) (suggesting that jurors unduly affected by prosecutor's strong opening presentation of evidence); Bobby J. Calder, Chester A. Insko & Ben Yandell, *The Relation of Cognitive and Memorial Processes to Persuasion in a Simulated Jury Trial*, 4 J. APPLIED SOC. PSYCHOL. 62 (1974) (finding

about the truth of his case may impress a jury with the strength of the case merely by virtue of his decision to prosecute. Juries trust prosecutors; they are impressed by the prosecutor's prestige and expertise.[180] Indeed, jurors may reasonably assume that a case would not be brought in the first place if the prosecutor harbored any doubt, and may even assume that additional evidence probably exists to support the hypothesis of guilt.[181] Two generalizations reinforce the danger of letting juries decide a questionable case: juries usually reach a verdict and that verdict usually is guilty.[182]

Moreover, a jury trial under the best circumstances is a last resort; it is an expensive and infrequently used mechanism to try to resolve a dispute that the parties are unable to settle voluntarily.[183] To allow a jury to second-guess a prosecutor's determination that a reasonable doubt exists may be an unreasonably expensive use of judicial resources that could be better expended on more meritorious prosecutions. Thus, when a prosecutor has made a careful and objective determination that a reasonable doubt exists, there is nothing left for a jury trial to accomplish except to reaffirm the prosecutor's determination by conferring the community's stamp of approval on that judgment, or to second-guess the prosecutor's decision. But as noted above, there is no reason to expect that a jury will find the truth when a prosecutor remains in doubt.[184]

Finally, a fundamental value in the U.S. criminal justice system is that it is preferable to acquit a guilty defendant than to convict an innocent defendant.[185] Given the extensive documentation of wrongful convictions,[186] and the concomitant need to minimize that risk, it is most protective of this value if a prosecutor assumes the role of an informal gatekeeper of the truth to screen doubtful cases from the jury.[187]

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that the more arguments counsel raises with respect to different substantive arguments offered, the more jury will believe in that party's case); Stanley Sue, Ronald E. Smith & Cathy Caldwell, *The Effects of Inadmissible Evidence on the Decisions of Simulated Jurors - A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (973) (finding direct correlation between influence of inadmissible evidence and strength of prosecutor's case so that inadmissible evidence most prejudicial when prosecutor's case is weak).

180. *See supra* note 26.

181. In fact, some prosecutors try to make this point explicitly by insinuating that additional, unused evidence exists to prove the defendant's guilt. Convictions are often reversed for such misconduct. *See* GERSHMAN, *supra* note 54, § 2-8, at 186-93.

182. *See* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 55-63 (1966).

183. As it is, under the draconian regime of the federal sentencing guidelines, the prevalence of federal criminal trials is becoming increasingly infrequent. *See* Yaroshefsky, *supra* note 16, at 933 n.69 (estimating that only three percent of indictments are tried in New York's federal southern district; ninety seven percent are plea dispositions).

184. *See supra* notes 175-78 and accompanying text.

185. *See In re* Winship, 397 U.S. 358, 372 (1970) ("a fundamental value determination in our society [is] that it is far worse to convict an innocent man than to let a guilty man go free.") (Harlan, J., concurring).

186. *See supra* notes 8-14 and accompanying text.

187. This is not to suggest that prosecutors currently are remiss in not screening doubtful cases. Prosecutors typically decline to prosecute substantial numbers of cases. Of the 98,454 criminal suspects charged from Oct. 1, 1995 through Sept. 30, 1996, thirty-three percent declined for the prosecution. *See* Bureau of Justice

B. IMPLEMENTING THE DUTY TO PREJUDGE THE TRUTH

To meet his constitutional and ethical obligations, a prosecutor should evaluate his proof according to the following precepts. First, a prosecutor should approach the preparation of a case with a healthy skepticism concerning the evidence collected. Second, a prosecutor should be willing to subject the hypothesis of guilt to rigorous testing. Third, a prosecutor should have the courage to decline prosecution if he entertains a reasonable doubt of the defendant's guilt.

1. SKEPTICISM

A prosecutor should approach the preparation of a case with a healthy skepticism.[188] He should not assume that his witnesses are telling the truth, the forensic evidence is accurate, and the defendant is guilty. Only by maintaining the attitude of a true skeptic can a prosecutor insure the validity of the hypothesis of guilt and be able to exclude reasonable hypotheses of innocence.[189] A prosecutor's preliminary analysis will likely be influenced by the quality of the investigation. A prosecutor might reasonably assume that more serious cases such as homicides and drug-trafficking conspiracies will probably command greater investigative resources and be investigated more thoroughly by the police than routine burglary or assault cases. And a prosecutor might reasonably place greater confidence in the accuracy of an investigation that employs specialized resources, involves close and ongoing supervision, includes investigators with

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Statistics, U.S. Department of Justice, *Compendium of Federal Justice Statistics, 1996*, 16 (1998). The point of this Article is to explain the ethical basis for the prosecutor's screening function, and how the prosecutor should exercise that function.

188. *See* Uviller, *supra* note 177, at 1703 ("[T]he prosecutor should approach the case handed to him with a working degree of suspicion. The good prosecutor - like any good trial lawyer - is skeptical of what appears patent to others, and curious concerning details that seem trivial to the causal observer."). The extent to which prosecutors approach a case with a skeptical mindset is unclear. *See* Yaroshefsky, *supra* note 16, at 945-47 (several former federal prosecutors stated: "[Some prosecutors] get wedded to their theory and things inconsistent with their theory are ignored;" "[A]dditional probing makes the case more complicated and sometimes more difficult to prevail so people ignore such facts;" "[I]n high profile cases, the pressures and mindset of some prosecutors make it less likely that the government will carefully examine lies by its cooperators"); Jonakait, *supra* note 177, at 554 ("Instead of being an agnostic on guilt, the prosecutor naturally assumes that defendants are guilty.").

189. A difficult problem might arise in prosecuting several defendants together who though jointly involved in the crime, have markedly different degrees of culpability. A prosecutor might reasonably conclude that one of the defendants has only limited involvement in the case, or the prosecutor might entertain a reasonable doubt of his guilty involvement. However, the prosecutor might also reasonably anticipate that this defendant might falsely "take the weight" for the other defendants if his case was prematurely dismissed. A prosecutor could attempt to "lock in" the person's testimony either by immunizing him and obtaining his sworn grand jury testimony, or through a plea disposition and an appropriate plea colloquy that limits his ability to manipulate the process. *But see* Kaplan, *supra* note 4, at 179-80 ("[A] far lower degree of belief in guilt (or perhaps even none at all) seemed to be required when the question was whether the subject under consideration should be joined as a co-defendant with one whom the prosecutor did believe to be guilty.").

considerable experience and selective caseloads, and involves significant oversight by prosecutors.[190]

In judging the quality of the proof, a prosecutor is aware of the risk to truth from the testimony of certain kinds of witnesses, and has a special responsibility to insure that their testimony is truthful. These notoriously unreliable witnesses include identification witnesses,[191] young children,[192] and cooperating witnesses such as informants, accomplices, and so-called "snitches."[193] The vast majority of wrongful convictions are attributable to the testimony of these witnesses.[194] The testimony of these witnesses share common risks to the truth; they pose

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190. The structure of some prosecutors offices provides an added reason why prosecutors must be skeptical, and alert to credibility or evidentiary defects. For example, the practice in some prosecutors offices of horizontal assignments to bureaus instead of vertical assignments to specific cases might impair communication among prosecutors about defects in a case until the case is being readied for trial. Defects may not be as easily discovered if different prosecutors are assigned to different functions such as initial screening, grand jury presentations, plea negotiations, and trial work. And mistakes once made may become increasingly difficult to correct as the case moves further through the prosecutor's office on its way to trial. *See* CARTER, *supra* note 178, at 129-130 ("degree to which segmentation of work on a case prevented the discovery of weaknesses" and "discouraged the deputies from learning about the mistakes they made."). Additionally, the practice in some prosecutors offices of assigning new or inexperienced prosecutors to screen new cases, or assigning these prosecutors to present cases to a grand jury, risks creating at an early stage serious legal and factual errors. *See* Felkenes, *supra* note 178, at 100, 105 (prosecutors are generally young lawyers who utilize the office of the prosecutor as a training ground for legal and trial experience).

191. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932) (documentation of sixty-two American and three British cases of convictions of innocent defendants); FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927) ("The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."); Jennifer L. Davenport, Steven D. Penrod, & Brian L. Cutler, *Eyewitness Identification Evidence*, 3 PSYCHOL. PUB. POL'Y & L. 338 (1997) ("both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identifications"); Rattner, *supra* note 14, at 289-92 (claiming that misidentification is the single largest reason for wrongful convictions); Gross, *supra* note 177, at 396 ("eyewitness unreliability is the unmistakable conclusion of a vast quantity of psychological research").

The recent execution of Gary Graham in Texas came after years of litigation and public controversy over the accuracy of a highly questionable identification by the only eyewitness. *See* Jim Yardley, *In Death Row Dispute, A Witness Stands Firm*, N.Y. TIMES, June 16, 2000, at A22.

192. *See* Angela R. Dunn, *Questioning the Reliability of Children's Testimony: An Examination of the Problematic Elements*, 19 LAW & PSYCHOL. REV. 203, 203-09 (1995)(describing "widespread concern about the reliability of the child's statements" and factors affecting unreliability); Carey Goldberg, *Youths' "Tainted" Testimony is Barred in Day Care Retrial*, N.Y. TIMES, June 13, 1998, at A6 (discussing several reversals of convictions in sexual abuse trials and increasing concern over reliability of child witnesses).

193. *See* Yaroshefsky, *supra* note 16, at 918 ("[R]isk that cooperators will provide false evidence is a longstanding, well-documented concern"); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 97 n.98 (1995) ("the incentives for the defendant to give 'truthful' testimony may also lead him to give a false account that he believes – correctly or not – the government would prefer to hear."); Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 787 (1990) ("The fact that accomplice testimony is presumptively unreliable has never been disputed."); Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1412-17 (1990) (providing several dramatic illustrations of informant frame-ups).

194. *See supra* note 14 and accompanying text.

special dangers of falsehood and mistake of which the prosecutor is aware but the jury is not.[195]

Additionally, a prosecutor should take a hard look at prior encounters between witnesses and the police to ascertain the presence and extent of any improper influence. Courts have not been especially vigilant over suggestive interviewing techniques of witnesses, leaving it up to the adversary process to expose improprieties.[196] Even assuming highly skilled defense counsel able to test the accuracy and truthfulness of the prosecution's proof – a basic postulate of the adversary system's effectiveness[197] – the process necessarily malfunctions when the prosecutor is able to control and shape the information that enters the process and eliminate or polish up information that is detrimental to his case.[198] Among

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195. These risks include inherent weaknesses in eyewitness testimony, *see* United States v. Wade, 388 U.S. 218, 228-29 (1967) (noting degree of improper suggestion contributing to misidentification); Gross, *supra* note 177, at 432 ("juries are not particularly good at evaluating eyewitness testimony and determining its accuracy and are not exceptionally careful about convicting defendants on the basis of eyewitness evidence."), inevitable fabrications from suggestive interviewing techniques with children, *see* Idaho v. Wright, 497 U.S. 805, 812-13 (1990) (noting "blatantly leading questions," "interrogation was performed by someone with a preconceived idea of what the child should be disclosing," and failure to preserve interview on videotape); State v. Michaels, 642 A.2d 1372, 1383 (N.J. 1994) (noting coercive and suggestive interviewing techniques, bias of interviewer, asking leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and use of their statements, use of threats, bribes, and cajoling, and failure to videotape or otherwise document interview sessions), and the capacity of informants, accomplices, and "snitches," to manipulate the truth. *See* Yaroshefsky, *supra* note 16, at 921 ("a cooperator can manipulate the details of the events without arousing much, if any, suspicion and still be believable to a jury"). Various prophylactic procedures have been established to minimize potential impediments to the truth from these witnesses. Procedures include cautionary instructions, *see* Cool v. United States, 409 U.S. 100, 103 (1972) (cautionary instruction regarding testimony of accomplice a "commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity."); On Lee v. United States, 343 U.S. 747, 757 (1952) (encouraging courts to give juries "careful instructions" to scrutinize informant's motivation for testifying); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (leading case requiring cautionary instructions emphasizing dangers of eyewitness identifications), corroboration requirements, *see* N.Y. CRIM. P. L. § 60.22 (requiring corroboration of testimony of accomplice); GA. CODE ANN. § 24-3-53 (requiring corroboration of confession), and use of expert witnesses. *See* United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991) (allowing expert testimony on reliability of eyewitness identification); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909 (1995) (arguing that testimony by research psychologists about eyewitness testimony is necessary to provide jurors education and perspective about eyewitness testimony).

196. For commentary on the practice and ethics of witness preparation and witness coaching, *see* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989); John D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389 (1987).

197. *But see supra*, note 14.

198. For egregious examples of prosecutorial manipulation of a witness's testimony, *see* Kyles v. Whitley, 514 U.S. 419, 442-43 (1995) (eyewitness told police he did not see struggle and shooting, but at trial "describe[d] with such detailed clarity" the struggle and shooting that it "rais[ed] a substantial implication that the prosecutor had coached him to give it."); Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) (after cooperator identifies Walker and another person named Givens as participants in a felony murder, prosecutor learns that Givens was in jail at time of robbery; at trial, cooperator identifies Walker without mentioning Givens). *See also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975) (discussing partisan manipulation of evidence). There are additional dangers when a prosecutor brings a case to trial involving the testimony of witnesses in whom the prosecutor lacks confidence. In order to counter

the common dangers are excessive coaching,[199] failure of the interviewer to take notes in early interview sessions until the witness "has got the story straight,"[200] and the discredited practice of destroying notes.[201]

Prosecutors should be especially alert to any motive a witness might have to falsify. This caution applies not only with respect to cooperating witnesses, such as informants and accomplices, but also to witnesses who do not appear to have any interest in the outcome of the case.[202] The practice in some prosecutors' offices of "polishing up" questionable witnesses does serious damage to the pursuit of the truth. Some police and prosecutors engage in Pygmallion-like

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inevitable and unforeseeable defense attacks on her witness's credibility, even the most conscientious prosecutor may need to make arguments that impress a jury but disserve the truth. A prosecutor may argue that an eyewitness's confidence bespeaks accuracy, even though the prosecutor knows that such contention is misleading. *See* Steven Penrod, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 817 (1995) (research study demonstrating how witness confidence "a dubious indicator of eyewitness accuracy"). A prosecutor may argue that an accomplice is telling the truth because he signed a cooperation agreement to do so, even though the prosecutor knows that such contention is misleading. *See* United States v. Arroyo-Angulo, 580 F.2d 1137, 1150 (2d Cir. 1978) (characterizing prosecutor's use of cooperation agreement as "prosecutorial overkill," observing that the prosecutor often has no way of knowing whether the witness is telling the truth or not and that "the promise in the cooperation agreement adds little to the truth-telling obligation imposed by the oath.") (Friendly, J., concurring). A prosecutor may argue that a child witness's credibility has been validated by an expert, even though the prosecutor knows that such contention is improper. *See* Smith v. State, 674 So.2d 791, 793 (Fla. Dist. Ct. App. 1996) (reversible error for prosecutor to elicit from expert that child had been abused). And a prosecutor may argue that a confession is reliable because if the police witness was fabricating he could have lost his pension, even though the prosecutor knows that such an argument is improper. *See* Commonwealth v. Kelly, 629 N.E.2d 999 (Mass. 1994) (argument that police officers would not put their pension on line by testifying falsely improper).

199. *See* Bennett L. Gershman, *Coaching Cooperators*, CARDOZO L. REV. (2001) (forthcoming) (describing how prosecutors overtly, covertly, and unintentionally coach false and misleading testimony from cooperating witnesses); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 110-11 (1992) (describing how some prosecutors "steer" police testimony by presenting witness with alternative scenarios, advise police witness of what testimony is needed, and tell police to "toughen up" certain aspects of their testimony); Damaska, *supra* note 6, at 1094 ("During the sessions devoted to 'coaching,' the future witness is likely to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.").

200. *See* Yaroshefsky, *supra* note 16, at 961-62 (several former federal prosecutors stated that they rarely took notes in initial sessions with cooperating witnesses; according to one former prosecutor, "office lore is don't take too many notes or figure out how to take notes so that they are meaningful to you and no one else. You do not want a complete set of materials that you have to disclose.").

201. *See* United States v. Riley, 189 F.3d 802 (9th Cir. 1999); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

202. *See* ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US (1999) (an estimated one percent of the population are pathological liars); Kristin Choo, *Perjury With Conviction: Lawyers Can Use Strategic Tactics At Trial to Expose Pathological Liars on the Witness Stand*, A.B.A. J., June, 1999, at 71 (discussing wrongful prosecution of Jeffrey Blake, convicted of a double murder on basis of testimony of Dana Garner, a psychopathic liar whose bizarre and uncorroborated testimony should have been scrutinized more carefully by prosecutors). According to defense counsel, the prosecutor was told by a family member that Dana Garner was a pathological liar, but took no action. Telephone interview with Michelle Fox, Esq., attorney for Jeffrey Blake (Mar. 7, 2000).

attempts to "make over" witnesses who have serious credibility problems, and then hide information that would expose the deficiencies.[203] One of the more notorious examples is the testimony by jailhouse "snitches" who claim that defendants spontaneously made full confessions to them under the most incredible circumstances but are presented at trial to look like public-spirited citizens doing their duty to truth and justice.[204]

A skeptical prosecutor endeavoring to fulfill his duty to truth encounters one of the hardest problems when he suspects that a police officer is lying.[205] Prosecutor offices in New York City encountered this problem several years ago in litigating so-called "dropsy" cases, in which police officers, in order to avoid constitutional strictures on searches and seizures, testified that defendants dropped, or abandoned, gambling or narcotics paraphernalia under circumstances that made such furtive conduct appear incredible. Many prosecutors believed the police version to be contrived, challenging the officer directly: "Do you expect me to believe that?" The police, not surprisingly, maintained the truthfulness of their account, and prosecutors had no way to disprove the claim.[206]

A dilemma with stakes far higher than the "dropsy" phenomenon confronts a prosecutor in a murder case that has been "solved" by an uncorroborated confession. Prosecutors are aware that fraudulent confessions are one of the

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203. *See supra* notes 196-201 and accompanying text.

204. *See* DWYER, NEUFELD & SCHECK, *supra* note 8, at 126-58; Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches: Trading Lies For Freedom*, L.A. TIMES, Apr. 16, 1989, at 1.

205. *See* H. RICHARD UVILLER, TEMPERED ZEAL 115-16 (1988) ("most police officers" view police perjury as "natural and inevitable"); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457 (1999) ("Judges, prosecutors and defense attorneys report that police perjury is commonplace, and even police officers themselves concede that lying is a regular feature of the life of a cop."); Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 (reporting on official inquiry into police corruption); Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, 596-97 ("Every lawyer who practices in the criminal courts knows that police perjury is commonplace."). Commentators have suggested that prosecutors commonly suspect police of fabrication but do not take any action to correct it. *See* Orfield, *supra* note 199, at 109-10 (suggesting that "prosecutors frequently either tolerate or, more rarely, encourage police perjury at all steps in the process;" one-half of the prosecutors interviewed believe that prosecutors "knew, or had reason to know, more than 50% of the time when police fabricated evidence in case reports"). Commentators differ about the willingness of prosecutors to criticize police conduct. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 193-197 (3d ed. 1994) (noting that some prosecutors are "not at all reluctant to criticize police actions" and "it is indeed the policy of the office to educate police."); JACOBY, *supra* note 178, at 110 ("the prosecutor often distrusts and questions the actions and motives of the police."). *But see* CARTER, *supra* note 178, at 84 ("[E]mpathy, uncertainty, the necessity of maintaining trust, and the fear of criticism encouraged some prosecutors to become advocates for the police and discouraged most prosecutors from screening out aggressively the errors they perceived in police practices.").

206. Some prosecutors actually dismissed cases when the scenario was too farfetched, and one office sought unsuccessfully a judicial remedy in the appellate courts. *See* People v. Berrios, 270 N.E.2d 709 (N.Y. 1971) (unsuccessful attempt by New York County District Attorney to seek procedural remedy in New York Court of Appeals that would shift the burden of proof to the prosecutor when police testify that drugs were voluntarily abandoned). *See also* Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 698 (1996) (given "widespread willingness among police to lie on the stand," author proposes that police be required to submit to polygraph examination when outcome of suppression hearing depends on credibility).

principal causes of wrongful convictions.[207] Not all cases of fraudulent confessions are readily capable of exposure.[208] A prosecutor faces a serious dilemma when based on experience and instinct he strongly suspects that a confession is false but cannot prove it and there is no corroborative evidence. What is the prosecutor to do in such a case? Should the prosecutor remain neutral, and trust the adversary process to expose the truth?

There is no easy answer to this question. It may be the hardest question facing a prosecutor who seeks the truth.[209] A prosecutor in such case should be suspicious, and should rigorously test the hypothesis of guilt.[210] The presence or absence of corroborating evidence is obviously critical to a determination of the truth.[211] And if after such investigation a prosecutor still harbors a reasonable doubt, he must decline to prosecute.

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207. *See* Mark Hansen, *Untrue Confessions*, A.B.A. J., July, 1999, at 50 (quoting Michael McCann, Milwaukee's district attorney: "[A]ny experienced prosecutor knows that [false confession] can, and sometimes does, happen"). *See also* STATE OF NEW YORK, COMMISSION OF INVESTIGATION, *An Investigation of the Suffolk County District Attorney's Office and Police Department* 55 (1989) ("astonishingly high" number of homicide prosecutions involving confessions (94 percent) "provokes skepticism regarding Suffolk County's use of confessions"); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 455 (1998) (research depicting "numerous examples of highly probable false confessions"); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L.L. REV. 105, 111 (1997) (finding that "standard interrogation methods are likely to produce false confessions in a small but significant number of cases [and] these cases are particularly likely to lead to miscarriages of justice."). One of my earliest recollections as a prosecutor was learning that my bureau chief was instrumental in exonerating a defendant charged with murdering two young women by proving that the police instigated him to falsely confess, and then suggested the details of his confession. The prosecutor was able to demonstrate that several critical details in the confession were factually implausible, and that other assertions of the defendant were to inaccurate facts of which the police who obtained the confession were aware. *See* Jack Roth, *Hogan Clears Whitmore In Two East Side Murders*, N.Y. TIMES, Jan. 28, 1965, at 1. The Supreme Court cited the case in a footnote in the *Miranda* decision to support its assertion that interrogation practices produce false confessions. *See* Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966).

208. Requiring that police interrogations be recorded on tape, as required by Alaska and Minnesota, might curb the incidence of false confessions. *See* State v. Scales, 518 N.W.2d 587, 589 (Minn. 1994) ("In the exercise of our supervisory powers we mandate a recording requirement for all custodial interrogations."); Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) ("Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.").

209. For federal prosecutors, the credibility of so-called "cooperators" may be more problematic than the credibility of federal law enforcement agents. *See* Yaroshefsky, *supra* note 16, at 959 (quoting a former federal prosecutor as stating that "embellished testimony" by cooperating witnesses "is the dirty little secret of our system").

210. *See infra* notes 212-21 and accompanying text.

211. Corroborative proof is obviously crucial to resolving defects or contradictions in the evidence. *See* Yaroshefsky, *supra* note 16, at 932 ("Virtually all former AUSAs emphasized corroboration as the key factor in assuring cooperator truthfulness."). Several state jurisdictions require corroboration of an accomplice's testimony for a legally sufficient case. *See e.g.*, N.Y. CRIM. P. L. § 60.22; CAL. PENAL CODE § 1111. Federal law does not require corroboration. *See* Caminetti v. United States, 242 U.S. 470, 495-96 (1917). Rules requiring corroboration of the testimony of complainants in sexual abuse cases have been abolished. *See* Anderson, *supra* note 14, at 2122.

2. RIGOROUSLY TESTING HYPOTHESIS OF GUILT

In addition to being skeptical of the facts, a prosecutor should be willing to assume an active role in confirming the truth of the evidence of guilt and investigating contradictory evidence of innocence.[212] As in the robbery case discussed earlier, only by such active involvement can a prosecutor confirm the truth, reconcile contradictions, and expose serious deficiencies that suggest that the defendant may be innocent.[213] A prosecutor preparing a case hinging on eyewitness identification should be conversant not only with legal authority but with social and psychological literature on memory and the accuracy of eyewitness identification.[214] Being knowledgeable and resourceful are indispens-

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212. *See* Yaroshefsky, *supra* note 16, at 940 (noting that former federal prosecutors reported "numerous instances where facts were not uncovered due to lack of investigation."). For recent instances of prosecutors failing to be alert to defects in the investigation, see Sack & Firestone, *supra* note 6, at A20 (describing "disintegration" of prosecutor's murder case against football star Ray Lewis mostly for failing to conduct adequate investigation into credibility of witnesses); Jim Yardley, *Man Is Cleared in Murder Case After Eight Years*, N.Y. TIMES, Oct. 29, 1998, at B1 (describing prosecutor's failure to carefully investigate credibility of key witness). The extent to which prosecutors should be charged with a duty to uncover police fabrication of evidence depends on the relationship between a prosecutors office and the police department. *See* James Sterngold, *Police Corruption Inquiry Expands in Los Angeles*, N.Y. TIMES, Feb. 11, 2000, at A16 (reporting that one hundred cases may have been tainted by planted evidence, false testimony, and other police abuses); *Former State Trooper Explains Why He Fabricated Evidence*, N.Y. TIMES, Apr. 16, 1993, at B5 (describing scandal in upstate New York in which state troopers repeatedly falsified fingerprint evidence). The often close relationship between prosecutors and police make detection of police fabrication unlikely. *See supra* notes 199-205 and accompanying text. To be sure, contaminated crime scenes, lost or destroyed evidence, questionable identification procedures, and suggestive interviewing techniques impede the assembling of a factually accurate and complete case. The robbery case with which this article began was impaired from the start by questionable identification procedures, police prejudgment of the defendant's guilt, and a serious discrepancy between the complainant's description and the defendant's appearance.

213. Some prosecutors are unwilling to aggressively investigate their cases to confirm the truth. *See* Yaroshefsky, *supra*, note 16, at 945 (recounting that former federal prosecutors stated: "Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case;" "They get wedded to their theory and things inconsistent with their theory are ignored."); Jonakait, *supra* note 177, at 559 ("The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity."); Louis M. Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That "Will Not Die,"* 66 GEO. L. J. 1, 12 (1977) (prosecutor's "unwarranted confidence . . . was maintained by the simple expedient of ignoring or, if necessary, distorting evidence that did not conform to the thesis being propounded."). In the prosecution of Jeffrey Blake, the prosecutor failed to interview an eyewitness who could have corroborated the informant's account. Telephone interview with Michelle Fox, Esq., attorney for Jeffrey Blake (Mar. 7, 2000).

214. There is an increasing body of scientific literature on human memory, with specific application to recall of information by crime victims and witnesses. *See* Yaroshefsky, *supra* note 16, at 953 n.174 (listing various research studies describing how people actually construct memories from experience and phenomena that influence recall). As with any able trial lawyer, a prosecutor should be conversant with information that affects the credibility of her witnesses. Many prosecutors are unwilling to confront such issues, either because they of a mindset that "truth is elusive," or a simplistic, "linear attitude about the truth." *See* Yaroshefsky, *supra* note 16, at 953. Prosecutors generally know much more than juries about the dangers of eyewitness identification, and this expertise enables prosecutors to make an informed judgment on the reliability of their proof. *See* Gross, *supra* note 177, at 424, 438-40 (describing several instances in which prosecutors took the initiative to exonerate defendants who had been mistakenly identified by eyewitnesses).

able qualities in prosecuting difficult cases such as those involving sexual assault, child abuse, and domestic violence.

Studies suggest that many prosecutors use polygraph examinations effectively to clear innocent suspects or as a basis for further investigative action.[215] Prosecutors occasionally administer lie detector tests to defendants and witnesses.[216] Using polygraph tests to attempt to exonerate a defendant is effective only if a prosecutor is institutionally capable of undertaking the corrective action of dismissing the case in the event the witness fails the test.[217]

A prosecutor should always be concerned with representations by defense counsel that a client is innocent. These claims are made sparingly so as not to impair an attorney's credibility.[218] Testing the proof with a hard "second-look" is not only conducive to establishing the truth, but also is in the prosecutor's self-interest as an advocate. Closely questioning his witnesses – even subjecting them to the kind of vigorous cross-examination they might be subjected to by skilled defense counsel at trial – also serves the dual interests of assuring that the prosecution accords with the truth and preparing the witness for a potentially difficult courtroom interrogation.

Contradictory or inconsistent evidence must be carefully tested. First, by failing to consider inconsistent evidence, the prosecutor forms an unwarranted confidence in the defendant's guilt that might prevent him from taking further steps to ascertain whether continued prosecution is justified.[219] Indeed, one of the major factors in unraveling errors in cases of mistaken identification has been the willingness of prosecutors to notice evidence that another person may in fact be the perpetrator.[220] Second, a prosecutor who minimizes the significance of contradictory evidence will probably not be alert to his *Brady* obligation to

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215. *See* CARTER, *supra* note 178, at 123 (describing policy in one prosecutors office of "willingness to dismiss a case when polygraph examination indicated the suspect's innocence," and agreement between prosecutors and defense counsel "that if suspect failed the test he would plead guilty rather than take the case to trial."); Gross, *supra* note 177, at 422, 438-39 (discussing relative importance of polygraph evidence either in clearing suspects or encouraging further investigation).

216. *See id.* at 422 (noting reasonable accuracy of polygraph testing, but also that at least seven defendants were prosecuted and convicted despite fact that they passed pretrial polygraph tests). Prosecutors also employ the threat of taking a polygraph test as a means of testing a witness's sincerity. A prosecutor can employ the test without being constitutionally required to disclose to the defense the results. *See* Wood v. Bartholomew, 516 U.S. 1, (1995) (polygraph results showing that key prosecution witness lied not admissible at trial and therefore not *Brady* evidence requiring disclosure).

217. *See infra* notes 222-26 and accompanying text.

218. *See* CARTER, *supra* note 178, at 85 ("[T]he prosecutor adjusts to cues from the defense attorney, the most important of which is the defense attorney's trustworthiness."). In a recent federal prosecution of a wrongfully accused defendant, a highly experienced defense attorney refrained from making such representation to the prosecutor, apparently based on his belief that prosecutors hear such claims so often that it falls on deaf ears. Telephone interview with Philip Weinstein, Esq. (Nov. 20, 2000). *See* Benjamin Weiser, *Right Name, Wrong Man on Trial, Prosecutors Admit*, N.Y. TIMES, Jan. 22, 2000, at B3.

219. *See* Yaroshefsky, *supra* note 16; Jonakait, *supra* note 213.

220. *See* Gross, *supra* note 177, at 424 n. 93, 438-39.

disclose this evidence to the defense.[221] Both of these consequences impair the integrity of the truth-finding function of the trial and increase the chances that an innocent defendant may be convicted.

3. MORAL COURAGE TO DECLINE PROSECUTION

This leads to the final quality of a prosecutor intent on serving truth: moral courage.[222] Such courage is possible only in an office that encourages prosecutors to be ministers of justice. Prosecutors' offices that instill such an ethos encourage prosecutors to discuss openly and critically with supervisors and colleagues the kinds of issues discussed in this Article. Prosecutors should be encouraged to evaluate a case critically with colleagues and supervisors to decide whether a prosecution should be undertaken in view of questionable proof and the availability of alternative prosecutorial options.

A prosecutor's moral courage to judge the truthfulness of a witness may be influenced by institutional considerations that discourage either critical evaluation or the ability to take appropriate action. Prosecutors' offices that are heavily influenced by conviction statistics – both to project a tough law-and-order image and for leverage in budget negotiations – will probably maintain close supervision over individual decision making by assistants, and principled decisions that might be perceived as inconsistent with a strong crime-fighting image may be discouraged.[223] It is much more likely in such a setting that a possibly innocent defendant will be required to accept a generous plea offer on the eve of trial rather than that the prosecutor will dismiss a case in which he lacks confidence.[224]

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221. *See supra* notes 103-14 and accompanying text.

222. Just as the annals of criminal law are replete with instances of prosecutorial abuses resulting in miscarriages of justice, so are they filled with examples of heroic prosecutors actively bent on correcting injustices. For commentary on moral judgment as affecting discretion, *see* Anthony v. Alfieri, *Prosecuting Race*, 48 DUKE L. J. 1157, 1242-45 (1999) (discussing prosecutorial invocation of "moral norms" to guide discretion); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 57-60 (1997) (advocating exercise of moral judgment on "ad hoc basis").

223. *See* CARTER, *supra* note 178, at 107 (county's control of prosecutor's budget allocation "made it wise [for prosecutor] to conform" to county's criticism of unresolved cases of welfare fraud); Felkenes, *supra* note 178, at 116 ("[Prosecutor's] future in politics depends very much on his justification for the public expenditures used to support his office. The office of the district attorney is under a self-imposed pressure to justify its budget."). There is anecdotal evidence that some prosecutors offices stifle principled decision-making. *See* Felkenes, *supra* note 178, at 117 (according to one young prosecutor, "his freedom to do what he believes to be right is restricted by the position he holds as prosecutor"); Alschuler, *supra* note 175, at 64 n.42 (discussing instance of assistant who would not prosecute a case unless he was personally satisfied of the defendant's guilt beyond a reasonable doubt. Denigrated by colleagues as the "best defense lawyer in the office," he left the office after his first year).

224. *See supra* note 175. By contrast, prosecutors who need not be as responsive to community pressures are better situated to make politically unpopular but prosecutorially correct choices. These prosecutors are less concerned about acquittals or dismissals than elected prosecutors. Although federal prosecutors offices are usually insulated from political or community pressures, the issue of whether to bring a federal civil rights

Even good prosecutors who strive to do the right thing may discover that their quest to do justice suddenly conflicts with the rigorous demands of the adversary system. The temptation for a prosecutor to believe that his job is to win is always present for people trained in the adversarial ethic.[225] Nevertheless, prosecutors should resist the temptation. The remarks of Attorney General and later Supreme Court Justice Robert H. Jackson should be the enduring ideal:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[226]

C. PROMOTING A CULTURE OF TRUTH

A prosecutorial culture embodying the qualities described by Justice Jackson would undoubtedly encourage prosecutors to judge truth aggressively. By contrast, a prosecutorial culture that advocates winning and maintains won-loss statistics not only discourages a critical examination of truth but encourages misconduct as well.[227] Commentators are able to offer only tentative conclusions as to how particular prosecutors and prosecutors' offices approach decision-making.[228] Such conclusions are based on personal

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prosecution following an acquittal in state court is an unusual instance of a federal prosecutor responding to strong community pressures to prosecute a case in federal court that would ordinarily remain in the state court. *See* Amy Waldman, *Diallo Family Meets With Justice Officials to Press for Federal Prosecution of Officers*, N.Y. TIMES, Mar. 3, 2000, at B4. The extent to which a prosecutor is obliged to consider the victim's interests may influence how critically he analyzes the case and his willingness to proceed in a doubtful case. Federal prosecutors ordinarily have no individual complainants to whom they must justify their conduct, and who might arguably attempt to limit the fair but unpopular exercise of discretion. Moreover, the availability of capital punishment can be highly distortive of the truth to the extent that political or institutional considerations override an impartial and objective judgment of the truth. *See* Bennett L. Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 275 (1989) (describing how desire to solve police officer's murder overrode careful analysis of the proof).

225. *See* Kenneth Bresler, *"I Never Lost a Trial:" When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (unprofessional for prosecutors to "keep tallies and reveal them in various contexts: political campaigns, interviews with journalists, resumes, cocktail parties and other opportunities for self-promotion"); Felkenes, *supra* note 178, at 109 (prosecutor's "working environment caus[es] him to view his job in terms of convictions rather than the broader achievement of justice").

226. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

227. *See* Bresler, *supra* note 225, at 543 ("A prosecutor protective of a 'win-loss' record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case - to win at all costs"); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131, 133 (1986) (prosecutorial misconduct occurs so often because "it works").

228. Prosecutors are reticent about discussing certain aspects of their work. *See* BAKER, *supra* note 178, at 14 (prosecutors interviewed "made a point of keeping the content positive and 'safe;' " "Their political instincts dictate a canny caution when speaking to anyone even vaguely identified as a working member of

experiences, available studies of prosecutors' offices, interviews of ex-prosecutors, anecdotal information, and professional and popular literature. Many prosecutors apparently do not view their role as including a duty to the truth.[229] These prosecutors are influenced to some degree by political pressures from the community and the victim, and approach a case with a mostly uncritical, deferential view of the evidence. These prosecutors focus almost exclusively on winning the case either through a guilty plea or a guilty verdict.[230] Because of political or institutional constraints, these prosecutors may be fearful of offending police, victims, or superiors by appearing to be too defense-minded.[231] This type of mindset, however, is incompatible with loyalty to the truth. The following statement by a local prosecutor following the dismissal of a controversial murder case in which an innocent defendant spent eight years in jail is not atypical: "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time."[232]

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the media."). Consider the recurring and vexing problem of the prosecutor's violation of his duty to disclose exculpatory evidence. It would be useful for systemic and remedial purposes to learn why so many prosecutors choose not to disclose evidence of which they are aware and which is favorable to the accused. *See* STEWART, *supra* note 178, at 207-08 (account of dilemma faced by prosecutor in "CBS Murders" case in deciding whether to disclose arguably exculpatory statement). There may be a myriad of explanations for the prosecutor's nondisclosure, some innocent and some venal. Do prosecutors recognize that the evidence constitutes *Brady* material? Do they rationalize nondisclosure by resorting to doctrinal exceptions? Or are they simply acting in bad faith? Violations cannot be for lack of training or supervision since the *Brady* rule is as embedded in the prosecutorial culture as any rule of criminal procedure. The most an observer can do is speculate on the reasons. It would seem that empirical studies might be able to illuminate this critical area of prosecutorial discretion. Unless a prosecutor faces tough questions from a critical judge at trial or during an appellate argument, or from a lawyer in the context of civil litigation, *see* Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), an observer is hard-pressed to penetrate the prosecutor's mind to learn the reason for the dereliction.

229. These prosecutors, by implication, would argue that even if they have a duty to the truth, that duty has been satisfied by virtue of their confidence in the defendant's guilt. *See* CARTER, *supra* note 178, at 154 (prosecutors maintain that they "almost never 'get the wrong man.'"); Felkenes, *supra* note 178, at 112 ("Many [prosecutors] believe that once an accused reaches the trial stage, his guilt has been determined by the screening process of the police and prosecutor, which they believe effectively eliminates the innocent, thereby allowing only the guilty to proceed through the system."). *But see* Gershman, *supra* note 224, at 275 (according to defense attorney Melvyn Bruder: "Prosecutors in Dallas have said for years, 'Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.'").

230. *See* BAKER, *supra* note 178, at 46 (prosecutor describes "constant pressure to win cases, to keep the office statistics of 'guilty as charged' climbing from one political season to the next."); CARTER, *supra* note 178, at 128 (most deputy prosecutors felt their supervisor "particularly concerned himself with developing good office statistics"); Felkenes, *supra* note 178, at 109, 112 (one-third of prosecutors interviewed believed "their major function is to secure convictions;" many believed that "once an accused reaches the trial stage, his guilt has been determined by the screening processes of the police and prosecutor.").

231. *See supra* notes 223-24 and accompanying text.

232. *See* Yardley, *supra* note 172, at B1 (statement of Assistant District Attorney who prosecuted Jeffrey Blake for a double murder, despite obvious deficiencies in the credibility of the key prosecution witness).

Because of politics, institutional pressures, adversarialness, self-righteousness, and arrogance, these prosecutors may sincerely believe that defendants probably are guilty, will tend to overlook or ignore exculpatory hypotheses, and will place winning a case above any other litigation value.[233] This "conviction mentality" is especially dangerous in a prosecutors' office that fails to train and supervise young prosecutors on basic norms of prosecution, such as the duties not to lie, use false and misleading evidence, and prosecute persons who are not clearly guilty.[234]

Other prosecutors' offices, by contrast, view their role as embracing a duty to the truth.[235] These prosecutors are less responsive to community pressures or the influence of crime victims are consistently skeptical about the evidence and resourceful enough to test and retest the validity of the hypothesis of guilt and have the moral courage to refuse to prosecute a case in which they lack personal confidence of the defendant's guilt. These prosecutors are animated by a credo that to be a good prosecutor "requires commitment to absolute integrity and fair play; to candor and fairness in dealing with adversaries and the courts; to careful preparation, not making any assumption or leaving anything to chance; and to never proceeding in any case until convinced of the guilt of the accused or the correctness of one's position."[236]

CONCLUSION

As I have tried to show, a prosecutor has an affirmative duty to pursue the truth even when assuming the advocate's role. Most of the time, and rightly

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233. Contributing to an adversarial mentality may be the practice in large state and local prosecutors offices of hiring assistants directly out of law school. These young men and women, who lack prior professional experience, are suddenly endowed with awesome power, and have virtually unfettered discretion to exercise their power soundly or irresponsibly. *See* United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) (referring to a federal prosecutor's serious misconduct, court notes "great danger in 'untrained lawyers wielding public power,'" quoting Stephen Gillers, *Under Color of Law*, ABA J., Dec. 1992, at 121).

234. *See Kojayan*, 8 F.3d at 1324 ("What we find most troubling about this case is not the AUSA's initial transgression, but that he seemed to be totally unaware he'd done anything at all wrong, and that there was no one in the United States Attorney's office to set him straight.").

235. Because prosecutors offices are so very different, there has been relatively little discussion over the extent to which a "prosecutorial culture" can be identified, and whether there exists a "federal prosecutorial culture" that is different from a "state or local prosecutorial culture." *But see* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 238 (2000) ("it may be that federal prosecutors, and the offices in which they work, take the duty [to do justice] more seriously than state prosecutors as a whole"). Many academic commentators, particularly those who have served as Assistant United States Attorneys, when they write about issues in criminal prosecution typically confine their discussion to the federal prosecutorial system.

236. *See* STEWART, *supra* note 178, at 354-55 (quoting Whitney North Seymour, U.S. Attorney for the Southern District of New York).

so, the good prosecutor, after careful analysis and active preparation, will have no reasonable doubt of a defendant's guilt and may appropriately pursue the case vigorously and fairly. When he is not sure of the truth, and has a reasonable doubt, he should attempt to resolve the doubt. If he is unable to do so, and no alternative course of action is reasonably available, then the only proper course is to dismiss the case, however difficult that action might be. Insisting on prosecuting the case presents an unacceptable risk that an innocent person will be convicted.

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OUTSIDE COUNSEL

BY JOEL COHEN

When a Prosecutor Doubts the Defendant's Guilt

Laymen seem puzzled, or suspect sleaziness, when defense attorneys explain, "I can represent someone I believe—or even know—is guilty."

They are correct: the defense attorney, while encumbered by certain limitations, is professionally obliged to represent him nonetheless (unless his conscience simply does not allow it). It would be foolhardy to demand, as the relevant American Bar Association (ABA) opinion does,[1] that criminal attorneys probe their clients for the facts, only to be ethically required to abandon them—or else, counsel a guilty plea—when a client concedes guilt.

Is there a symmetry in the prosecution function? What must a prosecutor do if he has serious doubts about the defendant's guilt—accepting, as we do, that the prosecutor must take action when there is actual knowledge of a defendant's innocence (e.g., an exonerating DNA test)? It would be unthinkable for the prosecutor's office to insist, at penalty of firing, that the prosecutor pursue a defendant who he or she believes is factually innocent when other prosecutors are available who don't share that view.

But what options does a prosecutor have in the face of what he perceives to be an imminent injustice, when "the office" asks that he seek to sustain a case in which the defendant has been convicted, knowing that his personal resignation from the case would be useless since his successor will simply follow the office's directions?

The 'Palladium' Case

Recently, a former New York County prosecutor that handled the postconviction hearing (but not the trial) in the famously tortured *Palladium* murder case claimed to the New York Times—front page, mind you—to have concluded that two convicted defendants, whose guilt was contested, were innocent.[2] Troubled by his conscience, the

Palladium prosecutor effectively claimed to the Times that he "threw the hearing" by assisting the defense in any way that he could—tracking down reluctant witnesses, prepping them for testimony,

The 'Palladium' prosecutor, troubled by his conscience, said he threw the hearing by assisting the defense—tracking down witnesses, prepping them, and taking care to not damage their credibility on cross-exam.

and taking care to not damage their credibility on cross-examination, though possessing extensive impeachment material. He also provided other sub rosa assistance to defense counsel, helping them sort through new evidence, and continued trying to persuade his superiors to drop the case. As reported, one motive for not resigning the case was: "The next guy will, in my view, simply 'follow orders,' and the innocent defendants will languish in jail."

Put aside, for a moment, the defendant's guilt or innocence, since a prosecutor will never know for sure if the defendant is "actually innocent." After the prosecutor has unsuccessfully lobbied for dismissal within the office, is it then ethically permissible for him to simply "throw" the case, rather than allow someone else to replace him?

Brady v. Maryland[3] and 40 years of subsequent case law place grave responsibilities on the shoulders of prosecutors to ensure that they disclose exculpatory evidence to their adversaries. In addition, DR 7-103(b) requires a prosecutor to turn over evidence that tends to "negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment." DR 7-103(a) further bars prosecutors from instituting criminal charges when it is obvious that the charges are not supported by probable cause.[4]

Notwithstanding a prosecutor's compliance with *Brady*, the disciplinary precepts, and separate-and-above responsibility "to seek justice, not merely to convict,"[5] a prosecutor must also "not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused."[6] A prosecutor with discretionary power over a litigation must also refrain "from instituting or continuing litigation that is obviously unfair," and "advise his or her superiors and recommend the avoidance of unfair litigation" if the prosecutor does not possess the discretionary power but believes the case lacks merit.[7]

Assume, in the *Palladium* case, that the prosecutor followed leads to dig up exculpatory evidence, concluded that the case lacked merit, and recommended dismissal. Assume further that the prosecutor proposed his resignation from the case in the event that his dismissal recommendation was not followed. Assume that, in response, the district attorney's office proposed that he simply adduce the relevant evidence at the post-trial hearing (since he knew the case best), without arguing inferences in summation, in order to let the judge decide, and had the prosecutor's colleague do the summation. Is there anything else that the prosecutor could, or should, have done?

Ethics Experts

In the New York Times article, legal ethics expert Stephen Gillers comments that, in

Joel Cohen, *a former state and federal prosecutor, practices white-collar criminal law at Stroock & Stroock & Lavan and teaches professional responsibility at Fordham Law School.* **Danielle Alfonzo Walsman,** *an associate at Stroock, assisted in the preparation of this article.*

aiding the defense, the *Palladium* prosecutor improperly subverted his client's case. In Mr. Gillers' estimation, the *Palladium* prosecutor had two options under the circumstances: withdraw or quit. However, the prosecutor's actions found more support in the blogosphere. On Balkinization (at balkin.blogspot.com), Georgetown Law School Professor David Luban (who is not an attorney) disagreed with Mr. Gillers, praising the *Palladium* prosecutor for "doing the right thing" in having pursued the role of "conscientious objector" on the hearing "battlefield." Responding to Mr. Luban's piece, bloggers questioned whether the *Palladium* prosecutor was a conscientious objector or simply an unfaithful agent—indeed how could he be a "C.O." when, by all appearances, he took sides against his own army? Clearly, a case could be made for a conflict of interest between the office's intent in prosecuting the case and the *Palladium* prosecutor's own personal interest in seeing the convictions thrown out. DR 5-101 would suggest that a prosecutor in that position should not continue representing his office in the case.[8]

As Mr. Gillers acknowledges, law professors may argue about "justice" and "doing the right thing" in the more or less hierarchy-free world of academia, however lawyers in private and government practice are not so unrestrained. When the client gives a clear direction as to its lawful objective (and there has been no claim here that the district attorney's office was pursuing something unlawful), it is the responsibility of the lawyer (or subordinate lawyer, as the case may be) to pursue that objective zealously.[9] It is an ethical violation to intentionally prejudice or damage a client in its pursuit of a lawful goal.[10]

New York City Bar Association Ethics Opinion 2004-3, although not directly on point, deals with the issue of disagreements within an office, regarding the conduct or direction of a litigation. If a government lawyer is not authorized to determine the agency's objectives and "because of strong philosophical disagreement with the agency, the government lawyer is unable to seek to achieve the lawful objectives determined by the government representative with decision making authority, then the lawyer may be permitted or required to withdraw from the representation."[11] Regardless of office politics, zealous representation is a must. So while it sounds admirable for a government attorney to go the extra mile for what they believe is "right," one finds no support for a decision to essentially "go over to the other side."

If an attorney in private practice disagrees vehemently with a client's cause, the remedy is simple: resign or petition the court to resign over the differences. However, the attorney has an immutable duty of confidentiality to the client before she resigns and, absent extraordinary circumstances, must take the facts of that disagreement to her grave—even if the world at large would agree with her on the merits. She may not make a so-called "noisy withdrawal"[12] unless a continuing fraud by the client is implicated. A client's right to confidentiality is paramount.

Prosecutorial Hierarchy

For prosecutors, the crime victim is not the client, and the public itself cannot be polled on each and every decision the office must make. The chief prosecutor, whether elected or appointed, is the representative of "the People." The buck must stop with the chief, who is responsible for the ultimate, tough decisions. Line assistants, and even their supervisory counterparts, are hard-pressed to claim a right to make their own decisions, aside from day-to-day discretions that are necessarily placed in their hands.

When a decision comes "from the top," it needs to be followed. The *Palladium* prosecutor was motivated by a desire to reverse what he believed to be an injustice, and operated from no corrupt motive. However, "good intentions" aside, the prosecutor, as a member of the bar, simply set a problematic example by his conduct —though, in this writer's view, not one that merits disciplinary action.[13]

If prosecutors were free to pursue their own conception of justice, tested or untested, it would be a miscarriage of justice. The People of the State of New York have charged District Attorney Robert M. Morgenthau and his office with prosecuting those responsible for crime. This requires a team of skilled professionals, but as with any team, there is inescapable hierarchy, and each assistant must ultimately seek to further the office's objectives (or successfully convince the office otherwise) or decline the assignment, whatever the professional cost.[14] A lawyer may not ethically "choose to lose" without a client's consent.

The February 2008 revision to Rule 3.8 of the ABA Model Rules makes clear that when a prosecutor knows of new, credible evidence creating a reasonable likelihood that the office has obtained a wrongful conviction, the prosecutor shall (1) make the information available to the proper authorities and the defendant, and (2) conduct an investigation.[15] In the face of "clear and convincing" evidence of a wrongful conviction, the prosecutor must "seek to remedy the conviction."[16]

According to the ABA, and common sense, "the obligation to avoid and rectify convictions of innocent people…is the most fundamental professional obligation of criminal prosecutors."[17] Thus, a prosecutor who is convinced of a defendant's innocence or wrongful conviction, but whose belief is at odds with the office's perspective on the newly discovered evidence, is in a wrenching position indeed. The actions of the *Palladium* prosecutor would appear to have complied with the ABA's recent and explicit mandate for investigation in the face of potentially exonerating evidence, and the need for significant disclosures of his findings to the defense (though the new ABA rule has not yet been adopted by New York). Still, the *Palladium* matter seems unseemly, in light of the reportedly opposite position of the prosecutor's client, the office of the district attorney.

Conclusion

The inescapable fact is that a prosecutor who is potentially inspired to "play God" with his case might simply be wrong about the defendant being innocent. And if a very public defendant (who is in fact innocent) benefits from a prosecutor's unorthodox willingness to help vindicate him, yes, the prosecutor's obituary will surely present him as a hero for having corrected an injustice, at risk to his own reputation. Most would simply overlook the ethical misstep and conclude, "no harm, no foul." The precedent, however, might prove disastrous.

The view expressed here may seem apostasy coming from the defense bar, but it is not. Prosecutors must always be vigilant in their *Brady* duties and obligations to remedy injustices. But if a prosecutor wishes to go a good deal further than *Brady* requires, which is admirable and should be encouraged, they need to solicit and gain the chief's blessing and must do it by the rules—not figuratively, wearing a trench coat on a fog shrouded bridge at midnight.

1. ABA Formal Op. 87-353.
2. Benjamin Weiser, "Doubting Case, a Prosecutor Helped the Defense," N.Y. Times, June 24, 2008, at A1.
3. 373 U.S. 83 (1963).
4. NY Code of Prof. Responsibility §1200.34.
5. ABA Criminal Justice Standard 3-1.2(c) on the Prosecution Function.
6. Ethical Canon 7-13, ABA Model Code of Prof. Responsibility.
7. Id. at Ethical Canon 7-14. See also Fred C. Zacharias, "Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?," 44 Vand. L. Rev. 49, n. 22 (1991).
8. N.Y. Code of Prof. Responsibility §1200.20 ("A lawyer shall not…continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own…personal interests.").
9. Id. at §1200.32(a)(1).
10. Id. at §1200.32(a)(3).
11. New York City Bar Association, Opinion 2004-3 "Government Lawyer Conflicts: Representing a Government Agency and Its Constituents."
12. See ABA Formal Op. 93-336 (1993) (When a lawyer discovers that a client is engaged in a fraud…the lawyer must make a "noisy withdrawal" by withdrawing the opinion letter without stating the reasons for doing so.)
13. But see the opinion expressed by Mr. Gillers in "Doubting Case, a Prosecutor Helped the Defense," supra.
14. "A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused." ABA Criminal Justice Standard 3-3.9(c) on the Prosecution Function.
15. Model Code of Prof'l Responsibility R. 3.8(g).
16. Id. at 3.8(h). See also ABA Comment [9] to R. 3.8 (A prosecutor's good faith belief that new evidence does not trigger the rule, though later found erroneous, is not a violation).
17. ABA Criminal Justice Section Report and Recommendation to the House of Delegates, February 2008.

DEFENSE COUNSEL:

THE TRUTH FUNCTION

UNITED STATES v. DEL CARPIO-COTRINA, 733 F. Supp. 95 (S.D. Fla. 1990)

United States v. Del Carpio-Cotrina, 733 F. Supp. 95 (S.D. Fla. 1990)

U.S. District Court for the Southern District of Florida - 733 F. Supp. 95 (S.D. Fla. 1990)
March 21, 1990

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733 F. Supp. 95 (1990)

UNITED STATES of America

v.

Fausto DEL CARPIO-COTRINA.

No. 89-388-CR.

United States District Court, S.D. Florida.

March 21, 1990.

Joel DeFabio, Miami, Fla., for Del Carpio-Cotrina.

***96** Jeffrey S. Weiner, Benjamin S. Waxman, David S. Mandel, Mary V. King, Asst. U.S. Attys., for the U.S.

MEMORANDUM ORDER

SCOTT, District Judge.

This cause is before the Court to determine whether defense counsel Joel DeFabio has breached his ethical obligations by failing to disclose to the Court that the Defendant Fausto Del Carpio-Cotrina had jumped bond and would not appear to stand trial on criminal charges.

I. BACKGROUND

On June 30, 1989, Fausto Del Carpio-Cotrina was indicted by the grand jury on charges of conspiracy to possess with intent to distribute and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a) (1) and 846. Steve Bronis appeared as defense counsel at the arraignment held on July 3, 1989. The U.S. Magistrate released Del Carpio on a $25,000 corporate surety bond, to run concurrent with a pre-existing $50,000 corporate surety bond. In addition, Del Carpio and his wife posted a $200,000 personal surety appearance bond.

On July 10, 1989, the Court set the case for a trial date of July 26, 1989. On July 18, 1989, Joel DeFabio filed his appearance and moved to be substituted as defense counsel. DeFabio stated that he had been retained by Del Carpio on July 13, 1989. The same day, DeFabio moved for a continuance of the trial date.[1]

On July 26, 1989, the Court conducted a hearing on the Defendant's motion to substitute counsel. Bronis and Del Carpio were present. DeFabio had a scheduling conflict and Leonard Farr appeared in his place. Del Carpio expressed his preference for DeFabio as defense counsel. Accordingly, the Court granted the motion to substitute counsel and continued the trial date to August 28, 1989.

DeFabio attempted to contact Del Carpio on several occasions to inform him of developments in the case, but was unsuccessful. During the first week of August 1989, Del Carpio's wife telephoned DeFabio and told him that Del Carpio had left the residence with a suitcase and that she did not know where he had gone.

DeFabio did not advise the Court of these events. Instead, three days before trial, at the calendar call, DeFabio moved for a continuance of the trial date. As grounds for the motion, DeFabio represented that he had a special trial setting in another matter in Tampa. The Court initially denied the motion, but then reset the trial date to the week of September 5, 1989 due to the Government's scheduling conflicts.

On September 1, 1989, at a second calendar call, Farr, again appearing for DeFabio, informed the Court that DeFabio had been unable to reach Del Carpio and did not expect him to appear for trial. The Court issued an Order to Show Cause ordering DeFabio to explain why he had failed to advise the Court that Del Carpio would not appear for trial. At a hearing held on September 6, 1989, DeFabio argued that he was never certain that his client would fail to appear, and therefore, under the attorney-client privilege and ethical rules governing attorneys, he had no duty to notify the court of his client's disappearance.

After the hearing, the Court ordered the Government to brief the issue, and we gave DeFabio the opportunity to respond. DeFabio, through the National Association of Criminal Defense Lawyers, filed a memorandum in response. The Court has carefully considered the arguments of counsel and we are fully cognizant of the seriousness of the issues raised. With that caveat, we proceed to the legal analysis.

II. DISCUSSION

A. *Legal Standard*

Federal district courts possess "the inherent power to protect the orderly administration ***97** of justice and to preserve the dignity of the tribunal." *Kleiner v. First National Bank,* 751 F.2d 1193, 1209 (11th Cir. 1985). Because attorneys are officers of the court, a district court is "necessarily vested" with the authority to control attorneys' conduct and impose reasonable sanctions on "errant lawyers" practicing before it. *Id.; United States v. Dinitz,* 538 F.2d 1214, 1219 (5th Cir.1976). Moreover, "a district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it." *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir.1980); *Woods v. Covington County Bank,* 537 F.2d 804, 810 (5th Cir.1976). This is true even though grievance procedures are otherwise available. *Musicus,* 621 F.2d at 744.

In determining whether an ethical violation has occurred, the Court should look to the controlling ethical principles of the forum state for guidance. The Rules of Disciplinary Enforcement for this district[2] direct the Court to apply the ethics rules of the State of Florida in matters concerning attorney misconduct.[3] "As the legal profession's own source

of ethical standards, [state ethics rules] carr[y] great weight in a court's examination of an attorney's conduct before it." *Woods*, 537 F.2d at 810. However, the Court should also strive to "preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests." *Id*.

The issue before the Court is whether DeFabio had an obligation to disclose that Del Carpio had jumped bond and did not intend to appear for trial. Two of the Rules Regulating the Florida Bar are relevant to this issue.[4] Rule 4-1.6(b) of the Rules Regulating the Florida Bar, known as the confidentiality rule, governs disclosure of information learned in the course of the attorney-client relationship.[5] The confidentiality rule provides:

> (a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.
>
> (b) A lawyer shall reveal such information to the extent the lawyer believes necessary:
>
> (1) to prevent a client from committing a crime.

Florida Rule 4-1.6(b), Confidentiality of Information.[6]

***98** Rule 4-3.3 governs the lawyer's duty of "candor toward the tribunal." Under Rule 4-3.3:

> (a) A lawyer shall not knowingly:
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(b) The duties stated in paragraph (a) ... apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

Florida Rule 4-3.3, Candor Toward the Tribunal.[7]

Thus, if a lawyer learns in the course of representation "that a client intends prospective conduct that is criminal," the lawyer "shall reveal information in order to prevent such consequences." Florida Rule 4-1.6, Comment. In addition, the lawyer must disclose confidential information when necessary to avoid assisting a criminal or fraudulent act by the client. Florida Rule 4-3.3(a) (2).

B. *Analysis*

The Court has been unable to find any reported decisions addressing whether an attorney has a duty to advise the court that the client has jumped bond and does not intend to appear for trial. The Florida Bar has withdrawn its opinion on the issue for reconsideration. [8] However, the relevant ethical principles have been interpreted in the analogous context of client perjury.

Perjury is similar to bail-jumping in terms of ethical considerations because both crimes may interfere with the administration of justice. In addition, for both crimes, the lawyer may learn of the client's intent before the crime has been committed. At that point, as an officer of the court, the lawyer must inform the court of the client's criminal or fraudulent intent. This is especially true if counsel's silence will help the client commit the crime or fraud. Thus, Florida Rules 4-1.6(b) (duty to disclose future crimes) and 4-3.3(a) (2) (duty of candor toward tribunal) apply equally to both situations.

The definitive case on client perjury is *Nix v. Whiteside,* 475 U.S. 157, 166, 106 S. Ct. 988, 994, 89 L. Ed. 2d 123 (1986). In *Nix,* the United States Supreme Court considered "the range of `reasonable professional' responses to a criminal defendant client who informs counsel that he will perjure himself on the stand." The Supreme Court held that "an attorney's duty of confidentiality ... does not extend to a client's announced plans to engage in future criminal conduct." *Id.* at 174, 106 S. Ct. at 998.

Nix has been construed to require "a clear expression of intent to commit perjury ... before an attorney can reveal client confidences." *United States v. Long,* 857 F.2d 436, 445 (8th Cir.1988). We think this ***99** reading of *Nix* is overly narrow. The Supreme Court did not

limit its holding to cases in which the client is the lawyer's source of information, and we see no reason to confine *Nix* to its facts. However, we do agree that a lawyer's duty to disclose future crimes or fraud by the client depends on the lawyer's state of knowledge. In short, actual knowledge is required. *In re Grievance Committee of the U.S. District Court,* 847 F.2d 57, 63 (2d Cir.1988) (construing DR 7-102(B) (2) to require actual knowledge).[9]

"It is admittedly difficult for a lawyer to `know' when the criminal intent will actually be carried out, for the client may have a change of mind." Florida Rule 4-1.6, Comment. Federal and state courts have agreed that actual knowledge means at least a "firm factual basis." *Long,* 857 F.2d at 445; *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115, 122 (3rd Cir. 1977); *Witherspoon v. United States,* 557 A.2d 587 (D.C.Ct.App.1989); *State v. James,* 48 Wash. App. 353, 739 P.2d 1161, 1169 (1987).[10] Other courts have framed the analysis in terms of proof "beyond a reasonable doubt." *See, e.g., Shockley v. State,* 565 A.2d 1373, 1379 (Del.1989).[11] All of these courts have generally equated a firm factual basis and proof beyond a reasonable doubt with the actual knowledge standard.

The actual knowledge standard is necessary to prevent unnecessary disclosure of client confidences and to protect the fiduciary nature of the attorney-client relationship.

> While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client. It is the role of the judge or jury to determine the facts, not that of the attorney.
>
> It is essential to our adversary system that a client's ability to communicate freely and in confidence with his client be maintained inviolate. When an attorney unnecessarily discloses the confidences of his client, he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation.

Johnson, 555 F.2d at 122.

Applying this standard to the record, the Court must determine whether DeFabio knew that Del Carpio had fled the jurisdiction and would not appear for trial, in violation of his bond conditions. DeFabio had attempted to reach his client on numerous occasions

without success. Del Carpio's wife called DeFabio to tell him that Del Carpio had packed a suitcase and left the marital residence.[12] She did not know where he had gone. Armed with these facts, DeFabio appeared before the Court three days before trial at the calendar call and moved for a continuance of the trial date. DeFabio did not advise the Court of Del Carpio's disappearance until three days before the new trial date, at the second calendar call.

Based on this record, the Court finds that DeFabio had a firm factual basis for ***100** believing that Del Carpio had jumped bond and did not intend to appear for trial. DeFabio had been unable to contact Del Carpio since the early stages of proceedings, and could not reach him even three days before trial. Moreover, Del Carpio's wife had called DeFabio to advise him that Del Carpio had left the house with a suitcase for parts unknown. It would not be a matter of speculation to conclude that Del Carpio had fled the jurisdiction. On the contrary, these facts, taken together, provided counsel with a firm factual basis for believing that his client did not intend to appear for trial.

This factual finding requires the Court to consider a difference between the perjury and bail-jumping scenarios. In the perjury context, a lawyer who knows that his client intends to commit perjury need not advise the court until the client takes the witness stand. In the bail-jumping context, it is less certain at what point in time a lawyer must advise the court that the client intends to jump bail.

DeFabio did ultimately advise the Court of his client's intentions, three days before trial. However, he first appeared before the Court to secure a continuance of the trial date. At that time, there can be no question that DeFabio had a duty of disclosure as an officer of the Court. Even if his scheduling conflict was legitimate, DeFabio could not seek an extension of time to appear for trial when he had a firm factual basis for believing that his client would not appear for the scheduled trial date. His failure to inform the Court could only assist Del Carpio in succeeding in his efforts to elude law enforcement officers. In effect, DeFabio's attempt to secure a continuance, no matter how legitimate his motive, could only buy more time for the defendant to flee the jurisdiction.

The Court concludes that DeFabio was required to inform the Court that he had a firm factual basis for believing that his client would not appear for trial before moving for a continuance of the trial date. Disclosure was necessary to "avoid assisting a criminal or fraudulent act by the client," Florida Rule 4-3.3(a) (2) and "to prevent a client from committing a crime," Florida Rule 4-1.6(b). We do not believe that this holding creates a conflict for an attorney between his duties to a client and to the court. "The duty of a lawyer

to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." *Sanborn v. State,* 474 So. 2d 309, 312 (Fla. 3d DCA 1985).

III. CONCLUSION

Although the Court has determined that DeFabio's conduct was not consistent with his obligations as an officer of the Court, we recognize that the state of the law, as developed in the case law and ethics opinions, has been uncertain. Perhaps counsel should have remembered that discretion is the better part of valor. Nonetheless, the Court will stay its hand and no sanctions will be imposed. However, this Memorandum Order will be published so the defense bar will be put on notice of this ethical obligation in like situations. It is so ordered.

DONE and ORDERED.

NOTES

[1] DeFabio argued that, as new counsel, he required additional time to prepare Del Carpio's defense. DeFabio further represented that he had conflicting vacation plans and a special trial setting in a separate matter.

[2] "[F]ederal district courts have clear statutory authority to promulgate rules governing the admission and conduct of the attorneys who practice before them." *Greer's Refuse Serv., Inc. v. Browning-Ferris Indus.,* 843 F.2d 443, 446 (11th Cir.1988); *see* 28 U.S.C. §§ 1654 & 2071; Fed.R. Civ.P. 83. This district has promulgated the Rules of Disciplinary Enforcement for the United States District Court for the Southern District of Florida.

For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

Rule 4, part A (Standards for Professional Conduct) of the Rules of Disciplinary Enforcement for the United States District Court for the Southern District of Florida.

[3] Rule 4, part B of the Rules of Disciplinary Enforcement for the Southern District of Florida, supplementing Rule 16(C) of the Local Rules of this Court.

[4] The Florida Supreme Court adopted the Rules Regulating the Florida Bar, effective January 1, 1987, superseding the Florida Bar Code of Professional Responsibility previously in force. On most issues, the Rules track the American Bar Association's Model Rules of Professional Conduct, which the ABA adopted in 1983. However, the Florida Rules differ from the ABA Model Rules on certain issues, including client fraud and attorney-client confidentiality.

[5] "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Rules Regulating the Florida Bar, Rule 4-1.6, Comment.

[6] Under Rule 1.6 of the ABA Model Rules of Professional Conduct, a lawyer may reveal such information to the extent that "the lawyer reasonably believes necessary [t]o prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *See also* Model Code of Professional Responsibility, DR 4-101(B) (1, 2), (C) (3) (a lawyer "may reveal [t]he intention of his client to commit a crime and the information necessary to prevent the crime.").

[7] Rule 3.3(a) (2) of the ABA Model Rules of Professional Conduct is identical. DR 7-102(B) (1) of the ABA Model Code of Professional Responsibility provides:

[A] lawyer who receives information clearly establishing that [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, or if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal except when the information is protected as a privileged communication.

In addition, the ABA Standards Relating to the Administration of Criminal Justice, the Defense Function, Standard 4-3.7 provides:

A lawyer may reveal the expressed intention of a client to commit a crime and the information necessary to prevent the crime, and the lawyer must do so if the contemplated crime is one which would ... corrupt the process of the courts and the lawyer believes such action on his or her part is necessary to prevent it.

[8] In 1973, the Professional Ethics Committee of the Florida Bar issued an opinion concluding that an attorney has an affirmative duty to inform the court that his client has

jumped bail. Florida Bar Comm. on Professional Ethics, Formal Op. 72-34 (1973). The Committee relied on the ABA's Formal Opinion 155 (1936), which held that an attorney has a duty to disclose the location of a client who has fled the jurisdiction while out on bail. After the ABA Committee withdrew this opinion, *see* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-349 (1984), the Florida Bar Ethics Committee withdrew its opinion for reconsideration in January 1989.

[9] One court has imposed a duty to investigate when the lawyer has "clear information" indicating crime or fraud by the client. *In re Grand Jury Subpoena,* 615 F. Supp. 958, 969 (D.Mass. 1985). However, we do not believe that the ethical rules, as written, require a lawyer to take affirmative steps to discover client fraud or future crimes. Independently, the Court is of the view that imposing a duty to investigate the client would be incompatible with the fiduciary nature of the attorney-client relationship.

[10] Certainly, "[m]ere suspicion" is not enough. *Sanborn v. State,* 474 So. 2d 309, 313 n. 2 (Fla. 3d DCA 1985).

[11] "A number of commentators also support a reasonable doubt standard." *Shockley,* 565 A.2d at 1379 n. 7 (citing commentators). This standard is not designed to permit a lawyer "to turn a blind eye to the facts" with impunity. *Shockley,* at 1379 n. 8. However, consistent with the reasonable doubt standard of proof in criminal trials, "proof beyond a moral certainty" is not required. *In re Grievance Committee,* 847 F.2d at 63.

[12] Notwithstanding the wife's disclosure, the marital residence will necessarily be forfeited to the Government in order to meet the $200,000 personal surety bond.

***IN RE GRAND JURY SUBPOENA (LEGAL SERVICES CENTER)*,**
615 F. Supp. 958 (D. Mass. 1985)

In Re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958 (D. Mass. 1985)

US District Court for the District of Massachusetts - 615 F. Supp. 958 (D. Mass. 1985)
August 8, 1985

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615 F. Supp. 958 (1985)

In re GRAND JURY SUBPOENA (LEGAL SERVICES CENTER). In re GRAND JURY SUBPOENA (PAPPAS & LENZO).

M.B.D. Nos. 85-34-F, 85-35-F.

United States District Court, D. Massachusetts.

August 8, 1985.

***959 *960** Jeanne Baker, Silverglate, Gertner, Baker, Fine & Good, Boston, Mass., John Callahan, Stephen R. Kaplan, Northampton, Mass., for No. M.B.D. 85-34-F.

Mary Beth Carmody, Asst. U.S. Atty., Springfield, Mass., for No. M.B.D. 85-35-F.

MEMORANDUM[1]

FREEDMAN, District Judge.

Petitioners in the above-captioned cases are custodians of records of a legal service clinic and a private law firm who have been served with subpoenas *duces tecum* commanding them to produce to the federal grand jury their legal files relating to their respective representations of two Nigerian nationals and their alleged American spouses in pending proceedings before the Immigration and Naturalization Service ("INS").[2] Petitioners have moved pursuant to Fed.R.Crim.P. 17(c) to quash these subpoenas, relying on the attorney-client privilege, the work product doctrine (both factual and opinion), the fifth amendment privilege against self-incrimination, and as being unduly burdensome and oppressive in the context of ongoing legal representation of the clients.

Mohammed O. Odufowora and Rudna Delores Lee, clients of Pappas & Lenzo, and Elizabeth Adesanya Parker and Dwight D. Parker, clients of Legal Services Center, have moved to intervene in these cases. Fed.R.Civ.P. 24(a). The Court has allowed these motions.

On July 29, 1985 the Court heard oral arguments from all parties on petitioners' motions to quash and gave parties the opportunity to file additional briefs with the Court. On August 7, 1985, after having carefully considered the matter, the Court allowed petitioners' motions to quash the subpoenas *duces tecum*.

I.

Briefly stated, the facts of these cases are as follows: The Grand Jury is conducting an investigation into alleged conspiracies to circumvent the immigration laws by entering into sham marriages. Specifically, the Grand Jury is investigating alleged violations of 18 U.S.C. § 371 (conspiracy to commit an offense or defraud the United States); 18 U.S.C. § 1001 (making false or fraudulent statements); 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 1622 (subornation of perjury); and 18 U.S.C. § 2 (aiding and abetting).

With respect to the Legal Services Center, the government contends that its clients, Elizabeth Adeshola Adesanya and Dwight D. Parker, entered into a sham marriage to circumvent the immigration laws of the United States and that the true ***961** nature of this marriage was known (or at least reasonably should have been known) to the staff of the Legal Services Center when it prepared a second Petition to Classify the Status of Alien Relative for the Issuance of an Immigrant VISA (I-130) on behalf of Elizabeth Adesanya and Dwight Parker and an accompanying affidavit of Dwight Parker. Previously, Adesanya

Parker had filed an earlier I-130 petition which had been denied on August 15, 1983 by the District Director of the INS because of a lack of prosecution and his finding that their marriage was a sham entered into for the primary purpose of evading immigration laws. Part of the reason for this denial was that the man who showed up for the INS "marriage interview" with Elizabeth Adesanya was an imposter. The real Dwight Parker admitted as much in a February 10, 1983 affidavit which stated, "I never filed any papers with Immigration on [Adesanya's] behalf. I never went to Boston with her for an interview."[3] This form affidavit, executed in the presence of only David Golden, an investigative officer of the INS, also set out a pre-printed waiver of Miranda rights and included the statement that "I am willing to make a statement without anyone else being present."

The attorneys representing Ms. Adesanya knew of the adverse INS ruling and of the content of the original Dwight Parker affidavit. Nevertheless, they filed the second I-130 petition on behalf of Parker and Adesanya along with a sworn affidavit of Parker dated October 15, 1984 which contradicted and explained many of the statements contained in his earlier affidavit.[4]

The government also contends that the law firm of Pappas & Lenzo was involved in an attempt to circumvent the immigration laws by filing petitions setting forth the existence of an allegedly sham marriage between Mohammed Odufowora and Rudna Delores Lee. Specifically, the government contends that Attorney Dean G. Corsonnes, a member of the law firm of Pappas & Lenzo, prepared two Petitions to Classify Status of Alien Relative for Issuance of Immigrant VISA (I-130) on behalf of Rudna Delores Lee. The first was filed on September 15, 1983 but was withdrawn by the petitioner because she admitted that her marriage was a sham entered into to circumvent immigration laws. Attorney Corsonnes represented Mohammed Odufowora at a deportation hearing on June 14, 1984, at which Mr. Odufowora effectively admitted deportation; i.e., that his former immigrant status as a student had expired and that he remained in the United States without authorization. Subsequently, Mr. Corsonnes prepared and submitted a second I-130 petition accompanied by a sworn affidavit signed by Rudna Delores Odufowora, dated July 5, 1984, which the government contends was also drafted by Corsonnes. This affidavit states that the earlier withdrawal of the first I-130 petition was a product of coercion ***962** by David Golden, the INS investigator. She further asserts that her marriage was bona fide and not entered into to circumvent immigration laws.

It is the government's position that by filing the second I-130 petition, Corsonnes knew, or reasonably should have known, that his clients' marriage was a sham and that he was

assisting them in defrauding the United States by knowingly filing false and perjurious statements.

II.

The Court begins its analysis, as did the First Circuit, with the proposition that the Grand Jury has the right and duty to procure the evidence of every person. *In re Grand Jury Matters,* 751 F.2d 13, 16 (1984) *citing United States v. Dionisio,* 410 U.S. 1, 9-10, 93 S. Ct. 764, 769-70, 35 L. Ed. 2d 67 (1973). This right is not without limitation however: "The grand jury's right to every man's evidence is substantially limited only by express `constitutional, common-law or statutory [privileges and is also] subject to judges' supervisory powers', which, under Fed.R.Crim.P. 17(c), include the power promptly to `quash or modify the subpoena if compliance would be unreasonable or oppressive.'" *In re Grand Jury Matters,* 751 F.2d at 17. In the instant case, the petitioners have asserted by way of exceptions to this general rule, the attorney-client privilege, the work product doctrine, the fifth amendment privilege against self-incrimination, as well as a prudential argument directed to the Court's discretion under Fed.R.Crim.P. 17(c) in support of their motions to quash.

A.

The first privilege asserted by petitioners, the attorney-client privilege, is "the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States,* 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). The purpose of the privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice." *Id.* Our system of jurisprudence is underpinned by the very basic supposition that the critically important frank communication between attorney and client would not occur if the attorney-client were readily subjected to outside scrutiny. *See Fisher v. United States,* 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L. Ed. 2d 39 (1976).

The scope of the attorney-client privilege has been described as follows:

> The privilege applies only if (1) the asserted holder of the privileges sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney is informed (a) by the client; (b) without the presence of strangers; (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Show Machinery Corp., 89 F. Supp. 357, 358-59 (D.Mass. 1950).

The work product doctrine rests on similar concerns. The Supreme Court first recognized the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). The Court held:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategies without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of ***963** jurisprudence to promote justice and to protect their client's interests.

Id. at 511, 67 S. Ct. at 393. The work product doctrine has been substantially incorporated in Fed.R.Civ.P. 26(b) (3). This rule differentiates between the discovery of documents and tangible things (fact work product) which require a showing of substantial need and inability to obtain the equivalent without undue hardship *and* "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation," which require a greater showing before they must be produced. In *Upjohn, supra*, the Supreme Court, while not reaching the question of whether any showing of necessity can ever overcome the protection of "mental processes" work product, held that "a far stronger showing of necessity and unavailability by other means" is necessary at a very minimum before such material may be discovered. 449 U.S. at 383-84, 101 S. Ct. at 677-80.

Finally, the petitioners and the intervenor-clients have asserted the clients' fifth amendment privilege against self-incrimination. Basically, they argue that the documents in possession of the attorneys may implicate the clients' fifth amendment rights. The Supreme Court has held that clients may assert their fifth amendments rights for documents in the possession of the attorneys to the same degree as if the clients held possession to documents themselves. *Fisher*, 425 U.S. at 403-04, 96 S. Ct. at 1577. Because of the Court's conclusions respecting the common law privileges, it is not necessary to reach the question of the constitutional privilege.

B.

Ordinarily, the party asserting a privilege has the burden of demonstrating its applicability. *Matter of Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert. denied,* 449 U.S. 994, 101 S. Ct. 531, 66 L. Ed. 2d 291 (1980). The procedure generally followed is that the party asserting the privilege submits the disputed document to the Court for an *in camera* inspection along with an explanation as to how each particular document falls within the privilege. *In re Grand Jury Witness (Salas),* 695 F.2d 359, 362 (9th Cir. 1982). In their pleadings and during the hearing, petitioners objected to this procedure because 1) the government has a preliminary burden of demonstrating relevancy and 2) the subpoenas on their face seek to elicit privileged materials.

In *In re Special Grand Jury No. 81-1 (Harvey),* 676 F.2d 1005, *vacated on other grounds,* 697 F.2d 112 (4th Cir.1982),[5] on which the petitioners rely, the Circuit Court held that when the government seeks to subpoena the files of an attorney representing a client in an ongoing criminal procedure, the government must make a preliminary showing of necessity and relevance before the burden shifts to the petitioner to demonstrate the applicability of a privilege. The Court based its holding on sixth amendment and policy grounds:

> We recognize that normally a subpoena is presumed to be regular in that the subpoenaed party has the burden of showing the information sought is privileged or that there has been an abuse of the grand jury process.... Where the attorney for the target of an investigation is subpoenaed, ... attorney-client privilege considerations and sixth amendment interests arise automatically and

> a preliminary showing must be made before the attorney can be forced to appear before the Grand Jury.

676 F.2d at 1010. *See contra, In re Grand Jury Proceedings in Matter of Freeman,* 708 F.2d 1571, 1575 (11th Cir.1983).

The Second Circuit has very recently adopted the *Harvey* standard of requiring the government to make a preliminary showing of relevance and reasonable need before an attorney can be compelled to testify before the same grand jury which is ***964** investigating his client. *In re Grand Jury Subpoena Served Upon Doe,* 759 F.2d 968 (2d Cir.1985). The court, in reaching this conclusion, relied on two considerations. First, it took into account the fact that an attorney who was called upon to testify against his client would probably have to disqualify himself from his representation, thus jeopardizing his sixth amendment right to retain counsel of his choice. *Id.* at 973, 975-76. *See* Model Code of Professional Responsibility DR 5-102(B); *cf. Powell v. Alabama,* 287 U.S. 45, 53, 53 S. Ct. 55, 58, 77 L. Ed. 158 (1932). Second, the court also considered the requirements of the "adversary system of criminal justice, particularly when we consider the significance of the attorney-client relationship and the need for an independent bar." *Doe,* 759 F.2d at 975.

While the First Circuit has not ruled definitively on the question of whether the government needs make a preliminary showing of relevance or need before the question of privilege is reached, the court's opinion in *In re Grand Jury Matters, supra,* arguably supports such a procedure. The court held that quite apart from any question of privilege, a district court may consider, in the exercise of its Rule 17(c)'s supervisory powers, the implications of issuing a subpoena for attorneys' files during pending proceedings. 751 F.2d at 17-18 and cases cited.[6]

Mindful of importance of the attorney-client relationship to our system of justice, the Court adopts the reasoning of *Harvey* and *Doe* and will require the government to demonstrate, as a preliminary matter, that the information sought by the subpoenas is necessary to the grand jury investigation and that there is no other reasonably available source for that information other than the attorneys' files. Only after this showing is made does the burden shift to the petitioners to demonstrate the applicability of one or more privileges.

C.

In the instant case, both the petitioners and their clients are subjects of the Grand Jury's investigation. The government has failed to make any showing of necessity or relevance that would justify requiring the attorneys to disclose their legal files with respect to the Grand Jury investigation of the clients. Based upon the affidavit submitted by the government, it seems clear that the government's case against the clients does not depend in any way upon material that might be contained within the legal files of the petitioners.

With respect to the Grand Jury's investigation of the petitioners, however, the government contends that information establishing the culpability of the petitioners cannot be found in any other place and that it would be impossible for the Grand Jury to determine effectively whether there is probable cause to believe that a crime has been committed by petitioners without access to the subpoenaed material. The Court concludes that the government has satisfied its preliminary burden of demonstrating relevancy and necessity. Accordingly, the Court must consider the petitioners' assertion of privileges.

D.

There is no doubt that "`blanket assertions of privilege ... are extremely disfavored,' *In re Grand Jury Witness (Salas),* 695 F.2d 359, 362 (9th Cir.1982), and that the persons claiming a privilege `must establish the elements or privilege as to each record sought and each question asked so that ... the court can rule with specificity.' *Matter of Walsh,* 623 F.2d 489, 493 (7th Cir.), *cert. denied,* 449 U.S. 994 [101 S. Ct. 531, 66 L. Ed. 2d 291] (1980)." *In re Grand Jury Matters,* 751 F.2d at 17 n. 4. Nevertheless, where, as here, nearly every item identified in the Grand Jury subpoena clearly falls within the attorney-client privilege or work product rule, it is unnecessary for the Court to conduct a preliminary *in camera* inspection to establish ***965** the existence of a privilege. To do so would, in itself, constitute an unnecessary invasion of the privileged relationship between the attorney and his client and of the confidential files of the attorneys.[7]

The cases cited by the First Circuit in connection with its expressed aversion to blanket assertions of privilege are clearly distinguishable by the vastly different scope of the material being sought here. In *Salas,* for example, the grand jury subpoena commanded the production of accounts receivable records, time records, bills, retainer agreements, and records of payments for legal services rendered. The petitioner sought to assert a blanket privilege against disclosing all of these documents. The Circuit Court held, however, that these documents contained both privileged and non-privileged material. In order for the

district court to have been able to differentiate properly between the privileged and non-privileged material, an *in camera* inspection should have been made. 695 F.2d at 361-62. Similarly, *Matter of Walsh* involved both privileged and non-privileged communications leading the circuit court to favor an *in camera* inspection of the information. 623 F.2d at 494 & n. 5.

By contrast, the Grand Jury subpoenas in question here seek materials which, on their face, are clearly protected such as "correspondence with the clients," "memoranda ... of conversations and meetings with the clients" and "drafts of documents prepared for filings." Such material is indisputably protected by either the attorney-client privilege or the work product rule. The Court is satisfied that the petitioners have successfully demonstrated the applicability of these privileges to the subpoenaed documents without the necessity for the Court to conduct an *in camera* examination. Having done so, the burden shifts to the government to show that an exception to the privileges exists which could enable the Court to permit the subpoenas to stand.

III.

The government asserts that the crime-fraud exception applies. The Supreme Court explained this exception as follows: The privilege between attorney and client "takes flight if the relationship is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark v. United States,* 289 U.S. 1, 15, 53 S. Ct. 465, 469, 77 L. Ed. 993 (1933). The crime-fraud exception is equally applicable to claims of work product. *In re Sealed Case,* 676 F.2d 793, 812 (D.C.Cir.1982); *In re Grand Jury Proceedings (FMC Corporation),* 604 F.2d 798, 803 (3rd Cir.1979).

For the government to be able to invoke this exception, it need make a *prima facie* showing that the client consulted the attorney and the furtherance of an ongoing or future illegality but not for past crimes or frauds. *Clark,* 289 U.S. at 15, 53 S. Ct. at 469. *In re Sealed Case,* 676 F.2d 793, 812 (D.C.Cir.1982). The Circuit Court of the District of Columbia has explicated the standard further:

> Communications otherwise protected by attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or other misconduct.... To overcome a claim of privilege, the government need not prove the existence of a crime or fraud beyond a reasonable doubt. Rather, the government must first make a *prima facie* showing of a violation sufficiently serious to defeat the privilege and second, establish some relationship between the communication at issue and the *prima facie* violation. A *prima facie* violation ***966** is shown if it is established that the client was engaged in or planning a criminal or fraudulent act when it sought the advice of counsel to further the scheme.... The government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing crime or fraud.

In re Sealed Case (Doe & Roe), 754 F.2d 395, 399 (D.C.Cir.1985). A similar *prima facie* showing is necessary to defeat the assertion of work product. *Id.* at 399 n. 4.

A.

Before reaching the question of whether the government has satisfied its *prima facie* burden, it is necessary to comment on the propriety of the government's submission of the *ex parte* affidavit of INS Investigator David Golden as part of its *prima facie* case. Petitioner Legal Services Center has moved to disclose this affidavit and petitioner Pappas & Lenzo has moved to strike the affidavit in its entirety. The petitioners argue that the general obligation of grand jury secrecy Rule 6(e) (2) is inapplicable in these circumstances.

In support of the *ex parte* nature of the affidavit, the government relies upon Fed. R.Crim.P. 6(e) (2).[8] Rule 6(e) (2) sets out a finite list of persons who are bound by a general rule of grand jury secrecy. The penultimate sentence of this subsection of Rule 6(e) specifically states that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." According to the Advisory Committee, "the rule does not impose any obligation of secrecy on witnesses.... The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Fed.R. Crim. 6 Advisory Committee Note. It might be possible that Inspector Golden could be included in the Rule 6(e) (3) (A) (ii) provision for "such government personnel as are deemed necessary by an attorney for the

government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Fed.R.Crim.P. 6(e) (3) (A) (ii). If Golden were to fall in this exception, the obligation of secrecy would attach to him. However, the government has not brought to the attention of the Court the government's compliance with Fed.R.Crim.P. 6(e) (3) (B) which requires the government to promptly provide the district court before whom the grand jury was impaneled the names of the persons to whom disclosure under Rule 6(e) (3) (A) (ii) has been made. *See* n. 8, *supra.*

Furthermore, while the Golden affidavit purports to disclose the result of the Grand Jury's ongoing investigation, in fact, the Court finds it to be largely the product of Inspector Golden's own investigations. "Disclosure of the affidavit in open court is particularly appropriate where, as here, the information contained therein is a fruit of the Government's own investigatory activity and does not bear the imprint of the Grand Jury's independent initiative." *In re September 1971 Grand Jury,* 454 F.2d 580 (7th Cir.1971), *reversed on other grounds, United States v. Meara,* 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973).

***967** The government is correct when it states that *ex parte* affidavits and *in camera* submissions are common devices in the context of grand jury investigations. *See, e.g. Doe & Roe,* 754 F.2d at 398; *In Re Sealed Case,* 676 F.2d at 814. Where an affidavit recounts testimony before a grand jury or is clearly the product of a grand jury's own investigation, the government's interest in maintaining grand jury secrecy is undoubtedly heightened. In the instant case, these considerations are simply not present.

Ordinarily, having found that the affidavit should not be relied upon *ex parte,* the Court would order it be revealed to the petitioners or stricken entirely. Given the Court's decision on the merits, however, it seems unnecessary to order the government to reveal these affidavits at this time. The government obviously submitted them with the expectation that they would be under seal. Hence, the Court gives the government the opportunity at this point to either 1) withdraw the affidavit or 2) permit the affidavit to remain a part of the record in the case and submit copies thereof to the petitioners and the intervening parties.

B.

The government's purported *prima facie* showing to satisfy the crime-fraud exception is in two parts. First, the government contends that the clients consulted the petitioners in the

furtherance of an ongoing crime or fraud against the government. Specifically, the government accuses the client of misrepresenting the character of their marriages to the INS which, it suggests, constitutes the crimes of filing false or fraudulent statements, 18 U.S.C. § 1001; and perjury, 18 U.S.C. § 1621. The government also contends that the petitioner themselves by "turning a blind eye" to what the government considers obvious indications of the fraudulent character of their clients' marriages, committed offenses against the United States including aiding and abetting, 18 U.S.C. § 2; suborning perjury, 18 U.S.C. § 1622; and conspiracy to commit an offense or defraud the United States, 18 U.S.C. § 371.

With respect to the government's investigation of the clients, its *prima facie* showing failed because, as discussed *supra* at 964, the government had not satisfied its preliminary showing of relevance and need. There is absolutely no indication that the legal files of the petitioners would help the government's case in any way against the clients.

In addition, aside from the government's failure to satisfy its initial burden of relevance and need, its invocation of the crime-fraud exception in the context of the clients' alleged participation in ongoing or future crimes is not without problems. Specifically, the government's cases rest, to some extent, on the fact that the clients' first I-130 petitions had been either denied (Adesanya) or withdrawn (Odufowora) because of statements by the alleged American spouses admitting that the marriages were shams. However, both Nigerian nationals have filed new I-130 petitions accompanied by affidavits which try to explain the American spouses' earlier statements.

The Court seriously questions the propriety of instigating criminal investigations on the basis of the second filings before the petitions have been acted upon by the INS. Without the benefit of an administrative determination by the INS of the merits of the clients' I-130 petitions, the Court is reluctant to find that a *prima facie* showing of illegality has been made. This distinguishes this case from *Doe & Roe* in which the court noted that, in upholding the subpoenas, the district court correctly relied upon "actual findings of fact by courts of competent jurisdiction that [the clients] had committed an ongoing fraud in litigation in which it was represented by [the petitioners-attorneys]." *Doe & Roe,* 754 F.2d at 401. No such finding has been made as of yet on the second I-130 petitions.

With respect to the Grand Jury's investigation of the petitioners for their participation in alleged conspiracies to circumvent ***968** the immigration law, very troubling considerations come into play. Relying on *United States v. Sarantos,* 455 F.2d 877 (2d Cir.1972), the government accuses the petitioners of violating federal law by acting "with reckless disregard of whether the statements made in the [I-130] Petition[s] are true and

with a conscious effort to avoid learning the truth." Memorandum of the United States in Opposition to Petitioners' Motion to Quash. The government contends that petitioners were put on notice by prior determinations of the INS, conversations between Inspector Golden and the petitioners concerning their clients, and other facts, that should have led them to realize that their clients' marriages were, in fact, fraudulent. Further, in defiance or in reckless disregard of these "facts" the petitioners nevertheless proceeded to file on their clients' behalf claiming the existence of a bona fide marriage.

The holding in *Sarantos* must be carefully examined for what it did and did not contain in light of the unique set of facts before it. Robert Sarantos was an attorney who was convicted of two counts of making false statements to the INS and defrauding the United States government in violation of 18 U.S.C. §§ 371, 1001, 1546 and seven counts of aiding and abetting others in making false statements to the INS in violation of 18 U.S.C. §§ 1001 and 2. The issue before the Court of Appeals was whether the district court erred in instructing the jury that Sarantos could be found guilty of abetting and making false statements if the jury concluded that "`he knew ... [the statements] were false and that he wilfully and knowingly participated in furthering the conduct.'" *Sarantos,* 455 F.2d at 880.

The evidence at trial showed that Sarantos was involved with a scheme along with his codefendant Constantine Makris to obtain permanent residences in this country for male Greek aliens. Makris helped locate Puerto Rican women who were interested in marrying Greek aliens in return for a fee and actually helped arrange the sham marriages. Shortly after the marriage ceremony had occurred, the parties visited Sarantos' office. There, the wife would sign a VISA petition [I-130] in blank which Sarantos would later complete and file with the INS. The petitions falsely stated that the parties were living together as husband and wife. The court recounts the evidence of what Sarantos knew or could be charged with knowing as follows:

> Although the government failed to show that Sarantos was ever explicitly told that the couples were not living together, it did furnish abundant evidence that Sarantos was informed of the sham nature of the marriages; in some cases newlyweds required in his presence the aid of an interpreter or sign language because they shared no common language; divorce papers were executed simultaneously with immigration papers; Sarantos was told the wife was being paid a fee; and Sarantos was at least indirectly informed that the parties were not living together.

Id. at 880.

On appeal, Sarantos contended that if an attorney is charged with aiding and abetting the making of a false statement by a mere showing of reckless disregard of falsity, the attorney-client relationship would be radically altered as the attorney would be made "an investigative arm of the government." The court stated: "We have not held, as appellant contends, that an attorney must investigate `the truth of his client's assertions' or risk going to jail.... We have held, and continue to hold that he cannot counsel others to make statements in the face of obvious indications of which he is aware that those assertions are not true." *Id.* at 881.

While it is no doubt true that where an attorney has such obvious indications that his client's assertions are false as was the case in *Sarantos,* it would be improper and perhaps illegal for him to make those representations nonetheless; the facts of the instant case are far different. There is nothing even resembling the type of ongoing scheme that was operating in *Sarantos.* Further, the information the government ***969** imputes to the petitioners is quite different from that of which Sarantos was aware. Basically, the information the government alleges the petitioners acted in defiance of consists largely of INS' actions on the first I-130 petitions and Golden's suspicions.

A lawyer is under a professional obligation to "represent a client zealously within the bounds of the law." Model Code of Professional Responsibility, Canon 9 *adopted in* Mass.S.J.C. Rule 3:07. It is fundamentally inconsistent with this obligation to require an attorney to ascertain the truth or falsity of his client's assertions. So long as the attorney does not have obvious indications of the client's fraud or perjury, the attorney is not obligated to undertake an independent determination before advancing his client's position. Disciplinary Rule 7-102(B) of the Code of Professional Responsibility, adopted as a Rule of Massachusetts Courts, makes this clear:

> A lawyer who receives information *clearly* establishing that:
>
> (1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or a tribunal except when the information is protected as a privileged communication.

(emphasis added). To subject a lawyer to the obligation of investigating his client's behavior on less than "clear information" would undoubtedly undermine a client's confidence in his attorney. On the facts presented by the government including the affidavit of Golden, the Court concludes that the government has failed to satisfy its *prima facie* showing of attorney participation in crime or fraud which would enable it to defeat the petitioners' assertion of privileges.

IV.

Although the Court has concluded that the subpoenas should be quashed on the basis that the government has failed to satisfy its burden of proving the crime-fraud exception by *prima facie* case, the Court also wishes to briefly indicate that it would quash the subpoena on independent nonprivileged grounds as permitted by Fed.R. Crim.P. 17(c) because the subpoenas are unreasonable and oppressive in the context of the ongoing representation of a client before the INS. In *In re Grand Jury Matters, supra,* the First Circuit stressed the importance "that the federal Constitution places upon the right to counsel in criminal prosecutions and the fact that a judge could plausibly determine in these circumstances that the timing of the subpoenas unduly and unnecessarily burden that right." 751 F.2d at 17. Although the instant case does not involve criminal proceedings, it involves immigration proceeding which may lead to deportation. The courts have clearly held that an alien who is charged with deportability is entitled to due process. *Shaughnessy v. Mezei,* 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953); *Navia-Duran v. Immigration & Naturalization Service,* 568 F.2d 803, 808 (1st Cir. 1977). Indeed, "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon,* 326 U.S. 135, 154, 65 S. Ct. 1443, 1452, 89 L. Ed. 2103 (1945). Having recognized what is often at stake in immigration proceedings, Congress has expressly required that aliens facing deportation are entitled to representation by counsel. *See* 8 U.S.C. § 1252(b)(2). Clearly, the fact that the instant case involves immigration representation whereas *In re Grand Jury Matters* concerned criminal proceedings does not lessen the relevance of the First Circuit's holding to the instant case. The same facts that were important to the First Circuit in this case are present here; namely, the fact that the Grand Jury investigation was occurring on the very eve of the client's felony trial.

The Court believes that the timing of the grand jury's subpoenas, coming as they do while the petitioners are involved in pending INS proceedings on behalf of their clients, is unreasonable and oppressive. ***970** Fed.R.Crim.P. 17(c). To permit the subpoenas to stand would result in the veritable destruction of the parties' attorney-client relationships. It would also pose a significant chilling effect on the ability of attorneys, especially *pro bono* organizations such as Legal Services Center, to represent their clients zealously within the bounds of the law. *See* Amicus Statement in Support of Legal Services Center's Motion to Quash.

Accordingly, quite apart from any question of privilege, the Court would quash the subpoenas so long as the attorneys are still representing the clients in pending immigration matters. *See In re Grand Jury Matters,* 751 F.2d at 19.[9]

V.

For the reasons set forth above, the Court concludes:

1) The government has failed to establish the preliminary showing of relevance and need with regard to the Grand Jury's investigation of the clients to authorize the subpoenas in question;

2) While the government has satisfied the preliminary requirement of relevance and need with regard to the investigation of the attorneys' alleged wrongdoing, the Court finds that the petitioners have successfully asserted their attorney-client and work product privileges;

3) The government has failed to establish its *prima facie* showing of crime-fraud exception to these privileges; and

4) Quite apart from the questions of privilege, the subpoenas are, in the present context of ongoing representation by the petitioners of their clients before the INS, unreasonable and oppressive under Rule 17(c).

Accordingly, the Court has ordered that the subpoenas be quashed. An appropriate Order has issued.

SUPPLEMENTAL ORDER

For the reasons set forth in the Court's Memorandum issued this date, the respondent United States is ordered to:

(1) Withdraw the *ex parte* affidavits submitted in connection with the above-captioned case; *or*

(2) Provide a copy of the affidavits to the petitioner and intervening parties in which case the affidavits shall become part of the public file.

Respondent shall notify the Clerk by August 12, 1985 of its decision either to withdraw or disclose the affidavits in question.

It is So Ordered.

NOTES

[1] Because both cases raise very similar legal and factual considerations, the Court is issuing one Memorandum dealing with both cases but has issued separate Orders for each.

[2] The subpoena to the Legal Services Center seeks:

Any and all files of the Legal Services Center relating to the representation of ELIZABETH ADESHOLA ADESANYA (aka Elizabeth A. Parker, Elizabeth Sanya Parker) and/or DWIGHT. D. PARKER, concerning the immigrant status of ELIZABETH ADESHOLA ADESANYA (aka Elizabeth A. Parker, Elizabeth Sanya Parker) including but not limited to the following documents: correspondence with the clients, memoranda or other records of conversations and meetings with the clients, and other parties, including calendars or daily diaries, copies of reports of inquiries of investigations conducted on behalf of the clients, copies of documents obtained from the clients or other sources relevant to the representation of the clients, billing records, time sheets or other records of time expended on behalf of the clients, drafts of documents prepared for filing, and copies of documents filed on behalf of the clients.

If any of the documents requested are claimed to fall within the attorney-client privilege, please provide a list of any such document by date, author, recipient(s) (name and address), nature of the document and a brief description of the document.

The subpoena issued to Pappas & Lenzo is identical to the Legal Services Center subpoena except that it calls for "any and all files relating to the representation of MOHAMMED O. ODUFOWORA (aka Mohammed Odus) and/or RUDNA DELORES LEE (aka Rudna Delores Lee Odufowora, Rudna Odus, Renee Lee) concerning the immigration status of Mohammed Odufowora...."

[3] The affidavit also contains the following statement relevant to the question of whether the marriage was, in fact, a sham.

While employed at Springfield Technical Community College in the fall of 1980, I met Elizabeth Adesanya. A couple of months later on December 10, 1980, I married her. Part of the reason I married her was because I cared for her. I also realized that by marrying her I could hopefully get her citizenship. Things didn't work out. We actually never lived together as husband and wife.

[4] The second affidavit which the government asserts was drafted by the Legal Services Center, recounts that Parker married Adesanya after dating her for a period of four months because of his affection for her and their intention to start a family. However, Parker claims that during the course of their marriage he suffered from alcohol addiction which caused him to live apart from his wife for extended periods of time. During the time in which Adesanya's first I-130 application was pending before the INS, Parker was undergoing treatment for his alcoholism both as an inpatient and an outpatient. Because of his ongoing treatment for alcoholism, he was unable to attend the INS marriage interview. Adesanya, believing that her petition would be denied if her husband failed to show up, found someone to impersonate her husband. Finally, in the affidavit, Parker states:

Our marriage has never been a sham. We married out of affection, and with a full intention to build a married life. For a while, due to my addiction, we had difficulties. It was translated into an inaccurate affidavit written by Officer Golden and signed by me.

[5] *Harvey* was vacated when the subject of the grand jury investigation took flight. 697 F.2d at 112.

[6] *In re Grand Jury Matters* is discussed more extensively in Section IV, *infra*.

[7] The only items mentioned in the subpoenas which arguably fall outside any of the privileges asserted are: "billing records, time sheets and other records of time expended on behalf of the clients...." *Cf. In re Grand Jury Proceedings,* 600 F.2d 215, 218 (9th Cir.1979). This material would appear to be of dubious value to the Grand Jury. Hence, though it is probable that none of the privileges petitioners assert attach to this material, the Court concludes, in the exercise of its discretion under Fed.R.Crim.P. 37(c), that this material does not need to be produced.

[8] Fed.R.Crim.P. 6(e) (2) provides in part:

A grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government or any person to whom disclosure is made under paragraph (3) (A) (ii) of the subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule.

The exception of subparagraph (3) (A) (ii) of the rule mentioned above refers to an authorized disclosure made by a United States Attorney to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6 further provides that "[a]n attorney for the government shall promptly provide the district court, before which was empaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made." Fed.R.Crim.P. 6(e) (3) (B).

[9] The government has contended that the question of timing should be considered in quite a different context. Specifically, the government has suggested that once the deportation proceedings are concluded, the clients would be deported immediately and no longer subject to criminal prosecution. The Court notes that the United States Attorney and the Immigration & Naturalization Services are fellow agencies within the Department of Justice and can certainly cooperate between them in determining how to proceed on these matters to effectuate both organizations' interests in the individuals.

ARTICLE:

“MUST YOU BELIEVE YOUR CLIENT’S TESTIMONY?”

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OUTSIDE COUNSEL

BY JOEL COHEN

Must You Believe Your Client's Testimony?

To even raise this question (albeit in a legal publication that the lay public will never see), that is, whether a lawyer can legally and ethically offer testimony by his client that the lawyer simply does not believe, may give weight to the public's perception of the legal profession as impervious to truth.

The masses would probably even be appalled at the lawyer considering such testimony where the client has done nothing to hint to his counsel that the client's version is untruthful—such as a wink, a nod or constantly changing the recollection. (We deal in this piece with a lawyer's plain disbelief based on available countervailing evidence or the senselessness of the story.)

Put differently: Are lawyers simply agnostic regarding truth? Should they be? May they flatly ignore their own personal perception of the "truth," that is, unless, for example, the client has absolutely communicated that, "I want you to pursue my case by presenting my facts, including my testimony, as such and such, even though I have all but confided to you that the facts are otherwise"?[1]

Clearly, when the criminal client tells the lawyer that he acted with the requisite mental state charged or, in the civil context, when the client's facts flatly do not support the version he will attest to, the lawyer cannot allow the client to present, or aid the client in presenting, testimony that is inconsistent with what the client has privately admitted. To do so would not only violate ethical precepts. It may constitute a crime: subornation of perjury.[2]

Often, it's not like that at all. The criminal client doesn't directly tell his lawyer, "I'm guilty," and the civil client doesn't say that the cause of action (or defense) that he proposes to swear to is false. Typically, the client in a confidential interchange with his lawyer will tell the same story he proposes to testify to at trial—one that is more or less defensible.

A lawyer sometimes "knows," if only from a "sixth sense," that a client is in the wrong. Are the hands of that lawyer tied in terms of…the "truth" that the lawyer "knows" only from experience and third-party witnesses with more credible accounts?

The Lawyer's Instinct

Still, the lawyer sometimes "knows," if only from a "sixth sense," that the client is in the wrong, and that he would acknowledge it to counsel if, in fact, he were a truthteller. Are that lawyer's hands tied in terms of letting his client tell a story to the jury that is at odds with, for one, the prosecutor's story, and, more importantly, the "truth" that the lawyer "knows" only from the mother's milk of old-fashioned experience and third-party witnesses with much more credible accounts?

Indeed, the lay public—be it rational, idealistic, or simply naive—prefers to think a lawyer is ethically hamstrung in not allowing a client to testify in conflict with the lawyer's "honest beliefs" about the facts, even when he hasn't actually been told anything by the client that shows the story to be false. Note the striking contrast between the seemingly lily-white ideals of the anonymous majority opinion and that of a typical client, who could care less whether he has engaged an ethical lawyer. You never hear a client or former client brag that his lawyer is very ethical. Clients seek lawyers who will win.

How does this play out in a practical setting? Suppose your client is accused of robbing a Duane Reade in midtown Manhattan and arrested two days later at his home in Brooklyn. When questioned upon arrest, he denies the crime and maintains that he was home in bed (regrettably, without any amorous alibi witness) at the exact moment of the incident. The police, however, have statements from no fewer than five eyewitnesses who each finger your client—Mayor Michael Bloomberg, Nelson Mandela, Justice Stephen Breyer, Derek Jeter and, surely not least, the pope (your client, by the way, is an observant Roman Catholic).

The client's story sounds ridiculous to you, and you are persuaded by the five seemingly truthful accounts by unimpeachable witnesses (though, you can't help but wonder why the pope would be picking up his own drug prescriptions…). But that's your client's story and "he's stickin' to it," never vacillating from his claim of innocence. He doesn't even falter when confronted with fuzzy surveillance video that depicts the perpetrator, who looks very much like him, and remains supremely confident in explaining that his fingerprint was on the pharmacy's countertop because "I considered buying aftershave lotion earlier that day," (although nobody seems to remember him there).

Trial approaches, and your client insists that you challenge the five compelling witnesses (whom you believe to be truthful), and that

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he testify—even though you "know," as surely as you know anything, that his testimony will be false.

The strategy of letting a client testify to these facts is not for the faint of heart. But here, we talk about ethics, not strategy. Can a lawyer "ethically" prepare this defendant to testify, put him on the stand, and take him through that testimony (as opposed to simply calling him to the stand and asking, as was ethically defensible in one New York case:[3] "Tell the jury in your own words, what happened."), when counsel absolutely believes the story is false?

The Rules

In New York,[4] the Disciplinary Rules are strangely unilluminating on a lawyer's duties when he believes, but does not know, that his client intends to testify falsely, merely because the client has not confessed the wrongdoing to him. But the Model Rules of Professional Conduct do provide more guidance. According to Rule 3.3(b), "…[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." Indeed, Comment 8 to that rule adds, "although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, a lawyer cannot ignore an obvious falsehood."[5]

Interestingly, a lawyer with a reasonable belief that testimony will be untruthful may refuse on ethical grounds to offer testimony, for example, by alibi witnesses in a criminal case, or the litigant and his supporting witnesses in a civil case—even where he doesn't "know" that their testimony would be untruthful. However, it is clear that he may not refuse to put the defendant on the stand merely because he "reasonably believes" such testimony would be false, without "knowing" it to be untrue.

Putting aside the Clintonian epistemology of "when does someone know something" (as opposed, perhaps, in his case, to "when does someone 'know' someone else"), one could theoretically argue that a lawyer never knows that a client 's story is false, until the client says precisely, "I am lying about it to you and will lie when I testify"—and, theoretically, maybe not even then. It is hard, though, to imagine that lawyers should not be precluded from permitting such a defense.

'Nix v. Whiteside'

In the leading case, *Nix v. Whiteside*,[6] the Supreme Court affirmed a trial lawyer's refusal to call to the stand a murder defendant who claimed self-defense, but had radically changed his story on the eve of trial and told his attorney that he had just read about another case and "If I don't say I saw a gun, I'm dead."[7]

Nix may be an easy case and obvious ruling, though many scholars challenge its rationale and underbelly—"easy," because the defendant consistently omitted "the gun" from his story until just before trial and basically told his lawyer that he had determined that he would have to lie to be acquitted.

New York law is sparse on the subject, though in *People v. DePallo*,[8] the Court of Appeals affirmed a defendant's conviction where his lawyer held an in camera and ex parte conversation with the judge without the client's knowledge, telling the judge that he expected that his client would lie (even though he couldn't put his finger on precisely why), and thus presented the client's testimony in a one-question narrative form, without preparing the client.

'U.S. v. Midgett'

A worthwhile decision to consider is the North Carolina District Court decision in *U.S. v. Midgett*.[9] There, the victim, while eating lunch in his van, was approached by a man with a cup of gasoline who threw it in his face, demanding his billfold. The perpetrator ignited the gasoline causing horribly disfiguring injuries. Mr. Midgett and Theresa Russell were charged with this crime and another on the same day that used the same technique. Ms. Russell agreed to cooperate with the government, but Mr. Midgett chose trial.

Mr. Midgett was unhappy with his lawyer's unwillingness to pursue certain issues, including his proposed "third person" defense—steadfastly maintaining that a friend of Ms. Russell's committed the offense while Mr. Midgett lay in a drug-induced sleep in the back of the vehicle. Mr. Midgett was prepared to offer this testimony on the stand, but his lawyer would not allow it since he didn't believe that version of events. When the lawyer sought to withdraw, the court offered, alternatively, that Mr. Midgett proceed pro se. Mr. Midgett rejected the offer, kept his lawyer, didn't testify and was convicted.

The U.S. Court of Appeals for the Fourth Circuit reversed the conviction, placing great reliance on the fact that Mr. Midgett never wavered in his account to his lawyer. True, the "mystery man did it" defense lacked corroboration, the victim identified Mr. Midgett, and Ms. Russell testified that there was no one else in the car. Still, the court found that "[d]efense counsel's *mere belief*, albeit a strong one supported by other evidence, was an insufficient basis to refuse Midgett's need for assistance in presenting his own testimony." Neither the role of an attorney as zealous advocate nor as officer of the court "would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client," no matter how "far fetched" Mr. Midgett's story might sound to a jury.[10]

Clearly, Mr. Midgett's attorney had less to go on in concluding that his client's story was false than in the drug store thief example above, but the principle remains the same. You may think that you're not free to call him, but in our case, you may still be impermissibly relying on your "private conjectures" about the guilt or innocence of the client.

Honest Recollections

And even when your client's story varies over time in describing to you what occurred, it may be worthwhile to recall Justice John Paul Stevens' concurring opinion in *Nix* in which, while voting to affirm the conviction where the attorney had refused to let his client tell a perjured story, he noted the following:

> Justice Holmes taught us that a word is but the skin of a living thought. A 'fact' may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel…. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury…should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believes he recalls) details that he previously overlooked.[11]

Hardly the words of a shyster in search of just another payday. That's right. Justice Stevens!

1. See generally, *Nix v. Whiteside*, 475 US 157 (1986); DR 7-102(a)(4) ("In the representation of a client, a lawyer shall not…[k]nowingly use perjured testimony or false evidence.")
2. N.Y. Penal Law, Article 210; Title 18 USC §1622.
3. *People v. DePallo*, 96 NY2d 437 (2001).
4. See generally EC 7-6 ("In many cases a lawyer may not be certain as to the state of mind of the client, and in those situations the lawyer should resolve reasonable doubts in favor of the client.")
5. Model Rules of Professional Conduct, Rule 3.3(b), Comment 8.
6. See n. 1, supra.
7. Id. at 161.
8. See n. 3, supra.
9. 342 F.3d 321 (4th Cir. 2003).
10. Id. at 326, (emphasis added). See *U.S. ex rel Wilcox v. Johnson*, 555 F2d 115 (3d Cir. 1977). Courts have used different standards for a lawyer's level of confidence that the client will lie: "good case to believe," "compelling support," "knowledge beyond a reasonable doubt," "firm factual basis," "good faith determination," and "actual knowledge." See also *Doe v. Federal Grievance Committee*, 847 F2d 57 (2d Cir. 1988).
11. *Nix v. Whiteside*, supra, at 190-191 (Stevens, J., concurring.).

ARTICLE:

“TAKING THE MEASURE OF A CLIENT’S STORY; OUTSIDE COUNSEL”

TAKING THE MEASURE OF A CLIENT'S STORY; Outside Counsel

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WHEN COUNSELING a client in a crim-inal case, especially where the client is planning to testify, does a lawyer always want to know the whole truth directly from his client? Curiosity and its consequences for the proverbial cat aside, do professional or strategic considerations ever really create a need for the lawyer to know it all from the client's mouth?

To mix and mangle a metaphor, might it not be best, instead, simply to let sleeping dogs literally lie? Or is this too controversial to address -- even given the fiasco of the President's lawyer not knowing the truth from him during the President's deposition by Paula Jones' lawyers that started all of the impeachment business?

In the exasperating days before President Clinton finally admitted to the world that he had, in fact, engaged in conduct everyone suspected of him anyway, talking heads at every station change were telling us his options. Astonishingly, given their collective level of sophistica-tion, real or imagined, and the number of lawyers among them, these prime time pundits seemed to be telling America how the President's criminal lawyer might have been counseling his client. Indeed, premised on conjecture as to a mutual conclusion that, realistically, he could neither quash the subpoena nor take the Fifth Amendment, we were told that the President's counsel must have advised him on the ups and downs of three alternative versions of his grand jury testimony.

One -- hang tough; deny, deny, deny. Two -- admit the sex, whatever form it took, but deny obstruction. Three -- deny obstruction outright, but hide behind linguistic contortions of almost talmudic complexity to leave open the possibility that, while passively receiving the intern's ministerings, the president was actually reading confidential memoranda from the Joint Chiefs. Thus, behind door number three, revelation of the ugly sexual truth, albeit defined to exclude any actual lie to Paula Jones' lawyers during the president's earlier deposition.

Put aside, for the moment, the wisdom of any of these choices and, for that matter, the possibility that evidence contrary to each proposed proffer might make it too risky. That done, each course of testimony was surely available to a grand jury target unable, for whatever reasons, to avoid giving evidence and, more certainly still, quite clearly apparent to even a president, who is a lawyer himself -- without recourse to advice, much less consent, of the counsel.

Moreover, if in fact he were guilty as charged, the prospect of committing fresh perjury would hardly be a deterrent, especially if the president recognized any such charge as survivable given the credibility problem of the one-on-one witness and a

mounting sense of dissatisfaction with the whole process among voters and the public at large. Indeed, if a full admission would invariably yield impeachment proceedings or a mass call for the president's resignation, this last tack might well have had a certain appeal, at least to the witness himself.

The Lawyer's Role

So where, in reality, was the president's lawyer in all of this? The question here is not what might have entered the mind of a skilled politician whose presidency is at stake or, by the same token, any sophisticated target of grand jury proceedings with a need to testify. Nor does it concern the president's non-lawyer, or even law-trained advisors, all of whom conveniently proclaimed themselves duped by his earlier denials while offering free advice as to three supposed alternatives, over the airwaves from a studio with Geraldo or Larry King and beyond the likely reach of immediate subpoenas.

Instead, curiosity centered on how an ethical lawyer, like the president's, could have possibly counseled his client to do anything but admit guilt and throw himself on the mercy of the American people. That assumes, however, that the president had already had a frank and fully truthful conversation with his lawyer. Indeed, and in spite of speculation by out-of-the-loop spinners, if the President directly told his lawyer a truth that included sex of any kind, there would no longer have been any option to deny, deny, deny on the table.

Similarly, the president's lawyers could not have counseled any version of a one-way encounter that supposedly would not really have amounted to sex under a loophole in the Paula Jones deposition definition if his client had confided remotely active participation. The same would be true had the president informed his counsel of an attempt to obstruct justice, despite his bold assertion following the grand jury appearance on August 17, that he never told anyone to lie, and any plan to deny such conduct also would havebeen eliminated. Again, thanks but no thanks to the peanut gallery.

Even within the supposedly secure sanctuary of the attorney-client relationship, there are some things that cannot be said. So, if the president hypothetically admitted sex and obstruction to counsel, one wonders if, as his law partner Brendan Sullivan quipped when representing Oliver North before the Congress, that counsel was effectively reduced to a potted plant.

What Did Happen?

Perhaps, to avoid potted plant status, counsel consciously positioned himself to explore all of the testimonial options with his client, legally and ethically, before a decision was reached on what form the testimony would take. Surely his client, the president, would be savvy enough to recognize that his lawyer had chosen deliberately not to know, at least from him, certain of the facts until they agreed on a strategy to address the existing evidence that might contradict the president's eventual account to the grand jury.

Simply put, and putting aside the questionable strategic wisdom in hindsight for having done so, the lawyer and his client might well have made a pact, even without expressed words, not to discuss the true facts. In this regard, for example, the president's civil lawyer clearly did not know the Lewinsky truth when his client testified at the Paula Jones deposition.

To the contrary when the president was deposed, it was not Paula Jones' lawyers but his own civil counsel, Robert Bennett, who asked possibly the most damning question about a sexual relationship with Ms. Lewinsky. Obviously unaware of how harmful a truthful answer would be, Mr. Bennett thereby effectively confirmed that his client had kept his own counsel on this subject.[1] In fact, counsel admitted so in a subsequent letter to the judge in the Jones case.[2]

The public remains suspicious, particularly of the first lady's public stance that the president had denied any sexual contact whatsoever with the intern, until just days before he testified at the grand jury on Aug. 17, 1998. Nonetheless, the reality is that many conscientious and ethical lawyers affirmatively decline to learn their clients' account unless absolutely necessary, if ever.

This is true even though an A.B.A. Formal Opinion -- rendered in the context of lawyers who discover that their clients clearly plan to commit or have already committed perjury -- raises the possibility that lawyers who engage in such practice may be violating their duties to provide Candor to The Tribunal and to accord competent representation to their clients.[3] In fact, many lawyers who find themselves in similar circumstances will directly communicate to their clients, in words or substance, that there is no need, or even any room, for soul baring: Confess, if you must, to your Maker, and Him alone!

Possible Strategies

Without in any way subscribing to the appropriateness or validity of any such procedure there are a number of ways that, having strategically chosen blissful ignorance of his client's own account, some defense lawyers still may try to learn, within a state of supposed ignorance, as much as necessary. What follows is simply an exploration of the alternatives some practitioners apparently use. Bear in mind, as a truism, that ten adverse eye witnesses can testify uniformly to the client's guilt but, unless the client has actually inculpated himself directly to his lawyers, counsel may nonetheless ethically and legally have him testify to an exactly opposite and totally exculpatory version of events if that is the client's account.[4]

iWhat Does The Prosecutor Want? **ome lawyers say that they simply inquire as follows: The prosecutor will obtain an immunity order directing your testimony. Assuming you must testify, what does the prosecutor think you can say? Suppose the answer is:**

The prosecutor may think I can tell him that my best friend and CEO confided that he shot his wife and left the scene to make it look like a botched burglary. What's more, in a panic, he gave me the gun and I buried it.

Isn't the client, at least with this lawyer, then locked in when during later discussions, counsel learns from the prosecutor that he knows nothing about a gun? In other words, was the client's hypothesis about what the prosecutor would seek from him too specific to dismiss as speculation, even though the client did not actually tell the lawyer I received the gun and I buried it?

Some (in an anonymous, unscientific survey of skilled criminal lawyers conducted for this article), say it would have been preferable not to have asked the question in the first place. Instead, they contend, counsel should first have learned as much as possible about the prosecutor's thinking, and, in the process, have concluded that all the prosecutor wanted was an admission from the accused friend. Using this procedure, defense counsel would ithen **ave told the client:**

The prosecutor thinks your friend told you he killed his wife. It appears that he has no proof or corroboration whatsoever that this is what happened. And he knows nothing else about any role by you. Now, while our conversation is privileged, you must recognize my responsibilities as a lawyer. I can't knowingly let you commit perjury. Now tell me, what happened.

Is this satisfactory?

iWhat Would She Say? **thers inquire this way: If X were to testify, and assume for this exercise that her goal is to recklessly put you behind the 8-ball with the authorities, what would she say? Assume the client says in response that She might say that I exposed myself in a hotel room while I was a governor, and I asked her to massage me.**

Can counsel then help prepare testimony by the client in which he would deny the very same wrongdoing? Arguably, the answer is no.

iHypothetically ... ? **till others choose to discuss all of this in hypothetical terms: Hypothetically, if she obtained immunity, what would she say your role in this was? The goal of this practitioner, too, is to try to ascertain what the lawyer faces factually without actually hearing it from the client, and thus being locked into this version of the events under scrutiny. (She could hypothetically say anything. She could arguably say it was I who laundered the money in bills ultimately placed in an offshore bank account bearing the number of Mark McGwire's 1998 home run total.)**

Can a lawyer possibly take comfort that this client's answer was only hypothetical, and later help plan a testimonial denial? Surely, lawyers and prosecutors frequently engage in such hypothetical exchanges when discussing witness proffers and then, when a favorable deal cannot be reached, the client testifies inconsistently with the lawyer's hypothetical.

For example: Assume my client could tell you where the body is buried, would you be willing to give her immunity. If so, I'll go back and talk to her and see if something like that exists. But is this the same thing?

iWould It Be Helpful ... ? **inally, some practitioners first describe the law for their clients, or how it is defined in a particular context. They then ask their clients questions in that context: Would it be helpful here to rely on a particular definition of the offending conduct, e.g., sex, bribery, obstruction, in discussing your testimony. An intelligent client will easily understand this device.**

Some argue that all of this is ludicrous, that it is silly for a lawyer to either deny himself the truthful account from the most important witness, or believe that they may ethically rely on the validity of this -- pardon the phrase -- flim-flam, when a less exculpatory account later suits the client's needs.

Others see it as far worse. For example, columnist Stuart Taylor Jr., who is trained as a lawyer but is frequently an ardent critic of lawyers, argues that the litigation bar as a whole engages in a game that facilitates perjury -- enabling clients through witness preparation and coaching to lie under oath.[5] It is hard to argue that Taylor is out in left field at least in some individual instances, even though the ad hominem aspect of his Jeremiad paints with too broad a brush.

Counter-Intuition

Most criminal lawyers accept the notion that the practice of criminal law is counterintuitive; that is, they don't always need or want to know the facts from their clients. The path of least resistance for these lawyers to satisfy the Taylors of this world is simply not to engage in seemingly semantic exercises. They maintain that it is simply lazy to merely ask the client his version of events and, indeed, that it will invariably dictate an irreversible defense strategy. To them, a discreet investigation and the painful process of learning the facts from every source other than the client, if necessary, is the best practice. They believe that the supposed constraints of A.B.A. Formal Opinion No. 87-353 (see n.6, supra) are the presumptuous musings of football commentators who never had to face a quarterback blitz.

They add, on the other hand, that when it comes to client testimony, surrendering control to a client is the worst thing a lawyer can do. Thus, for example, if the client is being given immunity and the absolute truth will implicate a friend, the truth must nonetheless be actively and aggressively counseled. Or, if the witness's story is preposterous based on counsel's own investigation, the mumbo jumbo of What could she say? or Hypothetically ... ? or What does the prosecutor think ... ? is foolish. To these attorneys, the Fifth Amendment or a motion to quash, if there is any basis for it, is the only answer -- even if the president is the client. And, in Clinton's case, at least in retrospect, these alternatives would have been far preferable.

What's a lawyer to do? Let the client know, in no uncertain terms, when the client's own strategy is suicidal. The simple truth is that one may not need to hear the client's account directly from him to know that. Of course, an equal number strongly disagree and believe that to properly represent a client they must know everything from him: all the facts, ma'am, -- whether good or bad. (These attorneys, of course, rarely end up putting their clients on the stand at trial.)

Most important, though, the lawyer must fully understand the purpose for which the client has retained him, or is considering his retention. If it is do or die -- that is, the client or would-be client intends to fight all the way at trial, and there is no chance of a guilty plea or less onerous resolution than a conviction -- precluding later defenses by hearing a client's story directly from him may be unwise.

Worth noting in this context is that lawyers often simply do not need to hear their clients' accounts to know what their clients have to say. Simply put, some say, the skilled lawyer acquires a sixth sense over a career. This attorney will invariably come to know the client's story from the nuances of the case, peripheral facts, facial gestures or even body language that the client yields in background conversations -- even if the lawyer hasn't heard the story itself. The trial lawyer, after all, is part lawyer, part sociologist, part psychiatrist.

Beyond that, if a defense lawyer, for example, is positioned to listen to discovery tapes that captured his client in flagrante, the capacity to have heard the story directly from the client may be largely unnecessary.

Finally, hearing the client's specific and detailed account directly from him, especially at an early stage -- some practitioners literally wait until the prosecution completes its direct case at trial -- may later place the client in the predicament of having previously told his lawyer a false or misleading story.[6] This will inevitably hurt the fragile relationship that requires mutual trust, especially when and if new incriminating facts come to light.

1. iN.Y. Times, **arch 14, 1998, p. A11, col. 3 (Excerpt from the Deposition of William Jefferson Clinton in Jones v. Clinton, Jan. 17, 1998) (Question by Mr. Bennett:**

Q. In paragraph eight of her affidavit, she [Monica Lewinsky] says this, I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange

for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship. Is this a true and accurate statement as far as you know it?

A. That is absolutely true.).

2. Brian Blomquist, Paula Bombshell, iN.Y. Post **10/9/98, p. 5.**

3. The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never know that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4-3.2(a) and (b) are also applicable. A.B.A. Formal Opinion No. 87-1987, n.9. Apparently, no lawyers have been disciplined for the alleged offense of deliberately staying in the dark. See Stephen Gillers, A Fool For A Client? iThe American Lawyer **October 1997, at 74.**

4. Cf. Ted Schneyer, Firom Self-Regulation to Bar Corporatism: what the S&L **risis Means for the Regulation of Lawyers, 35 Tex. L. Rev. 639, 656-67 (1994) (discussing circumstances under which an attorney representing a bank has a duty to investigate underlying facts).**

5. iMiller's Law: Legal Ethics and The Clinton Administration **(Court TV television broadcast, Feb. 26 1998).**

6. See Joel Cohen, Why Clients Lie, N.Y.L.J., May 1, 1997, p. 1, col. 1.

hJoel Cohen

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OUTSIDE COUNSEL

BY JOEL COHEN

Gaining the Client's Truth

To separate the wheat from the chaff, that is, the potentially innocent from the likely not-so, The Innocence Project effectively obtains a DNA sample — a high-tech "affidavit of innocence," a predicate for acceptance onto its heavy case load.[1]

By the time the project's potential clientele reach it, they have been convicted and sentenced, maybe to death, and the project will only advocate for them "actual innocence" through scientific truth.

If the status of the caseload were not already so deadly, or potentially deadly, for the clientele, the exquisite purity — perhaps, certainty or finality — of a DNA test for a client, dispensing with the need for the nuanced rigmarole of painstakingly learning the real truth from the client that the rest of us must go through, representing the "death row boys" would be a dream come true. No lies; no obfuscations; no "you don't wanna knows." The Innocence Project has the "luxury" of only representing the decidedly innocent, or those who can get past the DNA test and still, at least credibly, claim innocence, even though already convicted.

Guilty Clients

The rest of us, typically, don't have that luxury. Quiet as it's kept, given the unchallengeable statistics, we infrequently represent a true "innocent," an individual who has no criminal responsibility whatsoever for the incident in question.

We may defy, defeat or avoid for them conviction, prosecution, or even investigation, for a variety of reasons. Still, based on the sheer numbers alone, they likely still possess at least some level of culpability — criminal culpability. And that culpability,

especially when we get it from the client's own mouth, may be ugly indeed, especially for him.

For some clients who face the experience of spilling their guts to a lawyer for the first time, the completely "truthful" confession — rare, to be sure, given that such significant numbers of clients lie to their lawyers, at least at first or for a long while — will, in their minds, likely quell the lawyer's zeal for the battle. ("Well 'he's guilty,' so the pressure's not really on him any more.")

Quiet as it's kept, given the unchallengeable statistics, we infrequently represent a true "innocent," an individual who has no criminal responsibility whatsoever for the incident in question.

Isn't it easier, perhaps, more efficacious, to simply assume that the client has passed (or even flunked) the narrative equivalent of the DNA test, and get the facts from the variety of other sources available? Remember, virtually no criminal lawyer requires "innocence" as an entrance pass to his office — else the office would be in a cardboard box. Do we really need to know the client's truth, or whatever else he proposes to tell us, especially when, at day's end, we may not get it anyway?

Some argue that it's simply easier and better not to know the truth. For those lawyers, they can thereby "truthfully" (and presumably, ethically) maintain the client's innocence to the media, or even the cocktail party circuit, in high-profile cases. They can take the "high road" of the client's claim of innocence in strategic discussions with prosecutors. They can "ethically" argue innocence during bail applications or court conferences with judges that try to "resolve" the case. Finally, and most important, they can put the client on the stand with ethical impunity if, as a pure matter of trial strategy, they believe the client can fend off the prosecutor's attack.

One American Bar Association opinion[2] dealing with defendants who want to commit perjury, frowns on lawyers who stay in the dark about their client's story because they won't, thereby, be armed with the facts they need to know. The experienced practitioner, however, undoubtedly knows better how to capably defend a criminal client. Some actually pride themselves on waiting until the prosecutor's case is "in," employing the stratagem of allowing the clever defendant to mold his testimony to the best the prosecutor had to muster on his direct case — without an ethically questionable word uttered between lawyer and client. Still, is "studied ignorance" of the client's real facts, even if he ultimately may get those facts through these questionable means, a realistic course?

No lesser light than the late Roy M. Cohn argued in a somewhat famous 1982 debate with Alan Dershowitz,[3] that "[b]efore a client could get three words out, any lawyer with half a brain would [rotely] say, '[y]ou probably don't know whether you're guilty or not, because you don't know the elements of the crime you're charged with.' " (As if, for example, the Gambinos, or whomever, don't know that it's "murder" when they pull the trigger, or career criminals are too hard on themselves when they conclude inwardly that they committed "fraud," when all they did was make criminally innocent, negligent representations.)

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Sometimes, true, the client doesn't know the "elements." But only sometimes! Can Cohn's view of the world possibly fit every case?

Cohn saw his strategy "to avoid hearing what I'm supposed to hear." He would then ask the client: "If someone was going to get up on the stand and lie about you, what would it be? And what would he lie about?" And then Cohn added: "And if the client's got any brains he'll know what I'm talking about."

Whether the client would know it, or not, we do. Cohn, exercising the punctilio of "zealousness" to represent the client, was seeking to gain the client's actual or "truthful" account through what was clearly deceptive legerdemain. While Cohn, for one, was "honest" enough to admit what he was doing, he would be hard pressed to argue that his silly game was an ethical course of conduct. Indeed, Cohn thought he was having it both ways: he did not come to actually "know" that his client was guilty or that the client was going to commit perjury when he would later deny, in testimony, the "lies" about him.

As Professor Monroe H. Freedman[4] says, Cohn would argue that he would not have to dissuade the client from committing perjury because Cohn did not "know" perjury was occurring.

As Southern District Chief Judge Michael B. Mukasey might argue, however, Cohn was engaging in misconduct by deliberately blinding himself to the "facts" that his client was truly communicating to him through that transparency — effectively, a ruse to keep the lawyer "in the dark" when the light of the client's account, even through the filter of the ruse engaged in, is truly blinding. ("They'll swear that I stabbed the deceased; but you don't " 'know' that I agree to their story, in case I later testify.")

Indeed, Judge Mukasey argued the flip side in a recent CLE program at Fordham Law School (moderated by the author) entitled, "Should Criminal Lawyers Be Constrained By The Truth?: The Limits of Zealous Advocacy." He argued that the lawyer who refuses to learn the facts from his client by having no factual communication with him at all engages in conscious avoidance conduct. The judge says that if good enough to formulate criminal liability in the right case, it should be good enough to sustain a disciplinary sanction too.[5]

Curiously, as Professor Bruce Green of Fordham Law School suggests, while it probably makes no logical sense, it may well be that although the doctrine of "conscious avoidance" applies for criminal purposes to a lawyer who suborns perjury, notwithstanding the lesser burden of proof in a disciplinary proceeding, it might not apply to the lawyer facing disciplinary charges involving subornation where the client did not specifically advise the lawyer of his intent. ("Many lawyers understand that some degree of conscious avoidance is permitted, if not essential to effective advocacy.")[6]

All said and done, skilled lawyers cannot, and must not, turn a deaf ear, even if there is, admittedly, a downside to it, to the source of information with the greatest incentive to help his own cause: the client defendant. Still, how is the lawyer best able to gain those facts, recognizing that he won't always get the truth in the process?

Most important, truth is not an easy commodity to obtain, especially from someone deeply wounded, worried about or disgraced (if only in his own eyes) by an investigation or prosecution, or even some fact that may come out that is embarrassing but hardly proof of criminal guilt. Too many lawyers act as if they must learn the bottom line facts from the defendant immediately[7] — even though immediacy is only necessary in a few cases, e.g., where meaningful "cooperation," if forthcoming, must begin promptly, or a misleading press statement based possibly on deliberately false information, as alleged in the Martha Stewart case,[8] can have dire consequences.

'Integrity' Tests

Many lawyers, rushing to gain the client's story, pursue it much like parents who try to pigeonhole their children with calculated "integrity" tests ("Do you have something to tell me?"), when they find the telltales signs of smoke around the house. The character lesson is probably better taught by the parent saying: "I found matches and a horrible odor in the bathroom. Tell me about it!"

Sure, in dealing with the bathroom "smoking offense," a parent seeks to imbue the child with character by getting her to "fess up" before she knows she's been caught. The role of lawyers, however, is not to teach their clients character. Rather, their role is to "get the facts" without impairing the relationship: A client's lie or lies embedded at the relationship's inception, when there is not yet a true "need to know," may do long-range damage to the candor of the relationship. It may better promote the relationship and, indeed, the truthfulness of the client's ultimate disclosures to counsel, to learn the client's story after sharing with the client material otherwise obtained. No disruptive confrontation that presents the lawyer to his client as his prosecutor may be necessary.

The experienced lawyer recognizes that learning the client's account is a touchy-feely business. Sure it is good to learn the facts as soon as possible. Investigations, prosecutions and their side effects — such as parallel civil litigations, media consequences and sentencing guidelines calculations — are too complex nowadays to leave crucial client facts to the last minute. This is especially so when the plea "train may leave the station" because the client has rotely professed innocence to his lawyer, unsure that the lawyer really wants to know the truth or that the client is best served by "yielding it" to counsel — both common misconceptions.

Still, the skilled lawyer likely knows that learning the client's account as soon as possible really means no sooner than it can be learned in a productive, helpful manner that will ultimately better the result obtained. He knows that the unvarnished truth may, sometimes, not be "released" to him by the client the first day, the first week, the first month or perhaps even longer in the relationship. That doesn't mean that the lawyer shouldn't begin the fact-finding process immediately. Good lawyers begin to know things usually a long time before they know them.

On the other hand, some clients are like the teenager who lies at first about the cigarettes she's been smoking. Confronted, she may stiffen and become frozen by the lies she first tells. The lies may continue until the habit is formed. The best thing to do for her is to help her find a way to come to terms with and be able to tell the truth. True, she may not like dealing with the short-term consequences of that truth. But the long-term consequences and penalties of continuing the lies, and not confronting the truth to compose a meaningful strategy, may prove to be far more onerous.

(1) See generally The Innocence Project, see info@innocenceproject.org (co-Directors, Barry Scheck and Peter J. Neufeld).

(2) ABA Formal Op. 87-353.

(3) Berreby, "The Cohn/Dershowitz Debate," National Law Journal, June 7, 1982, at 15.

(4) Freedman, M., "Understanding Lawyers' Ethics," Lexis Publishing, 1990, at 119-120.

(5) At that program Chief Judge Mukasey was not asked to and did not address in particular Cohn's remarks, but the issue generally.

(6) See generally, the excellent article, "The Regulation of Criminal Lawyer," Green, Bruce A., 67 FORDHAM L. REV. 327, 356 (1998).

(7) Cohen, J., "Why Clients Lie," N.Y.L.J. 5/1/97, p.1, col. 1

(8) *U.S. v. Stewart*, 03 Cr. 717 (MGC).

ARTICLE:

“‘ALTERNATIVE FACTS’ ARE NOTHING NEW FOR LAWYERS”

MENU

LEGAL ETHICS, OLD PEOPLE

‘Alternative Facts’ Are Nothing New For Lawyers

What about the client who stubbornly sticks to her version of the facts when it’s clear she is using alternative facts?

By JILL SWITZER

Feb 22, 2017 at 12:45 PM

Most of us dinosaurs, at least those of us who watched TV back in the 1950s and 1960s (the term “streaming” as used today was unknown), are familiar with the show *Dragnet*, which ran for years. The main character was Sgt. Joe Friday, played by a stolid and always unsmiling Jack Webb.

Sidekicks included Ben Alexander first and later Harry Morgan (the beloved Colonel Potter of *M*A*S*H* in the 1970s). Sgt. Friday always led the investigations and asked victims, witnesses, and even the bad guys for "just the facts."

The late Senator Daniel Patrick Moynihan said, "Everyone is entitled to his own opinion, but not his own facts."

Has the concept of alternative facts always been around, but now it's front and center?

Most people seem to think that the concept of "alternative facts" is new, but is it really? I don't think so, at least not for lawyers. How many times have you compared differing versions of the same situation and thought that someone, hopefully not your client, is on another planet?

Oftentimes, parties will agree on at least some facts with the remainder in dispute. What about the client who stubbornly sticks to her version of the facts when it's clear she is using alternative facts?

What if the plaintiff says that the sun rises in the east and the defendant swears it rises in the west? Is that the defendant's opinion or an "alternative fact," in today's lingo? What if the defendant is so credible in maintaining that fact that a jury decides to believe the defendant, despite jury instructions, centuries of scientific evidence, and personal observations to the contrary?

Back in dinosaur days, when I tried criminal cases to verdict on a regular basis, one of the voir dire questions I and every other attorney would ask in those cases was about the TV show *Perry Mason*.

If you’ve ever seen any episode of the show, it was a “whodunit,” but what was always consistent about the show was that Perry’s client was always innocent, the D.A. Hamilton Burger was always chagrined, and someone in the courtroom audience or one of the witnesses would, in one dramatic fashion or another, identify himself or herself as the culprit. It was Perry who always pointed the finger at the guilty party that resulted in his client’s acquittal.

We’d voir dire on that, trying to make sure (or as sure as one can be in voir dire) that prospective jurors always understood that the drama of *Perry Mason* almost would never play out in our courtrooms. (Remember, this was forty years ago, long before *CSI* and other crime shows of more recent vintage.) Yes, the prospective jurors nodded that they understood the difference between fiction and real life. Yes, they would follow the law as the court gave it to them. Once on the panel, the jurors were instructed, often both at the outset and then again at the conclusion, as to what evidence to be considered and what was not.

Is the use of “alternative facts” going to make our jobs harder? It’s tough enough when clients have difficulty coming to terms with the reality of their particular situations, that the facts brought out in discovery, in deposition, show that the client’s case is not a winner, that the client needs to understand the situation she’s in, and that she will lose in court because applying the law to the facts, as we attorneys do for our livelihoods, will result in an undesirable jury verdict and little, if any, hope on appeal.

Now with the concept of “alternative facts,” however, will clients accept an attorney’s advice and recommendation on courses of action and likely results in court? We try our best to protect our clients from what is often their own worst enemies, e.g., themselves. But if they’re convinced that they’re right, then there’s nothing we can do to protect them from themselves. Off to jury trial they go, seeking “justice” and their day in court.

Sometimes we have opposing counsel who refuse to believe anything we say, any documents we provide, or any witnesses who proffer a different version of the facts

that their clients say. (We’ve all had opposing counsel that are so intransigent and unwilling to listen that we throw up our hands — or something else.) In these situations, all we can do (and what we’ve done) is just stop banging our heads in frustration and let the court or the jury decide.

Now, with the concept of alternative facts front and center, will alternative facts affect jury trials? Will juries do their sworn duty to follow the law as the court gives it to them and accept the facts based upon the evidence presented in court, and only the evidence presented in court? If the jury decides that the facts presented in court are not the truth and uses alternative facts to reach its verdict, is that grounds for a mistrial? One basis for jury misconduct is conducting an independent and unauthorized investigation about the facts of the case. So, if a juror uses alternative facts as the basis for her opinion about the case, is that juror misconduct? Is it jury nullification?

It’s one thing to satirize the concept of alternative facts that we see all around us, but is the seemingly casual acceptance of alternative facts in certain circles a slippery slope that leads to unintended consequences for how we practice law?

California Civil Jury Instruction (CACI) No. 1707 states, “A statement of fact is a statement that can be proved to be true or false. An opinion may be considered a statement of fact if the opinion suggests that facts exist. In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [*name of defendant*] was making a statement of fact.”

Liar, liar, pants on fire? Alternative facts? Minds are very hard to change.

Jill Switzer has been an active member of the State Bar of California for 40 years. She remembers practicing law in a kinder, gentler time. She’s had a diverse legal career, including stints as a deputy district attorney, a solo practice, and several senior in-house gigs. She now mediates full-time, which gives her the opportunity to see dinosaurs, millennials, and those in-between interact — it’s not always civil. You can reach her by email at oldladylawyer@gmail.com.

TOPICS

Alternative Facts, Facts, Jill Switzer, Jury Trials, Legal Ethics, Lies, Old Lady Lawyer, Old People, Truth

ARTICLE:

“THE PRACTICE: FIRING CLIENTS”

MENU

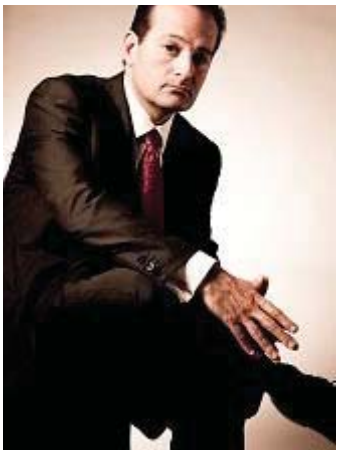
SMALL LAW FIRMS

The Practice: Firing Clients

When is it appropriate to fire a client? Brian Tannebaum has some advice for you.

By BRIAN TANNEBAUM

Apr 16, 2013 at 2:08 PM



I know you were expecting a round-up of last week's Legal Marketing Association ~~rainbow and unicorn festival~~ conference, where this year's theme was... well, the same as last year and the year before: "Why won't lawyers listen to our buzzwords?" Instead of a round-up of the group hug, which will only make you dumber, here's all you need to know based on the #LMA13 Twitter feed:

Formalizing client process via increased measurement and increased services provided is making difference in accounting client satisfaction.

That comment was made after Popehat read the Twitter feed and instead of voluntarily running into the path of a fire truck, asked this question:

How will your firm embrace synergizing social leverage rebranding communication channels to market integration strategies of scale?

Of course if you didn't go, you also missed the 4,759 announcements of:

We have another winner for our iPad giveaway! Stop by booth 300.

And that was it, buzzwords and iPads. Get ready for an onslaught of marketeer emails and cold calls with game-changing, new-normal worthless ideas that will be criticized at next year's conference, after you've paid for the marketeer to implement them in your practice.

while all the marketeers are busy convincing you with buzzwords that they have ways to get you more clients, clients, clients, I, of course, want to talk about getting rid of clients.

Can I never just jump on board and play along?

Usually, it's the client who fires the lawyer because they are not satisfied for whatever reason. Lawyers, though, are gun-shy to fire clients. Lawyers fear bar complaints, malpractice suits, and negative online reviews, or they grew up being ~~lied to~~ taught that clients are always right. So a lawyer will put up with almost anything to keep the client.

I can only speak from 18 years of experience as a lawyer with clients, so maybe some failed lawyer with eight months' experience or some former lawyer "selling the dream" can advise you better, but there is certain conduct that clients exhibit that should lead you to fire them.

Uncooperative clients.

"Uncooperative" doesn't mean they disagree with you. Uncooperative, in the "fire the client" sense, means clients who miss appointments, are constantly late, don't respond to communication, and believe you are on their schedule.

I think every retainer agreement should have a "client cooperation" clause. Something as simple as:

> "Client agrees to timely return phone calls and respond to emails (based on the agreed form of communication). Client agrees, but for emergencies, to advise of the need to reschedule appointments no less than 24 hours before the appointment. Client agrees to timely provide requested documents to avoid the need to seek repeated delays in a pending case. Failure to cooperate with the attorney, at the sole

discretion of the attorney, will result in termination of this agreement, and if there is a pending court proceeding, a motion to withdraw.

You can put whatever you want (subject to ethics considerations), and use the clause to remind the client that this type of behavior is not only important to your ability to properly represent the client, but is also part of your agreement. Obviously things happen and you need to be flexible, but by having a written agreement on more than just fees, you let the client know how you expect the relationship to work.

Uncooperative clients should be fired.

Clients who have a "shadow" lawyer.

These are clients that shouldn't be your clients in the first place but you took them on anyway. The client came in and wanted his "friend," or worse, his brother-in-law who's a lawyer in another state, on the phone. The lawyer doesn't do what you do, but the client wants this other lawyer copied on everything. Every strategy you come up with has to be run by this other lawyer. Every pleading you draft is reviewed by him. He (the lawyer) says he "doesn't want to step on your toes," but questions every single thing you suggest, do, think of, and write. Every time you ask the client for authority to do something, he doesn't respond right away because he's waiting to talk to the other lawyer.

Fire this client. Your professional independence is being affected, the client will find a way to blame you for anything that goes wrong, and more importantly, it's just freaking annoying.

Liars.

I often wonder if clients realize that the same behavior they swear they didn't exhibit is the same type of behavior they are exhibiting towards you as their lawyer.

Yes, I know, clients lie. I'm not talking about clients who lie about what happened or the circumstances of their plight. I'm talking about clients that lie to you, about almost everything. This includes the payment of attorney's fees.

I remember being taught not to be "judgmental" of clients. Some lawyers believe that means you should just calmly nod your head "yes" at everything the client says. I'm not going to pretend I don't know the client is lying. Not being judgmental doesn't mean you shouldn't let the client know you think they are full of crap. Even if you're stupid enough to ignore the fact that you don't believe what the client is saying about his case, you shouldn't tolerate the client adding to that by lying to you about matters relating to the representation — such as why fees or costs haven't been paid, why the client is missing appointments, or why the client continues to tell you they will meet deadlines and don't.

When do you fire a client for lying to you? When your gut tells you to do so.

Clients who don't need you.

These types of clients do two things. One, they tell you at the initial consultation that "this is how we're going to handle this," and two, they never want to get to the issue at hand, using you to delay everything. They are going to make things worse for themselves, and they want you to help them.

When you are representing a client, the paramount concern is protection of the client. Inherent in the protection of the client is maintaining the ethics of the profession. There's also that thing called a "reputation." No one client should manipulate you into putting ethics or reputation on the back burner. If you find yourself being used as a tool (I always try to throw some red meat in here for the commentariat, even though they think it's not intentional), whether for delay or to file some motion that has no merit, or any other reason, put a stop to it (unless, of course, you are a lawyer who prides himself on being used as a tool).

Obviously there are cases where delay benefits the parties, but this is another gut check. If every time there's a deadline, the client calls you the night before and says,

"Can we just get more time?," you need to have a heart-to-heart with the client and if you get no resolution, fire the client. This type of client didn't hire you for your legal work and advice, this client just expects you to "put this off" until they are ready to deal with it.

Before you fire the client.

Always try to work things out with the client. Sometimes the conduct is due to anxiety or something else, and sometimes it's just that the client has other ideas about how to handle the attorney/client relationship.

But never hold on to a client that sucks the life blood out of you by doing the types of things I've described here and won't stop. Difficult, demanding clients are one thing, but clients that have no concept of the way you ethically and professionally practice law need to go.

Brian Tannebaum will never "get on board" at the advice of failed lawyers who were never a part of the past but claim to know "the future of law." He represents clients, every day, in criminal and lawyer discipline cases without the assistance of an Apple device, and usually gets to work (in an office, not a coffee shop) by 9 a.m. No client has ever asked if he's on Twitter. He can be reached at bt@tannebaumweiss.com.

TOPICS

Brian Tannebaum, Clients, Firing Clients, Selecting clients, Small Law Firms, The Practice

CIVIL COUNSEL:

THE TRUTH FUNCTION

ARTICLE:

“CEGLIA v. MARK ZUCKERBERG: MAY A CIVIL LITIGATOR SIMPLY ACCEPT HIS CLIENT’S ‘TRUTH’?”

Joel Cohen, Contributor
Lawyer

Ceglia v. Mark Zuckerberg: May a Civil Litigator Simply Accept His Client's "Truth"?

11/16/2012 03:42 pm ET | **Updated** Jan 15, 2013

What are the obligations of my civil attorney, or one I seek to retain, if I present him with a handwritten contract, purportedly bearing the signature of the late George Steinbrenner, that says that I own 10% of the New York Yankees? Imagine I tell my lawyer that, out on a lark one summer afternoon, Steinbrenner and I met while swimming in the ocean at Jones Beach (or, more likely, Southampton...this is, after all, the George Steinbrenner). I tell my lawyer that a harsh undertow carried Steinbrenner out to sea and that I heroically swam out and saved him. My narrative is impassioned and convincing, and my delivery makes clear that the contract in my hands was hard-earned: in his uncommon gratitude for my bravery (and perhaps because of a secret disappointment in his sons), Steinbrenner wrote out the contract and we both signed on the dotted line.

Of course, as luck would have it, Steinbrenner is now dead and unable to corroborate or dispute my story. I manage to provide my lawyer with a confirmed sample of Steinbrenner's handwriting in an effort to prove that his signature is not a forgery, and I ask my lawyer to promptly file a lawsuit against the Yankees, the Steinbrenner Estate, and Steinbrenner's family. But my lawyer says, "No, I need a lot more before I can proceed." But why? Isn't my lawyer supposed to accept what I say and follow my direction, particularly because 1) I am oh-so-convincing, and because 2) my lawyer possesses no facts whatsoever, and never will, that go against what I'm saying? Doesn't an attorney have an ethical duty to zealously represent his client? It's not as if I told my lawyer that Steinbrenner came back from

heaven (or wherever) one night, and, while seated at my bedside, decided that the only way to adequately reward my uncommon valor was to give me a 10% stake in the Yankees!

Clearly, if you do or even if you don't know who he is, you owe defendant Paul Ceglia the presumption of innocence. Even the Manhattan United States Attorney, who had Ceglia arrested three weeks ago for filing a bogus lawsuit in New York — a lawsuit built on allegedly forged and false documents designed to establish at least a 50 percent interest in Mark Zuckerberg's mega operation, Facebook — would unhesitatingly acknowledge the propriety of this presumption... notwithstanding any personal views of the prosecution's merits. Indeed, every defendant warrants that presumption in the American criminal forum, even when gut instinct would lead the average, uninvolved stranger off the street to conclude that the accused is most likely guilty. And we owe defendants the presumption even as we cringe during press conferences as defense attorneys invoke the presumption as being the true stuff of our Constitutional system.

Does an attorney likewise owe a presumption of innocence to his criminally accused client? What about the civil litigator, who harbors doubts, perhaps even grave doubts, about the client's integrity and the truthfulness of the information the client conveys for the purpose of preparing legal papers? The answer is that, minor limitations aside (such as the rule that a lawyer may not allow a client who has admitted guilt in private to lie on the witness stand), a criminal lawyer is not constrained by what the client tells him and whether he actually believes it.

And so, Ceglia's criminal attorney, now that he has been charged, will properly operate within that protocol in defending his client, even if he fully believes. (Or even "knows" that Ceglia is downright guilty — that he outrageously concocted fabricated documents to support the bogus Facebook lawsuit. In fact, according to the criminal complaint filed against Ceglia on October 25 by United States Attorney Preet Bahara, Ceglia actually cut, pasted, and substituted contract pages to create an agreement that purported to say something that an existing contract did not.)

And what of the series of back-to-back litigators, some of whom are associated with extremely reputable law firms, who filed and pursued, with near scorched-earth fervor, the Ceglia lawsuit against Zuckerberg and Facebook? Though the reasons were never publicly disclosed, these litigators successively resigned their representation. Were these litigators free to accept at face value their client's claim of holding a legitimate contract when they filed civil complaints designed to gain monetary (or injunctive) relief on their client's behalf? Notably, Facebook's lawyer, Orin Snyder, has stated that "Facebook will send a strong message that it does not tolerate legal shakedowns and will take aggressive action against all those who file abusive lawsuits against the company." Does Snyder intend to target Ceglia's current and former attorneys in taking such action, and adversaries in other litigations against Facebook?

These questions lead us to one ultimate question: what if any legal regimen exists to stop the civil litigator from employing the same "ethic" that indisputably applies to criminal lawyers? Simple. The U.S. Constitution's Fifth Amendment right to the presumption of innocence just doesn't apply in the civil arena. If a plaintiff files a lawsuit, and particularly if his complaint must be sworn to — as is the requirement in many jurisdictions — the complaint must allege truthful facts. What is more, the attorney who signs the complaint must do so in good faith. If he does not, the attorney actually risks incurring court-imposed financial sanctions against both himself and his client for failing to exercise due diligence before putting his name on the client's civil complaint. He also risks the court referring him to a disciplinary committee to investigate his fitness to continue to practice law.

But wait: isn't a civil client entitled to an attorney who will litigate the civil claim as zealously as the criminally accused's attorney will defend his client? Indeed, he is. But a civil plaintiff (or, for that matter, a civil defendant), is not entitled to an attorney who simply acts as an automaton scribe — a lawyer who advances the civil claim without

inquiring into the bona fide legitimacy of that claim, oblivious to the reality that the client may be less-than-completely-candid... or worse.

Interestingly, a client — let's take Ceglia, for example — is permitted to have the same attorney represent him both for criminal and civil purposes. In the criminal case, the attorney can sit back and literally do nothing but put the prosecution to its burden of proving guilt, and argue to the jury at the end of the case that the prosecutor simply failed. In contrast, to succeed in the civil case, the attorney he must affirmatively file a complaint in good faith after performing the required due diligence. This disparity is underscored by Rule 11 of the Federal Rules of Civil Procedure, which specifically dictates that by signing or filing court papers, or by advocating a client's cause, an attorney certifies "to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the factual claims have evidentiary support, or will likely have it after a reasonable opportunity for further investigation and discovery."

One may wonder why a whole bunch of lawyers took Ceglia on as a client and then decided to cut their losses and abandon him. Andrew Ross Sorkin of the *New York Times* argues that the almighty buck probably moved them, at least until they began to scratch their heads and conclude that the client had asked (or was asking) them to go too far, potentially causing them to risk their reputations at the bar, or even their licenses to practice law.

Maybe so, or maybe not. We will probably never really learn what motivated these attorneys to pull out when they did. Did they come to question Ceglia's purported truths the way that federal prosecutors ultimately did, after first zealously waiving the flag for him? There is certainly no question that Zuckerberg's lawyers brought the case to the Feds and that Mr. Snyder's statement (quoted above) was designed to warn future civil claimants against Facebook that they too would face the dire consequences Ceglia is now confronting.

As for my heroic swimming encounter with Mr. Steinbrenner, it is clear that many lawyers would file that lawsuit on my behalf. Though I do not question his ethics or professionalism, I note that one attorney did actually initiate a lawsuit in federal court against the John F. Kennedy Estate on behalf of a plaintiff improbably named John Fitzgerald Kennedy who claimed that he was the "legitimate" offspring of a physical union between the late President Kennedy and Marilyn Monroe. Go figure!

The truth is, one should probably vet a lawyer the same way a lawyer should vet his client's claim when it causes the attorney's eyes to roll when he first hears it. If the allegation doesn't pass the decent lawyer's 'smell test' — not a legal standard, but still a useful way to consider real-world issues — it's likely it won't pass anyone else's smell test, especially the judge's. A lawyer should indeed accept a client's truth, but only if there is good reason to actually see it as true. Part of the value a client derives from his lawyer's zealousness is actually whether that lawyer zealously maintains his objectivity and professionalism and whether he is willing to tell the client what the client needs to hear - before the Feds decide to do so, and in much harsher tones. One wonders whether Ceglia, a man whose history demonstrates him to be a litigious individual, will one day try to sue his former lawyers for not having told him what they perhaps should have about the strength of his claim... the truth!

Joel Cohen is a partner in the New York office of Stroock & Stroock & Lavan LLP, where he practices white-collar criminal defense law. He also teaches Professional Responsibility at Fordham Law School. The author is a regular contributor to The Huffington Post. The views expressed are his personal opinions.

TAMBOURINE COMERCIO v. JAY H. SOLOWSKY,
No. 08-11192 (11th Cir. 2009)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-11192

D. C. Docket No. 06-20682-CV-JAL

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 17, 2009
THOMAS K. KAHN
CLERK

TAMBOURINE COMERCIO INTERNACIONAL SA,
a Portuguese corporation,
HAWKSBAY LTD.,
an Isle of Man corporation,

Plaintiffs-Appellants,

versus

JAY H. SOLOWSKY, ESQ.,
an individual residing in Florida,
PERTNOY, SOLOWSKY & ALLEN, P.A.,
a Florida professional association,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(February 17, 2009)

Before DUBINA, BLACK, and FAY, Circuit Judges.

FAY, Circuit Judge:

This appeal arises out of the allegedly unlawful conduct of an attorney and his law firm with respect to a sum of money they held in trust. Plaintiffs Hawksbay Ltd. ("Hawksbay") and Tambourine Comércio International, S.A. ("Tambourine") sued Defendants Jay Solowsky and his law firm Pertnoy, Solowsky & Allen, P.A.(collectively "Solowsky" or "Defendants"), claiming they unlawfully held Hawksbay's money in trust and also unlawfully dispersed it. At the close of Plaintiffs' case at trial Defendants made a Rule 50 Motion on all claims, which the district court granted. Plaintiffs raise the following issues on appeal: (1) the district court's grant of Defendants' Rule 50 Motion on Hawksbay's conversion and civil theft claims; (2) the district court's grant of Defendants' Rule 50 Motion on Tambourine's breach of fiduciary duty claim; (3) the district court's exclusion of David Turner's documentary and testimonial evidence; (4) the district court's exclusion of the outcome of a related case; and (5) the district court's exclusion of several other pieces of evidence. For the reasons set out below, we reverse on the first and third issues, as well as some of the evidentiary issues.

I. FACTS

A. Background

1. Sitindustries: Tambourine and Hawksbay

Tambourine and Hawksbay are two subsidiaries of the Italian entity Sitindustrie, S.P.A. ("Sitindustrie"). Sitindustrie manufactures tubes in stainless steel, copper, and nickel alloys. The founder of Sitindustrie, German Bocciolone ("German"), was the CEO until he died in 1993. After German's death, his daughter Antonella Bocciolone ("Antonella") took over as the CEO. In 1997 at the direction of Antonella, Sitindustrie's holding company, Kobarid Holdings, S.A. ("Kobarid") acquired Hawksbay and Tambourine to control Sitindustrie's investments.

Antonella served on the board of both Hawksbay and Tambourine with David Brenman, Tambourine's chief operating officer through 2002. Antonella and Brenman later married in 2000. At their direction, Tambourine lent twenty million dollars to Lionheart International Ltd. ("Lionheart") to be invested. Several months later Tambourine asked for the money back, but only received ten million dollars. Tambourine briefly retained Defendant Pertnoy, Solowsky, & Allen ("PSA") in 1999 to locate the missing ten million dollars - this sum of money was known as the "Lionheart ten million." The Lionheart ten million, however, is not part of this litigation.

In 1998, Tambourine entered into a Management Agreement with Edward Reizen, a self proclaimed fund management expert. Tambourine agreed to pay

Reizen four hundred thousand dollars annually to manage Tambourine's assets. The Management Agreement gave Reizen full authority to act for Tambourine.

In March 1999, Antonella and Brenman appointed Reizen to the Hawksbay board. Reizen was designated as the manager of Hawksbay's bank accounts and given the authority to transfer and invest Hawksbay's funds. At Antonella and Brenman's direction, Tambourine also lent the ten million dollars it did receive back from Lionheart to Hawksbay - this sum of money was known as the "Hawksbay ten million." From 1999 to 2002 Reizen allegedly interacted with numerous financial institutions as Hawksbay's representative. He was later removed as a board member in November 2002.

In 2000, after learning from the Sitindustrie financial manager that there was financial stress, Antonella's younger brother Fausto Bocciolone ("Fausto") began to look for the twenty million dollars managed by Tambourine and Hawksbay. After getting the cold shoulder from Antonella and Brenman, Fausto secretly copied documents concerning the money from Brenman's office. Fausto brought his concerns to the rest of the Bocciolone family and Antonella subsequently resigned as CEO in 2001. She was replaced by Fausto. Antonella and Brenman were later removed as Hawksbay directors in November 2002 and Fausto was appointed as a director of both Hawksbay and Tambourine. Fausto is currently the

CEO of Sitindustrie.

In December 2002 the Hawksbay loan matured, but was never repaid. Sitindustries created a team to look for the missing money in January 2003, including a Swiss lawyer, Yves Auberson. Auberson was able to trace the money for a while, but ultimately could not locate it. Sitindustries subsequently sued Antonella and Brenman in Switzerland and Canada to recover the Hawksbay ten million. That suit is not part of this case.

2. The Hawksbay Ten Million

In their brief, Defendants lay out the transfers of the Hawksbay ten million from 1998-2002. In 1999 the entire sum was transferred to IHAG Bank in Zurich. In 2000 the funds were combined with monies in which Reizen had an interest and used to purchase Powell Portfolio, Inc., BVI ("Powell") bearer shares. These shares were held in a UBS account and then transferred to the Avenin Group Ltd., BVI ("Avenin") where they were pooled in a one hundred million dollar investment.[1] The proceeds from the sale of the Avenin Note were sent to the Canadian Brokerage Firm, Pentstone Investment, and then to Walter Schumacher's client account in Switzerland in 2001. Hawksbay's lawyer, Auberson, was able to

[1] These transactions were facilitated by a Swiss lawyer, Walter Schumacher. Schumacher pooled Hawksbay's funds with the resources of a number of his clients to invest in Avenin.

trace the funds to the Avenin account, but subsequently lost the trail. Auberson looked, but did not find any funds in the Swiss banks, Schumacher's account, or in Canada.

The parties dispute what happened to the money next. Hawksbay asserts that the funds in Schumacher's client account were then transferred by Reizen to Solowsky's Interest on Trust Account in October 2006 - the funds transferred to Solowsky's trust account are discussed in detail below. Defendants, however, claim that after the funds were moved to Schumacher's account the trail goes cold and that there is no evidence to link the funds in Switzerland with the funds Reizen transferred to Solowsky's IOTA account.

3. Reizen's Transfer to Solowsky

On October 16, 2003, Reizen transferred six million dollars from a Deming Finance Ltd. account to a PSA client trust account known throughout this litigation as the "IOTA Account." "Hawksbay/Brenman" was written on the transfer documentation.

Reizen testified that he told Solowsky he had full authority over the funds and signed an engagement letter representing and warranting that he had:

> full and complete authority over and to the funds which we are holding in escrow, including the right to pay for legal defense in the above-referenced actions and any related actions which may be filed, and that, to your

> knowledge, your authority has not been revoked, suspended or repudiated in any way.

(Jt. Ex. 6.) Reizen further testified that he told Solowsky the transfer was intended to facilitate a settlement of the Bocciolone family dispute and that he (Reizen) believed he was entitled to over two million dollars of the funds under the Management Agreement. Reizen testified that Solowsky read the Management Agreement before he agreed to accept the funds.

On October 21, 2003 Reizen sent Solowsky the first authorization for disbursal of the funds from the IOTA account. The authorization identified the funds to be disbursed as the funds from the Sitindustrie/Brenman Settlement. As per Reizen's instructions, Solowsky distributed over three hundred and fifty thousand dollars. The money went to two companies, which Reizen testified that he used to make payments to himself, and to PSA as a retainer. On October 24, 2003 Solowsky transferred $5.5 million from the IOTA account to an interest bearing account at Gibraltar Bank.[2] Over the next three years, upon Reizen's written request, Solowsky disbursed over four million dollars from the trust accounts. These disbursals were all either made for Reizen's benefit or to PSA. Reizen's written requests all referred to the funds in connection with one or all of

[2] We refer to this money, as well as the money in the IOTA account, as being held in trust.

the following: Sitindustries, Hawksbay, Brenman, Kobarid, and Tambourine.

4. The Solowsky-Weiss Discussions

In 2003, Fausto hired Joel Weiss, a lawyer in New York, to try and locate the Hawksbay ten million. Weiss contacted Solowsky in Spring 2003 because Solowsky had represented Tambourine in its 1999 attempt to locate the Lionheart ten million. Solowsky told Weiss that he was owed money by Antonella and Brenman. Hawksbay paid Solowsky the money owed and Solowsky sent Weiss his file on the Lionheart ten million.

On October 23, 2003, at Reizen's request, Solowsky called Weiss. Weiss testified that Solowsky told him that in exchange for indemnification and releases, his clients could assist Hawksbay in finding a substantial amount of Hawksbay's missing money. Solowsky did not tell Weiss that Reizen had transferred six million dollars into his account a few days earlier.

After discussions with his clients, Weiss called Solowsky on October 31, 2003 and secretly taped the phone conversation. A transcript of the recording was introduced into evidence as Plaintiffs' Exhibit 7. Weiss began by telling Solowsky that Hawksbay wanted to recover its missing money and asked Solowsky what he had in mind. Solowsky explained to Weiss that the ten million dollars had been whittled down to five million dollars and change. Solowsky then offered that in

exchange for indemnification and releases his clients could obtain the five million and change for Hawksbay in ninety to one hundred and twenty days. Solowsky also asked Plaintiffs to stop looking for the money in the meantime. Weiss then asked Solowsky if he knew where the five million dollars was currently. Solowsky told Weiss three times that he did not know. Weiss ended the conversation by saying that he would convey Solowsky's offer to his clients. Solowsky and Weiss also communicated by letter on November 21, 2003 and December 10, 2003. Fausto declined Solowsky's offer.

Fausto testified that he did not find out Reizen had transferred six million dollars into the IOTA account in October 2003 until December 2005.

5. The Kobarid Litigation

What became of the Hawksbay ten million and whether Reizen misappropriated it was the subject of another Southern District of Florida case, Kobarid Holding, S.A., et al. v. Reizen, Case No. 03-23269 ("Kobarid"). In that case, the following entities sued Reizen to recover the Hawksbay ten million: Kobarid, Sitindustries, Tambourine, and Hawksbay. The defendants in this case served as defense counsel for Reizen in Kobarid until they were disqualified, based on their previous representation of Tambourine in 1999. Kobarid was decided on June 14, 2006, when the jury in that case found Reizen liable to Hawksbay for

breach of fiduciary duty, fraud, fraudulent concealment, conversion, civil theft, and aiding and abetting breach of fiduciary duty, all on account of his management of the Hawksbay ten million. After a jury verdict in Hawksbay's favor, the court entered final judgment for Hawksbay for over thirty-nine million dollars on June 16, 2006. The jury did not find in favor of any of the other plaintiffs.

On August 9, 2006, Solowsky transferred the remaining $1,456,775.78 in the Gibraltar account to Hawksbay.

6. The Instant Case

On March 17, 2006, Plaintiffs Tambourine and Hawksbay filed suit against Defendants Solowsky and PSA over their alleged role in concealing the six million dollars in their trust accounts. In the most recent version of the complaint, Plaintiffs brought the following claims against Defendants: Count I, for civil theft; Count II, for conversion; Count III, for breach of fiduciary duty; and Count IV, for negligent supervision. Plaintiffs also brought a claim for punitive damages.

These claims were eventually whittled down by Defendants' Motion to Dismiss and Motion for Summary Judgment. At trial the only claims remaining were those for civil theft and conversion by Hawksbay, and a breach of fiduciary duty claim by Tambourine.[3] Hawksbay's civil theft and conversion claims allege

[3] The court dismissed Hawksbay's claim for breach of fiduciary duty because Hawksbay did not claim to have or to have had an attorney-client relationship with Defendants, whereas

that Solowsky misappropriated Hawksbay's funds for his and Reizen's benefit. At issue in Tambourine's breach of fiduciary duty claim was whether Defendants breached their fiduciary duty to Tambourine, a former client, in representing Reizen in related litigation.

B. Procedural History

At the close of trial in this case, the district court granted Defendants' Rule 50 Motion and dismissed Hawksbay's civil theft and conversion claims, stating that Hawksbay failed to establish its burden of proof. The court held that Hawksbay did not prove that Solowsky knowingly obtained or used Hawksbay's funds; that Solowsky had a felonious intent to deprive Hawksbay of its right to the funds; that Hawksbay had an undisputed right to immediate possession of the six million held in trust; and that the funds in question were specific and identifiable. On this basis, the court entered Judgment as a Matter of Law on Hawksbay's conversion and civil theft claims.

The court also granted Defendants' Rule 50 Motion on Tambourine's breach of fiduciary duty claim based on the two-year statute of limitations for professional malpractice actions. The court stated that Tambourine should have known by

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Tambourine did claim to have established such a relationship when Defendants represented it in 1999 to locate the Lionheart ten million dollars. The court also dismissed Tambourine's claims for civil theft and conversion because Tambourine did not have any interest in the Hawksbay ten million, as it was merely Hawksbay's creditor.

December 2003 that a professional malpractice claim might exist based on a breach of fiduciary duty, but that the claim was time-barred because Tambourine did not file its action until March 17, 2006. As an additional basis for granting Defendants' Rule 50 Motion on Count III, the district court found that Defendants' representation of Reizen in the Kobarid litigation (which the district court called the "second engagement" of PSA in December 2003) was not substantially related or materially adverse to Tambourine - in other words, the court held *substantively* that Tambourine did not make out a breach of fiduciary duty claim insofar as it was based on Defendants' representation of Reizen in the Kobarid litigation.

II. STANDARD OF REVIEW

We review the grant of a Rule 50 motion for judgment as a matter of law de novo. Abel v. Dubberly, 210 F.3d 1334, 1337 (11th Cir. 2000).

"Rulings on the admission of evidence are reviewed for abuse of discretion." U.S. Steel, LLC, v. Tieco, Inc., 261 F.3d 1275, 1286 (11th Cir. 2001) (citation omitted).[4] "An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an

[4] Inherent in this standard "is the firm recognition that there are difficult evidentiary rulings that turn on matters uniquely within the purview of the district court, which has first-hand access to documentary evidence and is physically proximate to testifying witnesses and the jury." Tran v. Toyota Motor Corp., 420 F.3d 1310, 1315 (11th Cir. 2005) (quotation and citation omitted).

improper application of law to fact." U.S. v. Smith, 459 F.3d 1276, 1295 (11th Cir. 2006) (quotation and citation omitted). Further, we "will not reverse [the district court's evidentiary rulings] unless an erroneous ruling resulted in a substantial prejudicial effect." Wright v. CSX Transp., Inc., 375 F.3d 1252, 1260 (11th Cir. 2004) (quotation and citation omitted).

III. ANALYSIS

A. Rule 50 Motion: Conversion and Civil Theft Claims

On February 19, 2008 the district court granted Defendants' Rule 50 Motion for Judgment as a Matter of Law against Hawksbay's conversion and civil theft claims. Hawksbay contends that this ruling was fundamentally flawed.

Rule 50 requires a court to render a judgment as a matter of law when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1) (2007). In reviewing a motion for judgment as a matter of law, "we consider all the evidence in the light most favorable to the non-moving party, and independently determine whether the facts and inferences point so overwhelmingly in favor of the movant that reasonable people could not arrive at a contrary verdict." Webb-Edwards v. Orange County Sheriff's Office, 525 F.3d 1013, 1029 (11th Cir. 2008) (citation omitted).

1. Conversion

Hawksbay contends the district court erred when it entered Judgment as a Matter of Law against its conversion claim. We agree.

"[C]onversion is an unauthorized act which deprives another of his property permanently or for an indefinite time." Nat'l Union Fire Ins. Co. of Pa. v. Carib. Aviation, Inc., 759 F.2d 873, 878 (11th Cir. 1985) (quoting Senfeld v. Bank of N.S. Trust Co. (Cayman), 450 So. 2d 1157, 1160-61 (Fla. 3d DCA 1984)). Conversion must be proven by a preponderance of the evidence. Small Bus. Admin. v. Echevarria, 864 F. Supp. 1254, 1264 (S.D. Fla. 1994). Under Florida law, the claimant must further establish "possession or an immediate right to possession of the converted property at the time of conversion." U.S. v. Bailey, 419 F.3d 1208, 1212 (11th Cir. 2005). While demand by the rightful owner serves as actual notice of the rights of the bereaved party to the recipient, demand and refusal are not required elements for a conversion claim. Senfeld, 450 So. 2d at 1161. "The generally accepted rule is that demand and refusal are unnecessary where the act complained of amounts to a conversion regardless of whether a demand is made." Goodrich v. Malowney, 157 So. 2d 829, 832 (Fla. 2d DCA 1963) (citation omitted).

A conversion claim for money also requires proof that the funds are specific

and identifiable. Navid v. Uiterwyk Corp., 130 B.R. 594, 595 (M.D. Fla. 1991) (citing Allen v. Gordon, 429 So. 2d 369 (Fla. 1st DCA 1983). "Money is capable of identification where it is delivered at one time, by one act and in one mass, or where the deposit is special and the identical money is to be kept for the party making the deposit, or where the wrongful possession of such property is obtained." Belford Trucking Co. v. Zagar, 243 So. 2d 646, 648 (Fla. 4th DCA 1970) (citation omitted). This identification requirement ensures that a fund of money *actually exists to pay a specific debt owed* and the claimant is not merely transforming a contract dispute into a conversion claim. Allen, 429 So. 2d at 371; see also Gasparini v. Pordomingo, 972 So. 2d 1053, 1056 (Fla. 3d DCA 2008) (citation omitted) ("For money to be the object of conversion 'there must be an obligation to keep intact or deliver the specific money in question, so that money can be identified.'"); Fla. Desk, Inc. v. Mitchell Int'l, Inc., 817 So. 2d 1059, 1061 (Fla. 5th DCA 2002) ("[T]here is no evidence that there was any obligation on [the defendant's] part to keep intact or hold a specific fund to deliver to [the plaintiff]."); Gambolati v. Sarkisian, 622 So. 2d 47, 49 (Fla. 4th DCA 1993) (funds not identifiable because defendant "was seeking to enforce an obligation to pay money and nothing more . . . . [the defendant] was not required to pay to [the plaintiff] the identical monies he collected"); Rosen v. Marlin, 486 So. 2d 623,

625 (Fla. 3d DCA 1986) ("This is not a case where a party intentionally received a specifically identifiable sum of money knowing that he had no right to take it and who refused to give it back"); Russell v. The Praetorians, 28 So. 2d 786, 789 (Ala. 1947) (citation omitted) ("It seems to be well settled, that trover lies for the conversion of money, where there is an obligation on the part of the defendant to return specific coin or notes intrusted to him.").

Here, the court held that Hawksbay failed to establish a sufficient evidentiary basis to find Solowsky liable for conversion. The court found that Hawksbay did not establish by a preponderance of the evidence (1) "that the funds in question were specifically and identifiably the funds of Hawksbay"; and (2) "an undisputed right to immediate possession of the property in question." (Trial Tr. at 828-29.) We disagree.

a. Specific and Identifiable Funds

Hawksbay produced sufficient evidence for a reasonable jury to find that the six million dollars in trust was specific and identifiable. The funds were delivered by Reizen to Solowsky at one time, on October 16, 2003; by one act, a wire transfer; and in one mass, six million dollars. Unlike the plaintiffs in cases such as Gambolati and Florida Desk, Hawksbay's suit was not brought to enforce a general obligation to pay money, but to recover the actual ten million dollars that Reizen

allegedly stole from it. See 622 So.2d at 49; 817 So. 2d at 1061. Here, Reizen was under an obligation to keep intact or hold the ten million dollars Hawksbay gave him to invest. A jury could find the fund was a specifically identifiable sum of money.

Further, Reizen's testimony and the transfer documents specifically identify the money as Hawksbay's. Reizen put "Hawksbay/Brenman" on the bottom of the October 16, 2003 transfer documentation (Jt. Ex. 3) and Reizen testified that he labeled the transaction Hawksbay/Brenman because "[t]he funds belonged to either Hawksbay or one of their related companies through Mr. Brenman" (Trial Tr. at 340). Reizen further testified that he told Solowsky the funds belonged to Hawksbay[5] and that Reizen had control over the funds based on his Management Agreement with Tambourine.[6] In fact, Reizen testified that Solowsky would not

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[5] Mr. Garnett: Okay. Now did you tell [Solowsky] that you personally owned these funds before they came into his account?
Mr. Reizen: No.
Mr. Garnett: Did you tell [Solowsky] that they belonged to Hawksbay or one of the Plaintiffs?
Mr. Reizen: Yes.

(Trial Tr. at 344.) Mr. Garnett is Hawksbay's attorney in this case.

[6] Mr. Garnett: And did you tell [Solowsky] that you believed that whatever control you had over the funds was related to either your being on the board of directors or to this management agreement?
Mr. Reizen: Yes.

(Trial Tr. at 350.) The Management Agreement was between Reizen and Tambourine, not Hawksbay. Nevertheless, Reizen alleged that this Agreement authorized him to possess

move the funds into the IOTA account until he saw Reizen's Management Agreement.[7] Further, Reizen's written authorizations to disburse the money held in trust routinely referred to the funds as belonging to Sitindustrie, Brenman, Tambourine, Hawksbay and/or Kobarid. (See, e.g., Jt. Ex. 7; Jt. Ex. 8; Defs.' Ex. 9; Defs.' Ex. 12; Defs.' Ex. 21; Defs.' Ex. 22.) On this basis, a jury could find that the six million in trust was a specific fund of money that rightfully belonged to Hawksbay.

The district court held that the aforementioned evidence was insufficient because Hawksbay did not trace the funds "from the start of a paper trail to its deposit in the Defendant's account." (Trial Tr. at 829.) Defendants also cite to Hawksbay's failure to accurately trace the funds in their Appellate brief. However, to establish that funds are "specific and identifiable," a detailed tracing of the money is not required. As discussed above, funds are "specific and identifiable" if the claimant can prove that the defendant had an obligation to deliver a fund of money and that fund of money actually exists to pay a specific debt owed. See, e.g., Allen, 429 So. 2d at 371; Gasparini, 972 So. 2d at 1056.

Hawksbay's funds.

[7] Mr. Garnett: And when did you give [Solowsky] a copy of the management agreement?
Mr. Reizen: I believe it was in the first discussions we had before the funds – before he agreed to accept the funds to his account.

(Trial Tr. at 351.)

Here, Hawksbay has presented sufficient evidence that Reizen had an obligation to deliver ten million dollars to Hawksbay and that the six million dollars transferred to the IOTA account was part of that ten million. The fact that the ten million dollars were co-mingled with other investments does not make the funds unidentifiable or unspecific.[8] As far as Hawksbay is concerned, Hawksbay gave Reizen ten million dollars to invest and through numerous investment strategies Reizen lost $4.5 million. Reizen still had an obligation to keep intact the remaining $5.5 million and return it to Hawksbay. Hawksbay presented sufficient evidence that Reizen put the remaining money from the Hawskbay ten million into Solowsky's IOTA account. As discussed above, Reizen identified the money in trust as belonging to Hawskbay both in testimony and on all the transfer documentation. Defendants' evidence that the trail of the Hawksbay ten million was lost once the Avenin Note was sold and the proceeds were transferred to Schumacher's client account in Switzerland can be considered by a jury. It is possible that the jury will find there is insufficient evidence to link the funds in Switzerland with the funds transferred to the IOTA account. However, viewing the

[8] Defendants presented evidence that the Hawksbay ten million was pooled with other money into a one hundred million dollar investment in Avenin. Defendants contend that once the Hawksbay ten million was co-mingled with the rest of the Avenin one hundred million dollar investment, Reizen's indebtedness to Hawksbay became nothing more then general indebtedness. We find no merit in this argument.

evidence in the light most favorable to Hawksbay, we find that Hawksbay presented sufficient evidence for a jury to find that the funds held in trust were specifically and identifiably Hawksbay's as part of the ten million given to Reizen to invest.

b. Undisputed Right to Immediate Possession of the Funds

Hawksbay presented sufficient evidence for a jury to find that Hawksbay had an undisputed right to immediate possession of the money in trust. As discussed above, Reizen identified the funds as belonging to Hawksbay on the transfer documentation and Reizen testified that he told Solowsky the funds did not belong to him, but "belonged to Hawksbay or one of the Plaintiffs." (Trial Tr. at 344.) Defendants, however, did present evidence asserting that Hawksbay did not have an undisputed right to all of the money held in trust. Reizen testified that "there was a family dispute going on between members of the Bocciolone family." as to who the funds belonged to. (Id. at 343.) The transfer authorization slips also refer to the money in trust as belonging to all the various parties connected with Sitindustrie: Sitindustrie, Brenman, Hawksbay, Tambourine, and Kobarid. (See, e.g., Jt. Ex. 7; Jt. Ex. 8; Defs.' Ex. 9; Defs.' Ex. 12; Defs.' Ex. 21; Defs.' Ex. 22.) Further, Reizen testified that he thought Hawksbay owed him around two million

dollars under the Management Agreement.[9] Nevertheless, whether Hawksbay had an undisputed right to the money in trust is a question that should be left to the jury. A jury may find that Hawksbay did not have an undisputed right to those two million dollars and modify their award accordingly or that Hawksbay did not have an undisputed right to any of the money in trust. Viewing the evidence in the light most favorable to Hawksbay, however, the evidence does not point so overwhelmingly in favor of Defendants that reasonable people could not find that Hawksbay had an undisputed right to immediate possession of the entire six million in trust.

c. An Unauthorized Act Which Deprives Another of His Property[10]

Hawksbay presented sufficient evidence for a reasonable jury to conclude that Solowsky's control over the funds and his disbursal of those funds were

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[9]

Mr. Garnett:	All right. Now, it's true, isn't it, Mr. Reizen, that you didn't believe that you were entitled to all 6 million; isn't that true?
Mr. Reizen:	That's true. . . .
Mr Garnett:	Okay. And, in fact, you believed that the right to this – to these funds – the right to be paid these fees pursuant to the management agreement was, at most, maybe a little bit more than 2 million, correct?
Mr. Reizen:	Correct.

(Trial Tr. at 352.)

[10] The district court did not rule on the sufficiency of Hawksbay's evidence on this issue. However, as we review a Rule 50 motion de novo, we must consider all aspects of Hawksbay's conversion claim. See Abel, 210 F.3d at 1337.

unauthorized acts which deprived Hawksbay of its funds. Solowsky communicated with Hawksbay's attorney, Joel Weiss, by phone on October 23, 2003 and October 31, 2003 about Hawksbay's missing funds. On October 31, 2003 Weiss told Solowsky that his "clients want to recover their missing money. So there is no dispute about that." (Pls.' Ex. 7 at 2.) In response, Solowsky told Weiss that he could help Hawksbay recoup over five million of the missing ten million dollars. (Id. at 5.) Yet, after this phone call, instead of returning the $5.5 million in Solowsky's possession, Solowsky disbursed over four million dollars without Hawksbay's approval, leaving only $1,456,775 in trust to return to Hawksbay. These dispersals were made per Reizen's instructions and were solely for Solowsky's and Reizen's benefit,[11] depriving Hawksbay of over four million

[11] The dispersals were as follows:

01/21/2004:	$7,500 to David M. Turner, III
02/12/2004:	$83,750 to Klein, Walker & Associates
	$51,560 to Bland Payne Holdings USA, Inc.
	$85,000 to The Carolina Trading Company
	$100,000 to PSA's operating account
04/07/2004:	$145,920 to Klein, Walker & Associates
05/24/2004:	$550,000 to J.P. Morgan Chase Bank
	$275,000 to The Carolina Trading Company
09/20/2004:	$1,400,000 to The Carolina Trading Company
	$200,000 to PSA's operating account
11/03/2004:	$1,040,000 to Reizen
09/06/2005:	$20,000 to PSA
	$65,000 to Reizen

(Jt. Ex. 10, Uncontested Facts at 5-6.) Reizen testified that the payment to J.P. Morgan Chase was for his benefit (Trial Tr. at 360) and that Carolina Trading Company; Klein, Walker &

dollars. Further, Solowsky did not transfer the remaining funds to Hawksbay until August 9, 2006. (Jt. Ex. 10, at 8-9.) Thus, a jury could conclude that Solowsky deprived Hawksbay of the entire six million dollars from October 16, 2003 until August 9, 2006.

We therefore reverse the district court's Judgement as a Matter of Law on Hawksbay's conversion claim. Our holding does not suggest that a jury should find Solowsky liable of conversion. We merely hold that Hawksbay provided sufficient evidence for this issue to be resolved by a jury.

2. Civil Theft

Hawksbay contends the district court also erred when it entered Judgment as a Matter of Law against Hawksbay's civil theft claim. We agree.

"To establish a claim for civil theft, a party must prove that a conversion has taken place and that the accused party acted with criminal intent." Gasparini, 972 So. 2d at 1056. Florida Statute § 812.014 defines a civil theft:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

Associates and Bland Payne Holdings USA, Inc. were companies that he (Reizen) used to make payments to himself (id. at 361). David M. Turner, III was hired by Defendants as a consulting expert for the Kobarid litigation. (Jt. Ex. 10, Uncontested Facts at 5.) The payment to Turner was therefore also for Reizen's benefit. (Id.)

> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. § 812.014(1) (2007).

Under Florida law, the elements of civil theft must be proven by clear and convincing evidence. Fla. Stat. § 772.104 (2007). "Clear and convincing evidence is an intermediate standard between the preponderance of the evidence standard and the criminal beyond a reasonable doubt standard." Echevarria, 864 F. Supp. at 1265 (citation omitted). "Clear and convincing evidence does not mean 'unequivocal,' or 'proof that admits of no doubt.'" U.S. v. Owens, 854 F.2d 432, 436 (11th Cir. 1988) (quoting Addington v. Texas, 441 U.S. 418, 432 (1979). "[A] party who has the burden of proof by clear and convincing evidence must persuade the jury that his or her claim is highly probable." Id. at n.8.

Here, the district court held that Hawksbay did not establish a legally sufficient basis to find that Solowsky committed civil theft. In addition to the deficiencies the court found in Hawksbay's conversion claim, the court found that Hawksbay failed to prove by clear and convincing evidence that Solowsky (1) knowingly obtained or used property of Hawksbay; and (2) "acted with felonious intent to deprive Hawksbay of . . . its right to the property or a benefit thereof."

(Trial Tr. at 830.) We disagree.

a. Clear and Convincing Evidence Standard

Hawksbay rightly contends that the district court used the wrong standard of review for civil theft. The district court incorrectly defined clear and convincing evidence as requiring "proof which leaves no reasonable doubt" and as evidence that is "certain . . . unambiguous . . . and . . . unequivocal." (Id. at 828.) This standard is too high. As discussed above, clear and convincing evidence merely requires proof that the claim is highly probable. See Owens, 854 F.2d at 436. Certain, unambiguous, and unequivocal evidence is explicitly not required. Id. at n.8. Nevertheless, as we review Rule 50 Motions de novo, we do not consider whether the district court's error affected the outcome of the Rule 50 Motion. See Abel, 210 F.3d at 1337. Rather, we look at all of the evidence to determine whether a reasonable jury could find Hawksbay's civil theft claim highly probable.

b. Knowledge Requirement

Hawksbay presented enough evidence for a reasonable jury to find that Solowsky knew the money in trust belonged to Hawksbay. When Solowsky first obtained the funds from Reizen on October 19, 2003 he could have concluded that Reizen had a legitimate interest in those funds. Reizen signed an engagement letter warranting that he had full and complete authority over the funds. (Supra p. 6-7,

Jt. Ex. 6.) Reizen also testified that he thought he had control over the funds because of his Management Agreement and that he communicated this to Solowsky. (Supra p. 17, Trial Tr. at 350.) Further, Reizen testified that Solowsky refused to accept the funds until he saw the Management Agreement. (Supra p. 18, Trial Tr. at 351.) However, Reizen also testified that he told Solowsky the money belonged to Hawksbay (supra p. 17, Trial Tr. at 344) and that he thought he was personally only entitled to a little bit more then two of the six million dollars transferred.[12] A reasonable person could therefore find that Solowsky knew that at least four of the six million dollars belonged to Hawksbay.

Additionally, as soon as Solowsky read the Kobarid complaint,[13] Solowsky

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[12] Mr. Garnett: All right. Now, it's true, isn't it, Mr. Reizen, that you didn't believe that you were entitled to all 6 million; isn't that true?
Mr. Reizen: That's true. . . .
Mr. Garnett: Okay. And, in fact, you believed that the right to this – to these funds – the right to be paid these fees pursuant to the management agreement was, at most, maybe a little bit more than 2 million, correct?
Mr. Reizen: Correct. . . .
Mr. Garnett: Okay. Did you – and I've been through various things here. Did you tell [Solowsky] all of the things that you've testified to here this morning about your belief to entitlement of some of the funds, who the owner of the funds were, et cetera?
Mr. Reizen: Yeah, everything came up, pretty much.
Mr. Garnett: Okay. And did he ask you questions to make sure that he understood the situation?
Mr. Reizen: Yeah, we – we went pretty much in depth to understand what was going on. It was a lot of money.

(Trial Tr. at 350-55.)

[13] This complaint was filed on December 8, 2003.

was put on notice that Hawksbay did not want Reizen in possession of any of its money. Solowsky, the lawyer initially representing Reizen in the Kobarid litigation, surely read and studied the complaint. The Kobarid complaint alleged that "Defendant Reizen . . . conspired in a series of financial transactions to wrongfully transfer over $10,000,000.00 from Plaintiff Hawksbay to accounts controlled by Reizen and others for their personal use." (Kobarid, Dec. 8, 2003 Compl. at 2.) The complaint further alleged that Reizen committed a breach of fiduciary duty, fraud, fraudulent concealment, trespass, conversion, unjust enrichment, and RICO violations. (Id.)

After learning of the Kobarid litigation, Solowsky continued his dominion over the funds. Once Solowsky read the Kobarid complaint he could not have relied on the Management Agreement or anything else Reizen told him to disburse the money held in trust for Reizen's benefit. At this point, Solowsky knew Reizen was probably not entitled to the money he was holding in trust and should not have disbursed any of the funds.[14] Solowsky, however, continued to disburse the money in trust for his and Reizen's benefit. On this basis, a jury could find that Solowsky was liable for civil theft.

We find guidance for this point in Joseph v. Chanin. 940 So. 2d 483 (Fla.

[14] Several alternatives were available to Solowsky including depositing the funds with the court or holding it in trust but immediately notifying all the parties of such.

4th DCA 2006). In that case, one of the joint tenants of a bank account wrongfully appropriated more than his share of the money. Id. at 485. When he died that money went to a third party. Id. After the third party was informed she possessed more then her equal share, the third party refused to return the misappropriated money to the rightful owner. Id. The court held that the third party was liable for conversion because she kept the identifiable funds after she knew they did not belong to her and refused a demand to restore the funds to the rightful owner.[15] Id. at 485-87. Like the defendant in Joseph, Solowsky may be held liable for civil theft because he kept the funds after he knew that they did not belong to Reizen.[16]

c. Felonious Intent Requirement

Evidence that Solowsky lied to Joel Weiss about the location of the funds and disbursed a majority of the funds to or on behalf of Reizen is a sufficient basis for a reasonable jury to find that Solowsky acted with felonious intent to deprive Hawksbay of its funds. Hawksbay presented evidence that Solowsky lied to Weiss about the location of the almost six million dollars in trust that Reizen had labeled

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[15] While this case addresses conversion, the same principle is applicable to a claim for civil theft. The civil theft statute does not require that a party acquired the stolen property. The statute specifies that it punishes any party that "knowingly obtains or uses, or endeavors to obtain or to use the property of another." Fla. Stat. § 812.014(1). Thus, even if a party innocently obtained stolen property, once a party knows the property belongs to another and still "uses" the property that party may be liable for civil theft.

[16] Even knowing of Reizen's claim to some of the money, Solowsky knew that most of the funds belonged to Hawksbay.

as Hawksbay/Brenman. During their October 31, 2003 conversation, Weiss asked Solowsky "Do you know where the 5 Million is currently?" and Solowsky responded "I can't say. I do not know at this point." (Pls.' Ex. 7 at 5.) Weiss then asked again "Is it in the possession of your clients do you believe?" (Id.) Solowsky again responded "I do not know. I think that it may be, but I don't know, Joel." (Id.) Solowsky then attempted to induce Hawksbay to stop looking for the money.[17] After this conversation, instead of returning the money in trust to Hawksbay or notifying Weiss that the money was in his account, Solowsky continued to disburse the funds for his and Reizen's benefit.

Defendants argue that Solowsky had a duty to his client, Reizen, to comply with Reizen's instructions. It is true that a lawyer does not have an obligation to "take affirmative steps to discover client fraud or future crimes." U.S. v. Del Carpio-Cotrina, 733 F. Supp. 95, 99 n.9 (S.D. Fla. 1990). In this case, however, affirmative steps were not required for Solowsky to discover that he should not comply with Reizen's instructions. As discussed above, the Kobarid complaint, which Solowsky was required to read as Reizen's lawyer, put him on notice that

[17] Solowsky said, "And, in the meantime, because Swiss bankers get to be a little bit skittish, we would want whatever you guys are doing over there to stand still so as not to make it more difficult." (Pls.' Ex. 7 at 8.) Defendants assert in their Appellate Brief that Solowsky sought a stand still because he did not believe the $5.5 million in the IOTA account would be sufficient to settle the case.

Reizen was no longer entrusted to manage Hawksbay's money. Hawksbay presented evidence that even after reading the Kobarid complaint, Solowsky did not stop disbursing the money in trust for his and Reizen's benefit or tell Hawksbay (Weiss) that he (Solowsky) was in possession of six million dollars transferred to him by Reizen. Hawksbay presented evidence that Solowsky kept the location of the funds secret for over two years. Fausto Bocciolone, a director of Hawskbay and the CEO of Hawksbay's parent company, testified that he did not learn the money was in Solowsky's account until December 2005; after Solowsky had transferred over four million dollars out of the trust accounts for Reizen or Solowsky's benefit. (Trial Tr. at 62.)

Solowsky's secrecy about the location of the funds and his continual disbursements of money to himself and Reizen without Hawksbay's consent support the felonious intent requirement of a civil theft claim.

d. Deprivation of Entitled Party's Right to Property and Appropriation of Property for Benefit of Unentitled Party[18]

On October 31, 2003 Weiss informed Solowsky that Hawksbay wanted to recover its lost money. (Pls.' Ex. 7 at 2.) The Kobarid Complaint, filed on December 8, 2003, clearly informed Solowsky that Hawksbay thought Reizen stole

[18] The district court did not rule on the sufficiency of Hawksbay's evidence on this issue. However, as we review a Rule 50 motion de novo, we must consider all aspects of Hawksbay's civil theft claim. (See p. 21, n.10.)

the funds and that Hawksbay wanted the money back. It certainly informed Solowsky that Hawksbay did not want the money in trust transferred for Reizen's benefit. Yet after December 8, 2003, without Hawksbay's consent, Solowsky transferred over four million dollars from the funds in trust for Reizen's, not Hawksbay's, benefit. Only $1,456,775 was left in the trust accounts to return to Hawksbay. These actions support an inference that Solowsky deprived Hawksbay of its money and appropriated the property for Solowsky and Reizen's use; two parties not entitled to the funds.

We therefore reverse the district court's Judgment as a Matter of Law on Hawksbay's civil theft claim. Our holding does not suggest that a jury must find Solowsky liable of civil theft. We merely hold that Hawksbay provided enough proof at trial for this issue to be resolved by a jury.

B. Rule 50 Motion: Breach of Fiduciary Duty Claim

Tambourine has appealed the district court's grant of Defendants' Rule 50 Motion on its breach of fiduciary duty claim, arguing that the court applied the wrong statute of limitations. We affirm the district court on this point. Before laying out our analysis, we first explain the grounds for and procedural history of Tambourine's claim.

1. Background and Procedural History of Tambourine's Breach of Fiduciary Duty Claim

Tambourine's breach of fiduciary duty claim was originally based on two alleged breaches. The first was based on Defendants' alleged mishandling of the six million dollars held in trust. The second was based on Defendants' duty of loyalty to Tambourine as a former client[19] - specifically, Tambourine claimed that Defendants breached their duty of loyalty by representing Reizen in litigation adverse to Tambourine.[20]

When the district court ruled on Defendants' Motion for Summary Judgment, it limited Tambourine's claim so that it was only based on the latter breach - that is, Tambourine's claim was limited to one based solely on Defendants' duty of loyalty to Tambourine as its former client. (See D.E. #154 at 22 n.5.)[21] The court found genuine issues of material fact existed as to Defendants' breach of their duty of loyalty through their subsequent representation of Reizen in

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[19] As explained above, Tambourine briefly retained Defendants in 1999 to locate the missing Lionheart ten million.

[20] According to Rule 4-1.9(a) of the Florida Bar Rules of Professional Conduct, "[a] lawyer who has formerly represented a client in a matter" shall not later "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."

[21] The court also disposed of Tambourine's claim insofar as it was based on Defendants' mishandling of the money in trust. This was because it ruled that Tambourine did not have any interest in the Hawksbay ten million, as Tambourine was merely Hawksbay's creditor. (See D.Es. #75, 85.)

the Kobarid case and the related 2003 settlement negotiations with Joel Weiss,[22] and in their representation of Reizen in the 2000 Power Trading case.[23]

At the close of Plaintiffs' case at trial, the court granted Defendants' Rule 50 Motion on Tambourine's breach of fiduciary duty claim. The court found Tambourine's claim was barred by the two-year statute of limitations applicable to professional malpractice claims. See Fla. Stat. § 95.11(4)(a). Tambourine now appeals, arguing that the court should have applied the four-year statute of limitations applicable to intentional torts found at section 95.11(3)(o). Defendants, in turn, argue that the court was correct in treating Tambourine's breach of fiduciary duty claim as an action for professional malpractice subject to the two-year statute of limitations. They also argue that the court was correct in disposing of Tambourine's claim as untimely. We agree with both of Defendants' arguments for the reasons articulated below.

2. Applicable Statute of Limitations

Tambourine argues that the district court should have applied the four-year

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[22] The court found evidence supporting the argument that Defendants' 2003 settlement negotiations with Joel Weiss were related to the recovery of the Lionheart ten million (the sum of money Tambourine hired Defendants to find in 1999).

[23] The Power Trading case was a suit filed by investors against Reizen and others in 2000. PSA and Solowsky represented the defendants in that case, which settled later that year. The court found record evidence to suggest that Power Trading involved funds that were co-mingled with the Lionheart ten million.

statute of limitations applicable to intentional torts, rather than the two-year statute of limitations applicable to professional malpractice claims. We do not agree.

Section 95.11(3)(o) states that a four-year statute of limitations shall apply to "[a]n action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, *except as provided in subsections (4), (5), and (7)*." (Emphasis added). By its plain text, section 95.11(3)(o) carves out exceptions for the actions listed in subsections (4), (5), and (7) - and subsection (4)(a) contains the two-year statute of limitations for professional malpractice claims. Thus, it appears that the statute explicitly *excepts* professional malpractice claims from the four-year statute of limitations applicable to other intentional torts.

Tambourine argues that a breach of fiduciary duty claim based on the attorney-client relationship can give rise to a claim for professional malpractice subject to the two-year statute of limitations, *as well as* an intentional tort subject to the four-year statute of limitations. However, Florida case law indicates that a claim styled as one for "breach of fiduciary duty" claim, when brought against a law firm or attorney for actions relating to the attorney-client relationship, is treated as a malpractice claim subject to the two-year statute of limitations. One example is Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A., 671 So. 2d 805 (Fla. 3d

DCA 1996). There, the plaintiffs brought fraud and breach of fiduciary duty claims against attorneys who acted both as attorneys and escrow agents for the corporation from which the plaintiffs purchased land. Id. The trial court granted summary judgment to the defendants because it found the claims barred by the two-year professional malpractice statute of limitations in section 95.11(4)(a). Id. The Third District reversed, finding that the vocation of escrow agent did not qualify as a profession, and stated that "[r]egardless of the benefits defendants derived from their knowledge of the law in the fulfillment of their duties as escrow agent, *they were not acting as plaintiff' attorneys*. Therefore, the four-year statute of limitations, rather than the two-year professional malpractice limit, applies to this action." Id. at 806 (emphasis added).

In another case, the plaintiff brought an action for fraud and breach of fiduciary duty against the defendant, and the question on appeal was whether the two-year malpractice statute of limitations applied to those claims. Beach Higher Power Corp. v. Rekant, 832 So. 2d 831 (Fla. 3d DCA 2002). The court held that the defendant "could not be considered [the plaintiff's] attorney for the purposes of the instant suit, and accordingly, the two year limitations period did not control." Id. at 833-34.

In Green v. Bartel, the plaintiff filed claims for negligence, breach of

contract, and breach of fiduciary duty against her attorneys for their wrongful acts in disbursing her funds without permission. 365 So. 2d 785 (Fla. 3d DCA 1978). The court applied the two-year malpractice statute of limitations to the plaintiff's claims, without considering the fact that the plaintiff did not technically style her claims as malpractice claims. Id. at 787-88.

Further, in Palafrugell Holdings, Inc. v. Cassel, the court made the following observation in a footnote:

> A claim for breach of fiduciary duty, coupled with a claim for legal malpractice, does not necessarily combine to form one claim for legal malpractice. Rather, a complaint containing each of these claims can be one in which the plaintiff is pleading *in the alternative*, a perfectly acceptable practice under Florida law. Fla. R. Civ. P. 1.110(g). If the plaintiff is unable to establish that there existed an attorney-client relationship, there is the possibility that some other form of fiduciary relationship existed, for example, that of escrow agent.

825 So. 2d 937, 940 n.2 (Fla. 3d DCA 2001) (citations omitted) (emphasis added). This footnote, along with the preceding caselaw, all indicate that if a breach of fiduciary duty claim does involve an attorney-client relationship, it is considered a malpractice action. See also Wilder v. Meyer, 779 F. Supp. 164, 169 (S.D. Fla. 1991) (where the plaintiff brought an action for, among other claims, breach of fiduciary duty against his attorney, the court stated without comment that the claim was "governed by a two-year statute of limitations applicable to professional

malpractice claims," citing to Fla. Stat. § 95.11(4)(a)).

Based on the plain text of sections 95.11(3)(o) and 95.11(4)(a) and also the guidance provided by Florida courts, we hold the district court was correct in treating Tambourine's breach of fiduciary duty claim against its former counsel as a professional malpractice claim subject to the two-year statute of limitations.

3. Disposal of Tambourine's Claim

We also hold that the district court was correct in granting Defendants' Rule 50 Motion on Tambourine's breach of fiduciary duty claim. Before explaining our conclusion, we first explain the basis for Tambourine's appeal. The district court disposed of Tambourine's claim on two separate grounds. The first was the applicable two-year statute of limitations, discussed above. The second was a substantive ruling wherein the court found Defendants' representation of Reizen in Kobarid was not substantially related or materially adverse to Tambourine, and so could not form the basis of a breach of fiduciary duty claim. As Defendants point out, Tambourine did not appeal this substantive ruling. It is a well-established rule in this Circuit that "[i]ssues not clearly raised in the briefs are considered abandoned." Marek v. Singletary, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) (citation omitted). Thus, it is irrelevant whether the court properly disposed of Tambourine's breach of fiduciary duty claim insofar as that claim is based on

Defendants' representation of Reizen in Kobarid, because Tambourine did not appeal the court's substantive ruling disposing of it.

That said, there are two remaining bases for Tambourine's breach of fiduciary duty claim: Defendants' representation of Reizen in the 2000 Power Trading case, and Defendants' settlement negotiations with Joel Weiss in October 2003. However, we have already ruled that the two-year statute of limitations applies to Tambourine's claim. Thus, whether Tambourine's claim is based on Defendants' representation of Reizen in the 2000 Power Trading case or on the 2003 settlement negotiations, Tambourine missed the two-year deadline by waiting until 2006 to file its claim.

In sum, we affirm the court's grant of Defendants' Rule 50 Motion on Tambourine's breach of fiduciary duty claim. That claim was untimely, as it was not filed within the two-year statute of limitations applicable to professional malpractice actions.

C. Turner Evidence[24]

Hawksbay appeals the district court's exclusion of documentary and

[24] The remaining issues deal with the district court's exclusion of some of Hawksbay's evidence. These issues are essentially moot because the jury never got to consider Hawksbay's case. However, because we are reversing the court's grant of Defendants' Rule 50 Motion insofar as it disposed of Hawksbay's conversion and civil theft claims and sending those claims back to be retried, we will address and provide guidance on these evidentiary questions.

testimonial evidence from witness David Turner ("the Turner evidence"). We ultimately reverse the district court, dealing with Turner's documents and trial testimony separately. Before beginning our analysis, we first explain Turner's identity and the procedural history behind these two questions.

1. Background and Procedural History of the Turner Evidence

David Turner was a certified public accountant hired to provide forensic accounting services on Reizen's behalf in the Kobarid lawsuit. Solowsky himself hired Turner as a consultant in 2004, before Solowsky and his firm were disqualified from defending Reizen in that case.[25] Although Turner was vague about the reason for his being hired,[26] Reizen testified that Turner was hired to determine the amount of money Reizen was owed under the Management Agreement with Hawksbay. (Trial Tr. at 362.) Turner did not testify in Kobarid.

Hawksbay subpoenaed Turner for trial on September 17, 2007, and again in December of 2007 after the case was transferred to Judge Gonzales and rescheduled for trial. On January 30, 2008 Defendants moved to quash Turner's

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[25] As explained above in Footnote 11, Defendants paid Turner for his services in the Kobarid case out of the money Reizen gave them to hold in trust.

[26] When asked what he was hired to do in the Kobarid case, he stated he was "asked to prepare a schedule that would be used as a settlement in a lawsuit with Mr. Reizen that Mr. Solowsky was helping Mr. Reizen with. . . . I was doing a damage calculation and trying to put together a schedule that could be used in those settlement negotiations. . . . I started off with a ten million dollars amount and worked through a series of deductions that was told related to that 10 million." (Trial Transcript at 442-43.)

trial subpoena and also to exclude the Turner evidence. (See D.E. #186.) One of Defendants' arguments was that the evidence was protected work product. On February 8, 2008 the court denied those Motions, ruling that the Turner evidence was "relevant and material" and that the work product privilege did not apply.

During Reizen's direct examination at trial Hawksbay began inquiring into Reizen's relationship with Turner, and attempted to introduce documents from Turner's files related to his accounting work on Reizen's behalf. At this point Defendants objected on the basis of the work product doctrine and renewed their Motion to exclude the Turner evidence. (Trial Tr. at 372.) This time the court granted the Motion, finding that "the crime fraud exception does not apply here" but that "the work product exception does apply here." (Id. at 378.) Hawksbay called Turner to provide an offer of proof, after which the court excluded his testimony and documents on the basis of the work product doctrine. (Id. at 446.)

2. Turner's Documents[27]

[27] It is important to note at the outset that the only Turner documents at issue are those Hawksbay proffered at trial. According to Federal Rule of Evidence 103(a)(2), "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected," and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked," although nothing in Rule 103(d) "precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Here, Hawksbay only proffered four documents. (See Trial Tr. at 441.) These documents were referred to as P31-01, P31-02, P31-04, and P31-05, which is how we refer to them here.

In its initial brief Hawksbay claims that Rule 26(b)(4)(B)[28] governs whether the Turner evidence should have been excluded, not the work product rule at Rule 26(b)(3). Essentially, Hawksbay is arguing that where Rule 26(b)(4)(B) applies, it overrides the work product rule at Rule 26(b)(3).[29] However, as Defendants point out, Hawksbay never made this argument to the district court. "As a general rule, we do not consider arguments raised for the first time on appeal." Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1292 (11th Cir. 2003) (citation omitted). Accordingly, we will not address whether Rule 26(b)(4)(B) governing non-testifying expert witnesses overrides Rule 26(b)(3) governing work product. Instead, we will address the question posed to the district court - that is, the admissibility of Turner's documents under Rule 26(b)(3).

The federal work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3). The rule states, in pertinent part:

> (A) Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for

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[28] According to Rule 26(b)(4)(B) a party ordinarily may not discover facts known or opinions held by a non-testifying expert retained by another party in anticipation of litigation or to prepare for trial. However, a party may do so "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Rule 26(b)(4)(B)(ii).

[29] Specifically, Hawksbay argues that "the work product doctrine does not govern expert information. Rather, the disclosure of expert information is governed by [Rule] 26(b)(4)." (Initial Br. at 43.)

> another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (I) they are otherwise discoverable under Rule 26(b)(1); and
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

In analyzing the exclusion of Turner's documents under Rule 26(b)(3), we must determine whether that Rule applies to this particular situation. Rule 26(b)(3) explicitly covers documents or things "prepared in anticipation of litigation or for trial *by or for another party or its representative*." (Emphasis added).

We hold that the work product doctrine does not apply to the Turner documents. By its plain text, Rule 26(b)(3) applies to documents or things prepared by or for another party or its representative. Turner prepared the documents at issue here in anticipation of the Kobarid litigation for Reizen. Reizen is not a party to this case. Defendants were not parties to the Kobarid case, but rather served as Reizen's defense counsel for a time. Thus, the Rule's protection

applies to Reizen, not to Defendants. Indeed, the Supreme Court itself has stated, albeit in dicta, that "the literal language of [Rule 26(b)(3)] protects materials prepared for any litigation or trial *as long as they were prepared by or for a party to the subsequent litigation*." FTC v. Grolier Inc., 462 U.S. 19, 25 (1983) (citing 8 J. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 201 (1970)) (emphasis added).[30] According to the Wright & Miller article, "[d]ocuments prepared for one who is not a party to the present suit are wholly unprotected by Rule 26(b)(3) even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit." We also note that the Ninth Circuit has cited Grolier in "conclud[ing] that [Rule 26(b)(3)], on its face, limits its protection to one who is a party (or a party's representative) to the litigation in which discovery is sought." In re Cal. Pub. Utils. Comm'n, 892 F.2d 778, 781 (9th Cir. 1989); accord Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 93-3084, 1994 WL 58999, at *4 (6th Cir. 1994) (unpublished).

We acknowledge that this result is somewhat unsettling. While the Turner documents were prepared on Reizen's behalf in the Kobarid litigation, Solowsky

[30] "We have previously recognized that 'dicta from the Supreme Court is not something to be lightly cast aside.'" Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006) (quoting Peterson v. BMI Refractories, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)) (citations omitted).

was Reizen's attorney at that time. Solowsky actually hired Turner and commissioned the documents at issue here - which are now being sought to prove Hawksbay's claims against Solowsky himself. Nevertheless, we must abide by the plain text and meaning of the Rule.

Having determined that the work product doctrine does not apply to Turner's documents, we must analyze whether the district court abused its discretion in excluding them. In general, based on Hawksbay's arguments in response to Defendants' Motion to Quash and its arguments at the pretrial conference, during trial, and in its appellate briefs, this is the crux of what Hawksbay wanted the Turner evidence to establish: that Turner told Solowsky the funds held in trust rightfully belonged to Hawksbay, and that Reizen was only entitled to a small portion of it, if any.[31] Indeed, in Hawksbay's opposition to Defendants' Motion to Quash, it stated that "in early 2004, Turner learned the underlying fact that the [six million dollars] transferred into the Solowsky Defendants' trust accounts in October 2003 originated from Hawksbay, and Turner then informed the Solowsky Defendants of the Hawksbay origins of this money." (D.E. #190 at 9.) If true, such

[31] (See, e.g., Pretrial Conf. Tr. at 20) (Hawksbay's attorney: "The information that was gathered by Mr. Turner from Mr. Reisen [sic], which appears to be fully consistent with what Mr. Reisen's [sic] testimony is, plus, whatever it is Mr. Turner told Mr. Solowsky, is very important for us to be able to establish Mr. Solowsky's mindset with regard to this money, going forward."); (Trial Tr. at 378) (Hawksbay's attorney: "The . . . Defendants continue at each stage to try to break apart the pieces into pieces what happened in this case. . . . And we have to – to be able to establish what Mr. Solowsky was aware of, . . . of what it was that he was told.").

evidence would bolster the knowledge and intent prongs of Hawksbay's civil theft claim, and would also support Reizen's testimony that he told Defendants the six million dollars in trust was not his (which would weaken Defendants' charge that Reizen recently fabricated that testimony).[32]

Regarding Turner's documents specifically, Hawksbay claims that Turner's documents "directly trace the Hawksbay funds from the 'Initial Deposit from Hawksbay LTD' to the 'Actual balances on Solowsky's accounts'" and that "[t]hey are the smoking gun that flatly contradicts Solowsky's professed ignorance that the funds belonged to Hawksbay." (Initial Br. at 53.) The Turner documents generally concern the history of the Hawksbay ten million - deposits to and debits from the original sum. It appears that P31-01 is a memorandum from Turner to Reizen asking for information Turner needed to trace the Hawksbay ten million. P31-02 is a spreadsheet put together by Turner that lists a ten million dollar "[i]nitial deposit from Hawksbay" and traces various withdrawals and deposits until it concludes by listing around five million dollars as the "[a]ctual balances on Solowsky accounts." P31-04 appears to be another version of the same spreadsheet as P31-02. P31-05 is

[32] (See, e.g., Hawksbay Resp. to Mot. to Quash, D.E. #190 at 14) ("The Turner evidence provides substantial support to Plaintiffs' allegations of the Solowsky Defendants' wrongful mental state in early 2004 and the key elements of Hawksbay's civil theft claim and Plaintiffs' punitive damages claim, namely the Solowsky Defendants' *knowledge* that the money in their trust account originated from Hawksbay, and criminal *intent* to deprive Hawksbay of that money by disbursing it to themselves and others while concealing its location." (Emphasis in original).

a letter from Reizen to Turner providing information to Turner regarding the history of the Hawksbay ten million, and appears to be a response to P31-01.

These documents certainly appear relevant to Hawksbay's claims against Defendants, and specifically to Hawksbay's argument that Solowsky knew the funds held in trust were connected to Hawksbay. We have already held that the documents are not protected by Rule 26(b)(3), and we see no other reason for their exclusion. Thus, we hold that the court abused its discretion in preventing Hawksbay from introducing them at trial.

3. Turner's Testimony

The district court and the parties consistently refer to the "work product doctrine" when analyzing the Turner evidence, both testimonial and documentary. Invoking the work product rule makes sense when referring to Turner's Reizen file because Rule 26(b)(3) explicitly applies to "documents and tangible things," but based on the rule's plain text it does not apply to Turner's testimony. Instead, it would appear that question is governed by Rule 26(b)(4)(B), which covers facts known to or opinions held by non-testifying expert witnesses.

Rule 26(b)(4)(B) states that a party cannot "discover facts known or opinions held by an expert *who has been retained or specifically employed by another party* in anticipation of litigation or to prepare for trial and who is not

expected to be called as a witness at trial."[33] (Emphasis added). As Hawksbay points out, Turner was a non-testifying expert retained by a party to the Kobarid case (Reizen), not by a party to this case. Thus, we apply the same logic here as above with respect to the work product doctrine: Rule 26(b)(4)(B) does not apply to Turner because he was retained by a party to a different litigation, not by a party to this case.

Having determined that Rule 26(b)(4)(B) does not apply to Turner's testimony, we must analyze whether the district court abused its discretion in excluding such testimony at trial. Hawksbay claims it wanted to ask Turner what he knew about the origin of the funds held in trust, and what facts he had regarding the amount of money that Reizen thought was owed to him. It appears from Turner's proffer at trial that he would not have given such testimony. When asked whether Solowsky knew that the funds in trust were at all connected to Hawksbay or Tambourine, Turner said no. (Trial Tr. at 439.) Turner testified that Reizen did not tell him (Turner) that the funds in the trust account had initially come from a deposit from Hawksbay. (Id. at 438.) However, Turner's documents linking the original Hawksbay ten million to the contents of Defendants' trust account appear

[33] However, a party may do so "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Rule 26(b)(4)(B)(ii).

to belie this testimony at least in part. Hawksbay should have been able to question Turner about those documents and about his investigation in general.

In sum, because we find Rule 26(b)(4)(B) inapplicable to Turner's testimony, and we see no other reason to exclude such testimony, we hold that the court abused its discretion in excluding it.

E. The Kobarid Outcome

Hawksbay argues that the district court erred in excluding any mention of the verdict and judgment in the Kobarid case. For the reasons articulated below, we affirm the district court on this point. Before analyzing Hawksbay's arguments, we first recount the procedural history of this issue.

1. Background and Procedural History of the Parties' Attempts to Introduce the Kobarid Outcome

It appears that both parties initially sought to bring the Kobarid outcome into the case. On June 20, 2006 Hawksbay asked the court to take judicial notice of the final judgment in Kobarid pursuant to Federal Rule of Evidence 201. (See D.E. #25.) This Motion was never ruled upon. For Defendants' part, in their Motion to Dismiss the Amended Complaint they argued that Tambourine's various claims should be dismissed based on Kobarid, because Tambourine did not obtain a favorable verdict in that case. (See D.E. #66.) Defendants also invoked Kobarid in their answer to the Amended Complaint. (See D.E. #88.) On September 21, 2007

the parties submitted a joint pretrial stipulation. (See D.E. #130.) Defendants listed the Kobarid verdict and final judgment in their exhibit list, as well as other Kobarid documents. (See id.) The parties' uncontested facts referenced "the verdict and judgment against Reizen in the Kobarid Litigation." (See id.)

On February 2, 2008, six days before trial, Defendants filed a motion in limine seeking to exclude the verdict and judgment. (See D.E. #191.) At a hearing on that Motion Defendants argued that the verdict and judgment should be excluded under Federal Rule of Evidence 403 because they were highly prejudicial and because the jury would be confused and give them undue weight. Defendants argued that Hawksbay would not be prejudiced by their exclusion because Hawksbay never listed the verdict and judgment as exhibits, and also because every witness and exhibit presented in Kobarid had been listed in the instant case. Hawksbay argued that Defendants waived their right to exclude the verdict and judgment, and also that Kobarid was so intertwined with the instant case that Hawksbay had to reference the verdict and judgment to fully explain its claims to the jury. The court granted Defendants' Motion without comment on February 8, 2008, (see D.E. #198), and trial began on February 11, 2008.[34]

[34] We note that while the district court did not elaborate on its reasons for granting Defendants' Motion, we "may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below." Powers v. U.S., 996 F.2d 1121, 1123-24 (11th Cir. 1993).

2. Federal Rule of Evidence 403[35]

According to Rule 403, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, "'Rule 403 is an extraordinary remedy which the district court should invoke sparingly,' and '[t]he balance . . . should be struck in favor of admissibility.'" U.S. v. Tinoco, 304 F.3d 1088, 1120 (11th Cir. 2002) (quoting U.S. v. Elkins, 885 F.2d 775, 784 (11th Cir. 1989)). "In reviewing issues under Rule 403, we 'look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact.'" Id. (quoting Elkins, 885 F.2d at 784).

We hold that the district court did not abuse its discretion in excluding the Kobarid verdict and judgment, based on Rule 403. In Kobarid Hawksbay sued Reizen over his alleged mishandling of the Hawksbay ten million. Hawksbay ultimately obtained a jury verdict and final judgment in its favor: the jury found that Reizen stole ten million dollars from Hawksbay. We can see the danger of the jury here learning of the Kobarid outcome and inappropriately assuming that since

[35] In its briefs Hawksbay does not substantively deal with Rule 403. However, it was one of Defendants' major arguments in their Motion and at the Motion hearing, and the Court deems it worthy of analyzing first.

Solowsky received six million dollars from Reizen, that sum was part of the stolen Hawksbay ten million and that Solowsky too must have stolen it from Hawksbay.

Further, the district court's order only precluded Hawksbay from mentioning the Kobarid verdict and judgment - it did not prevent Hawksbay from introducing any *evidence* from that case. Indeed, in its appellate briefs Hawksbay does not point to any instance where the court barred them from mentioning or submitting anything related to Kobarid except for the verdict and judgment. Finally, we find it relevant that Kobarid was under appeal at the time Defendants sought to exclude it from trial. It may have seriously complicated the trial if Hawksbay revealed the outcome in Kobarid, but that outcome was subsequently overturned on appeal.

We recognize that the exclusion came at an unfortunate time for Hawksbay: on the eve of trial, and after months of Defendants maintaining that they themselves would use the Kobarid verdict and judgment at trial. However, we are dealing with a high standard: abuse of discretion. Given this high standard, we do not see reversible error in the court's decision to find the Kobarid verdict and judgment so prejudicial or potentially confusing as to warrant their exclusion. Accordingly, we find that the district court did not abuse its discretion in excluding the Kobarid verdict and final judgment.

3. Waiver

Hawksbay also claims that Defendants waived any objection to the admission of the Kobarid verdict and judgment by referencing them in the Joint Pretrial Stipulation. Defendants did list the verdict and final judgment as trial exhibits, and the parties also mentioned "the verdict and judgment against Reizen in the Kobarid litigation" in the uncontested facts. (D.E. #130 at 14.) However, because we have already held it was within the district court's sound discretion to exclude the verdict and judgment based on Rule 403, we need not address whether Defendants waived their right to object. The district court had a right to exclude the evidence on its own, as "[i]t is not only the trial judge's right but his duty to see that only proper and relevant evidence was admitted." Weaver v. U.S., 374 F.2d 878, 882 (5th Cir. 1967).[36]

4. Judicial Notice

Hawksbay further argues that the Kobarid verdict and judgment should have been judicially noticed by the district court. Federal Rule of Evidence 201 governs judicial notice of adjudicative facts, and Rule 201(b) states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot

[36] Under Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we are bound by cases decided by the former Fifth Circuit before October 1, 1981.

reasonably be questioned." Rule 201(d) states that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information."

On June 20, 2006 Hawksbay asked the district court to take judicial notice of the final judgment in Kobarid pursuant to Rule 201. (See D.E. #25.) This Motion was never ruled upon. We have stated that "a court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." U.S. v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) (citations omitted). However, merely because a fact may be subject to judicial notice, it is not insulated from other rules of evidence such as Rule 403. We have already held it was within the district court's sound discretion to exclude the verdict and judgment based on Rule 403, and Hawksbay's "judicial notice" argument does not change that result.

5. "Opening the Door"

Hawksbay also claims that it should have been allowed to reference the Kobarid outcome in rebuttal when Defendants "opened the door" to that topic. This Circuit does recognize the concept of "curative admissibility," also called "opening the door." See, e.g., Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc., 389 F.3d 1339, 1349 (11th Cir. 2004). "Under that doctrine, when a party offers inadmissible evidence before a jury, the court may in its discretion allow the

opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created." Id. (citations omitted). Thus, "the extent to which otherwise inadmissible evidence is permitted must correspond to the unfair prejudice created. Further, the trial court must also weigh the need for and value of the rebuttal evidence against the potential for undue delay, confusion, and prejudice." Id. (citations omitted).

Based on Hawksbay's references to the trial transcript in its appellate brief, we believe that this is the basis for its "opening the door" argument: during cross examination the defense asked Reizen, "Did you steal the money in the trust account?" and Reizen replied, "Absolutely not." (Trial Tr. at 400.) Defense counsel also made similar comments in his opening argument - he told the jury they would hear testimony from Reizen that he owned the money in the trust account and had authority to give it to Defendants. On Reizen's redirect Hawksbay's counsel tried to ask about the outcome of Kobarid, arguing that the door had been opened, but the court would not allow it. (Id. at 530.)

We hold that the district court did not abuse its discretion in preventing Hawksbay from asking about the Kobarid outcome in this instance. As stated earlier, the Kobarid judgment had not been finalized and the fact that one jury had found Reizen liable would not bind this jury in any way insofar as Reizen's

credibility. Reizen did not contest the fact that the court had ruled against him in Kobarid, he simply continued to deny that he had done anything wrong.

F. Remaining Evidentiary Issues

Hawksbay makes several other arguments regarding the district court's exclusion of evidence. We review these arguments below, mindful that "[b]ecause a trial court has broad discretion to determine the admissibility of evidence, we do not disturb evidentiary rulings absent a clear abuse of discretion." U.S. v. Ellisor, 522 F.3d 1255, 1266 n.12 (11th Cir. 2008) (citation omitted).

1. Peterson's Testimony

Hawksbay claims that the district court erred in excluding the testimony of Connie Peterson, Hawksbay's former counsel during the Kobarid litigation. (Trial Tr. at 247.) According to Hawksbay, Peterson would have testified that Hawksbay first learned Reizen hid its money in Solowsky's trust account in December 2005. She would have also testified that Solowsky "went ballistic" when she asked him about his conversation with Joel Weiss in 2003 during his Kobarid deposition. (Id. at 245.) Hawksbay claims this testimony would have shown that Solowsky kept the six million dollars secret for two years during the Kobarid litigation, which in turn suggests he had a felonious state of mind.

There are two issues here. First is Peterson's proposed testimony that she

did not learn of the six million dollars in Defendants' trust account until December 2005. We hold that the district court did not abuse its discretion in excluding such testimony, because it clearly would have been cumulative. "District courts are well within their discretion to exclude even relevant evidence for undue delay, waste of time, or needless presentation of cumulative evidence." U.S. v. Dohan, 508 F.3d 989, 993 (11th Cir. 2007) (citing Fed. R. Evid. 403). Indeed, "[d]istrict courts have broad authority over the management of trials. Part of this authority is the power to exclude cumulative testimony." Tran, 420 F.3d at 1315 (citations omitted). Here, Fausto himself had already testified he became aware that six million dollars had been transferred into Defendants' trust account in December 2005. (Trial Tr. at 61-62.) Peterson's testimony would have been cumulative and from a less direct source than Fausto, who was Peterson's client (Peterson was a "second chair" attorney for the plaintiffs in Kobarid).

The second issue is Peterson's proposed testimony regarding Solowsky's angry reaction to being asked about his conversation with Joel Weiss in 2003, when Peterson took Solowsky's deposition in Kobarid. During her proffer Peterson testified that Solowsky and his attorney were "hysterical" when she brought up Solowsky's 2003 conversation with Joel Weiss and the location of Hawksbay's missing money. Peterson stated: "I have never been in a deposition

where counsel or a witness got so angry, red in the face, screaming." (Id. at 229.) Apparently Solowsky did not answer Peterson's questions on this topic and threatened Peterson with sanctions. (Id. at 226, 229.) Hawksbay's attorney argued to the district court that "[h]ow [Solowsky and his attorney] reacted to that was absolutely evidence that they knew they were hiding something that they weren't supposed to be." (Id. at 239.)

We hold that the district court abused its discretion in excluding this evidence. The district court seemed to consider Peterson's testimony on this point irrelevant. However, in our view, testimony about Solowsky's extreme and angry reaction to Peterson's questioning and his refusal to answer are clearly relevant to Solowsky's state of mind - to whether he had a felonious intent with regard to the six million dollars held in trust. We see no other reason to exclude such testimony, and thus we reverse the district court on this point.

2. Solowsky Reputation Evidence

Hawksbay also argues that the district court erred in excluding evidence pertaining to Solowsky's reputation. This is the background of Hawksbay's argument: before trial the parties agreed not to discuss certain evidence of claims or complaints against Defendants, which stemmed from other cases. (See D.E. #127.) During defense counsel's opening statement he stated that Solowsky was a

"well-respected lawyer" who was "held in high regard by his peers." (Trial Tr. at 166.) He also claimed that Solowsky had no motive to steal six million dollars because such a theft would have put "[Solowsky's] reputation at risk." (Id. at 166-67.) Hawksbay objected after defense counsel finished its opening argument, claiming that Solowsky had put his own reputation at issue and that he thus "opened the door" to the introduction of rebuttal reputation evidence. (Id. at 265-66.) The district court did acknowledge that defense counsel referenced Solowsky's reputation during his opening (id. at 266-68), and warned that "if the defendant is going to put the character and reputation of the defendant before the jury, the plaintiff has every right in the world to respond to that," (id. at 266). The court also noted it had instructed the jury that attorneys' opening statements were not to be considered evidence. (Id. at 267.) Ultimately the court stated that if defense counsel introduced evidence of Solowsky's reputation during his case in chief, he would essentially be "opening the door" to rebuttal reputation evidence. (Id. at 267.)

Hawksbay argues that it should have been allowed introduce rebuttal evidence of Solowsky's reputation. We do recognize the concept of "curative admissibility" - also called "opening the door" or "fighting fire with fire." Here, however, it is difficult to issue a ruling because Plaintiffs did not proffer specific

rebuttal evidence on this topic, and Defendants never put on a case-in-chief. However, because we are sending Hawksbay's claims back to district court to be retried, we will state that we share the district court's concern on this topic. We agree that if defense counsel actually introduced the sort of reputation evidence to which he alluded in his opening, Plaintiffs would be able to rebut with reputation evidence of their own. It also may well be that defense counsel did "open the door" to such evidence with his statements during opening argument. However, these issues are best resolved in the context of the second trial.

3. The Parties' Attempts to Settle Kobarid

Hawksbay claims that the district court erred in precluding it from "rebutting" or "impeach[ing]" defense counsel's statement in his opening that Solowsky attempted to settle Kobarid but his pleas "fell on deaf ears." (Id. at 186, 302, 303.) According to Hawksbay, before trial Defendants moved to exclude all evidence related to "any attempt to settle Kobarid" and the district court granted this motion. (Initial Br. at 15.) This is not accurate, however - what Defendants moved to exclude was evidence related to the parties' attempts to settle the Kobarid *disqualification dispute*. (See D.E. #126.) The court did grant this request. (See D.E. #166.)

At trial during Fausto's redirect examination, Hawksbay's counsel attempted

to question Fausto about a letter he told his lawyer to send to Solowsky which addressed the topic of settling Kobarid. (Trial Tr. at 206-08, 303-04.) Defense counsel spoke up and stated that in his view Hawksbay was "opening the door" to a "privileged communication," and that "[i]f it does [open the door], fine; and we'll go through it. If it doesn't, then I object to the question." (Id. at 206.) The court "sustained" the objection. (Id. at 207.)

There appears to be some confusion on this topic. Prior to trial, the court did not exclude *all* evidence related to the parties' attempts to settle Kobarid - only their attempts to settle a very specific issue within the Kobarid litigation: Defendants' disqualification as Reizen's counsel. Thus, Hawksbay's counsel should have been free to question Fausto on his instructions to his attorney insofar as they pertained to settling the Kobarid lawsuit. We see no other reason to keep out such testimony, and thus we find the district court abused its discretion in excluding it.[37]

4. Evidence related to Kobarid

[37] It appears that the district court did not fully understand the basis for defense counsel's objection. Defense counsel could not have been objecting on the basis that Hawksbay was inquiring into a "privileged communication" Fausto had with his attorney. That privilege would have belonged to Fausto, and in testifying on this topic he was clearly waiving it. See, e.g., Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1417 (11th Cir. 1994) ("The attorney-client privilege 'belongs solely to the client,' and the client may waive it, either expressly or by implication.") (quoting In re Von Bulow, 828 F.2d 94, 100-01 (2d Cir. 1987)). It appears that defense counsel was merely making it clear that if Fausto waived his privilege on this point, defense counsel intended to question him on it as well.

Hawksbay takes issue with the district court's excluding evidence of Hawkbsay's inability to collect the vast majority of the Kobarid judgment against Reizen. (See D.E. #166.) Hawksbay claims that "[b]ecause the jury was aware that Hawksbay had sued Reizen in another matter, yet was called as a witness by Hawksbay, the jury might have suspected that Reizen had a motive to give such testimony." (Initial Br. at 60) (citations omitted). Hawksbay claims that "[t]o dispense that notion, Hawksbay could have showed that it attempted to collect the Kobarid judgment, but Reizen had essentially no locatable assets from which to draw." (Id.) (citations omitted). We do not believe the district court abused its discretion in excluding such evidence. As we explained above, the district court did not abuse its discretion in preventing Hawksbay from mentioning the outcome of Kobarid, because of the serious potential for confusion and also because that outcome was still under appeal at the time of the trial in this case. Clearly, allowing Hawksbay to reference its inability to collect the judgment would have necessitated an explanation of the result itself. Further, if the jury did not know the outcome in Kobarid, we cannot see how it would assume anything one way or the other about Reizen's motive for testifying on Hawksbay's behalf.

Finally, Hawksbay argues that the district court erred in refusing to allow any reference to Defendants' disqualification as Reizen's attorneys in Kobarid.

(See D.E. #166.) Hawksbay made clear at a pretrial conference that it did not seek to introduce the *substance* of the magistrate's disqualification order or the trial court's order adopting it. Instead, Hawkbsay wanted to introduce the mere fact that Defendants were disqualified from representing Reizen in Kobarid.[38] Hawksbay claimed that it needed to explain to the jury that Defendants originally represented Reizen until they were disqualified and different counsel took over, and that it was the new counsel who informed Hawksbay of the six million dollars in trust. In response Defendants argued that any reference to the fact of disqualification, without its context, would be highly prejudicial because it would suggest to the jury that they had engaged in wrongdoing. As Defendants pointed out, the orders themselves explained that Defendants were disqualified based on their prior representation of Tambourine (a plaintiff in Kobarid).[39]

The district court did not abuse its discretion here. The court could have reasonably determined, based on Rule 403, that the danger of unfair prejudice in allowing evidence of the disqualification - without its context - substantially

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[38] Hawksbay's attorney stated at the November 30, 2007 Pretrial Conference: "we do not intend to present the substance of the [disqualification] orders. There were two orders. . . . And they certainly detail very carefully the various bases for disqualifying the firm. All we're asking, your Honor, is to be able to reference the fact that it occurred . . . ."

[39] The magistrate's order explicitly stated that the disqualification should not be read to imply any ethical misconduct on Defendants' parts. (See Kobarid, April 1, 2005 Order Granting Motion to Disqualify Counsel at 2.)

outweighed its probative value. We especially note that the court only prevented Hawksbay from mentioning the fact of disqualification. The court did not prevent Hawksbay from mentioning that it was Reizen's new counsel, not Defendants, who disclosed the existence and location of the six million dollars in trust.

III. CONCLUSION

In sum, we reverse the district court's grant of Defendants' Rule 50 Motion on Hawksbay's conversion and civil theft claims; we affirm the court's grant of Defendants' Rule 50 Motion on Tambourine's breach of fiduciary duty claim; we find the court abused its discretion in excluding the Turner evidence; we find the court did not abuse its discretion in excluding the outcome in Kobarid; we find the court abused its discretion in excluding Peterson's testimony regarding Solowsky's reaction during his deposition, as well as evidence of the parties' attempts to settle Kobarid; and we affirm on the remaining evidentiary issues.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.