

# The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means

Todd A. Berger

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# **THE ETHICAL LIMITS OF DISCREDITING THE TRUTHFUL WITNESS: HOW MODERN ETHICS RULES FAIL TO PREVENT TRUTHFUL WITNESSES FROM BEING DISCREDITED THROUGH UNETHICAL MEANS**

TODD A. BERGER\*

*Whether the criminal defense attorney may ethically discredit the truthful witness on cross-examination and later during closing argument has long been an area of controversy in legal ethics. The vast majority of scholarly discussion on this important ethical dilemma has examined it in the abstract, focusing on the defense attorney's dual roles in a criminal justice system that is dedicated to searching for the truth while simultaneously requiring zealous advocacy even for the guiltiest of defendants. Unlike these previous works, this particular Article explores this dilemma from the perspective of the techniques that criminal defense attorney's use on cross-examination and closing argument to cast doubt on the testimony of a credible witness. It shows that, while it is ethically permissible to discredit the truthful witness, it is not uncommon for criminal defense attorneys to do so through unethical means. Further, absent voluntary compliance, current ethics rules cannot adequately prevent this type of professional misbehavior. Thus, a change in the culture of criminal defense lawyering is necessary to ensure that criminal*

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\* Associate Professor, Syracuse University College of Law. This Article originally began as a presentation given at the 2013 Applied Legal Storytelling Conference in London, England. In the course of turning that presentation into the current Article, many thanks are in order. The author would like to thank the many members of the Syracuse University College of Law Faculty Workshops (there are simply too many to name) who provided invaluable insight and feedback throughout the course of this work. The author would like to thank Professor Nina Kohn for taking the time to read many drafts of this Article. The author would also like to thank Professors Jason Hoge, Ruth Anne Robbins, J.C. Lore, and Philip N. Meyer for their thoughtful critiques. Additional thanks are in order to Amy Armstrong and Megan Brooks for their excellent research support. Hedimay Berger deserves a special thanks for the countless hours spent editing this Article. Lastly, the author would especially like to thank his wife, Beverly Beaver, who has accused him of "torturing her with this Article for the better part of half a decade."

*defense attorneys recognize the value of increased compliance with the ethical dictates that govern the practice of law.*

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## I. INTRODUCTION

Whether it is ethical to present a “false defense”<sup>1</sup> by discrediting a truthful witness on cross-examination and later during closing argument has been an area of great focus in modern legal ethics.<sup>2</sup> This Article explores the most common forms of cross-examination and closing argument that criminal defense attorneys use to accomplish this task. This work posits that, pursuant to current ethics guidelines, there are both ethical and unethical techniques that can be used to advance a false defense by discrediting the truthful witness.

While it is ethically permissible to discredit the truthful witness,<sup>3</sup> current ethics rules place reasonable constraints on the types of cross-examinations and closing arguments that can be used to make the truthful witness appear unworthy of belief.<sup>4</sup> Despite this fact, it is a commonplace occurrence in America’s criminal courtrooms for truthful witnesses to be discredited not through ethical means, but instead

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1. A “false defense” is defined as a trial theory in which defense counsel attempts “to convince the judge or jury that facts established by the state and known to the attorney to be true are not true, or that facts known by the attorney to be false are true.” Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 126 (1987).

2. Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055, 1055 (2000) (This question is the subject of fascinating commentary and thoughtful debate in professional literature). “Whether it is ethically permissible to suggest that a truthful witness is lying during cross-examination has been famously characterized as one of the ‘three hardest questions’” in terms of the ethical dilemmas faced in the practice of law. *Id.* (quoting Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966)).

3. See Subin, *supra* note 1, at 126.

4. *Id.*

through the use of unethical techniques that largely ignore the reasonable limits placed on the types of cross-examinations and closing arguments that can be used to make the true look false.<sup>5</sup> The reason for this is simple: the use of unethical forms of cross-examination and closing argument are the most effective from a trial advocacy perspective.

Further, in noting the ethical boundaries of the common techniques that are used to discredit truthful witnesses, it becomes clear that, absent voluntary compliance, current ethics rules are largely unable to prevent criminal defense attorneys from adopting these unethical forms of trial advocacy.<sup>6</sup> It is also unlikely that ethics rules will be amended to ensure that those who adopt unethical forms of cross-examination and closing argument will be revealed.<sup>7</sup>

As a result, the culture of criminal defense lawyering must change to ensure that criminal defense attorneys recognize that ethics rules that allow for truthful witnesses to be discredited, while placing reasonable limits on the types of cross-examination and closing arguments that are used to this effect, represent a fair and commendable balance between zealous advocacy of even the guiltiest defendants and that the corresponding search for the truth that is at the center of a criminal trial.<sup>8</sup> This change in the culture of criminal defense lawyering and a recognition of the value of these rules is an essential component of ensuring voluntary compliance with these largely unenforceable, ethical dictates in the context of making the true look false and the false look true.

This work leaves for another day a discussion concerning how this particular change in the culture of criminal defense lawyering can be brought about. Instead, this Article is limited to identifying the problem at hand, i.e., the frequency with which unethical techniques are used to discredit honest witnesses when advancing a false theory of defense and

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5. See *infra* Part III.B, IV.

6. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 795 (2004).

7. See *infra* Part IV.B.

8. This Article addresses these competing values in greater detail in *infra* Part III.C.2. However, the lawyer's dilemma in serving these competing ideals is perhaps best summed up by Professor Peter J. Henning who observes, "Lawyers must deal with a conundrum because they are required to act as officers of the court—presumably working to advance the truth—while providing loyal representation to clients who may have little to gain from its ascertainment, particularly in criminal cases." Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L., ETHICS & PUB. POL'Y 209, 211 (2006).

the inability of contemporary ethics rules to police this type of misbehavior. In this sense, this work is intended as an important first step in bringing about the more ethical practice of law in this unique context.

This work proceeds in three parts. Part II explains why criminal defense attorneys discredit truthful witnesses and provides an overview of the current scholarly literature addressing this topic. Part III demonstrates an applied approach to understanding the ethical limits of discrediting the truthful witness and provides a normative critique of current ethics rules that regulate this type of attorney conduct. Part IV explains why trial attorneys frequently choose unethical techniques to advance a false theory of defense and explores the difficulty that exists in curbing this type of unethical behavior.

## II. THE ETHICAL DILEMMA OF DISCREDITING THE TRUTHFUL WITNESS

### A. *Why Lawyers Discredit Truthful Witnesses*

In a criminal case, choosing a theory of defense is generally considered a matter of trial tactics and strategy.<sup>9</sup> It has become an accepted part of trial practice to view the selection of a particular theory of defense as the primary responsibility of defense counsel, subject to consultation with his<sup>10</sup> client.<sup>11</sup>

Sometimes the theory of defense may be based on the client's exculpatory account of "what really happened."<sup>12</sup> However, sometimes a client admits to his attorney that he is guilty of the crime, and the

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9. Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 *FORDHAM L. REV.* 1643, 1660 (2000) ("Initially, the decision regarding whether to explore an avenue of defense and how to present it is largely a matter of tactics or strategy." (citing MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1999)).

10. A fact pattern is used throughout this Article that is partially based on an actual criminal trial. In that trial the defendant was a male. Therefore, the pronoun "he" is used throughout this work for the purposes of literary consistency only.

11. This traditional view was perhaps best articulated by the Supreme Court of Colorado in *Steward v. People*, 498 P.2d 933, 934 (Colo. 1972) (holding that it was the defense lawyer who made the decisions in his role as "captain of the ship" as to what evidence to offer and what strategy to employ in the presentation of the defense). For a more detailed discussion concerning this area of trial practice, see generally Jean K. Gilles Phillips & Joshua Allen, *WHO DECIDES: The Allocation of Powers Between the Lawyer and the Client in a Criminal Case?*, *J. KAN. B. ASS'N*, Oct. 2002, at 28.

12. See *infra* note 53.

defendant wants to challenge the state's case without testifying, despite the fact that the state's evidence is legally sufficient to establish each element of the crime.<sup>13</sup> To that end, one legal expert posed the following question, "What should a criminal defense lawyer do when the lawyer is certain that the client is factually guilty (usually because the client has confessed to the lawyer), but the client nevertheless insists on a strong defense? This situation may be the defense lawyer's worst nightmare."<sup>14</sup>

When the state's evidence is legally sufficient to prove each element of the crime, often times the criminal defense attorney must challenge the weight (said another way—the quality) of the prosecution's evidence by discrediting the truthful witness and in the process presenting a false defense.<sup>15</sup> Put simply, when faced with such a predicament, the criminal defense attorney may have no other choice but to pursue this type of defense.

### B. *An Overview of Current Scholarly Literature*

As noted previously, whether it is ethically permissible to discredit the truthful witness on cross-examination and closing argument has been a topic that has long fascinated legal scholars.<sup>16</sup> However, rather than discuss the specific ethical limitations placed on the types of cross-examinations and closing arguments that are used to discredit honest witnesses, the general tenor of the existing scholarly debate has largely focused on more abstract-oriented discussions concerning whether society's best interests are advanced when the criminal defense attorney attempts to distort the truth.<sup>17</sup>

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13. See Subin, *supra* note 1, at 146.

14. Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client Is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229, 229 (2009).

15. See Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297, 302–06 (2012). When challenging the weight of the evidence, the defendant has conceded that the evidence is sufficient in the abstract to make out each element of the crime charged. *Id.* 304–05. In this sense, the defendant has acknowledged the state has presented a sufficient quantity of evidence to justify a conviction. *Id.* A review based upon a sufficiency-of-the-evidence claim examines the quantity of evidence presented by the prosecution and determines whether the prosecution has presented enough evidence to make out each element of the crime or crimes charged. *Id.* at 302. However, a challenge to the weight of the prosecution's evidence is not a challenge to its quantity, but rather its quality. *Id.* at 304–05.

16. See Myers & Ohlbaum, *supra* note 2, at 1055; see also Freedman, *supra* note 2.

17. See John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to*

In this regard, some scholars have posited that defense counsel should “do anything within the bounds of the law” in representing his client, regardless of the client’s guilt or innocence.<sup>18</sup> In embracing this type of advocacy, Professor John B. Mitchell argues that the goal of the criminal defense attorney is not to seek the truth but to ensure that the criminal defendant is not convicted unless the state can present proof beyond a reasonable doubt.<sup>19</sup> Therefore, according to Mitchell, it is ethically permissible for a criminal defense attorney to present the jury with alternative possibilities that counsel knows to be false, as doing so has the net effect of protecting the factually innocent and acting as a check on the government’s power.<sup>20</sup> Mitchell’s argument has been referred to as a “systemic justification” for presenting a false defense.<sup>21</sup>

Other scholars contend that the criminal defense attorney should advance a false defense and attempt to make the truthful witness look untruthful based on what has been termed “the ‘client-centered’ justification for zealous advocacy.”<sup>22</sup> These scholars argue that this form of zealous advocacy is necessary to advance client dignity and autonomy.<sup>23</sup>

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*Professor Subin’s Position on Criminal Lawyer’s “Different Mission,”* 1 GEO. J. LEGAL ETHICS 339, 339 (1987) (asserting that whether an attorney should discredit a truthful witness is “a difficult issue which touches upon the very nature of our criminal justice system, the role of the attorney in that system, the relationship of the individual to the state, and the Constitution”).

18. Suni, *supra* note 9, at 1649 (observing that some theorists argue that “defense counsel can, and perhaps must, do anything within the bounds of the law to represent their clients, regardless of innocence or guilt and regardless of the effect on third persons or truth”).

19. *See* Mitchell, *supra* note 17, at 340–41.

20. *Id.* at 342–44. Mitchell posits that “the criminal justice system protects the individual from the police power of the executive branch” and that requiring the government to present proof beyond a reasonable doubt is an essential component of protecting individual rights. *Id.* at 342. In this sense, Mitchell maintains that defense counsel can put forth what he terms a “pure reasonable doubt defense” in which counsel presents the jury with alternative possibilities that counsel knows are false, without asserting the truth of those alternatives. *Id.* at 343–44.

21. *See* Suni, *supra* note 9, at 1651.

22. *See id.*

23. *See, e.g.,* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 13, 26–27 (1990). Freedman’s basic premise is that the American adversarial legal system is rooted in the Bill of Rights and exists principally to affirm the human dignity of each individual. *Id.* Freedman believes that it is necessary for the criminal defense attorney to advance a false defense because doing so preserves the sanctity of lawyer-client confidentiality—the lawyer only knows the “truth” through client confidences—which safeguards individual autonomy and dignity. *Id.* at 65–86.



Other thinkers posit that client-centered advocacy requires vigorous discrediting of truthful witnesses because the principal obligation the lawyer owes to his client is one of fidelity and loyalty.<sup>24</sup> In reaching this conclusion, some of these thinkers draw heavily on religious texts, which they believe provide spiritual support for their position.<sup>25</sup>

However, not all scholars have so readily embraced the notion that the defense attorney should advance a false defense by discrediting the truthful witness. Perhaps most prominently, Professor Harry I. Subin argues for a more limited role when defense counsel knows the defendant is guilty, which is motivated in large part by the defense attorney's dual obligations as an advocate and an officer of the court.<sup>26</sup> Subin concedes that, because the defendant has a constitutional right to force the government to prove each element of the crime beyond a reasonable doubt, it corresponds that it is likewise ethically permissible to discredit the truthful witness in order to challenge the weight of the government's evidence.<sup>27</sup>

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24. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 519–29 (1999). In a provocative article, Professors Smith and Montross posit that the principal duty owed to the client is the duty of fidelity and loyalty, which is derived from biblical teachings contained in “The Prophets and The Writings.” *Id.* at 518–19. The duty of fidelity in turn requires that the criminal defense attorney rigorously cross-examine a truthful or sympathetic witness. *Id.* at 528–29.

25. *Id.* at 518–19.

26. See Subin, *supra* note 1, at 128. Subin proposed that criminal defense attorneys should be prohibited from asserting defenses that they know to be false. *Id.* (“It is true that in our system the prosecution has the burden of proving guilt, and the defense the corresponding right to remain completely passive in the presentation of facts to the jury. It is true that the defense attorney has the right, and the obligation, to challenge the government’s proof to assure its accuracy. The question is whether it should also be the ‘duty’ of the ‘most honorable’ defense attorney to take affirmative steps to subvert the government’s case when he or she knows it is accurate. I shall argue that the attorney can perform his or her duty fully even if not permitted to act in this way, and that if stricter limits on truth subversion were instituted, the rights of persons accused of crimes generally would be enhanced.”).

27. See Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689, 689–90 (1988). Subin found support for this position in ABA Model Rule of Professional Conduct 3.1, which holds that a criminal defense attorney is entitled to “put the prosecution to its proof even if there is no nonfrivolous basis for the defense.” *Id.* at 696 n.34 (quoting MODEL RULES OF PROF’L CONDUCT r. 3.1 Model Code Comparison (AM. BAR ASS’N 1983)). “[A]ccording to the drafters [of the rule], it reflects, ‘the constitutional principle that the state must prove every element of the crime . . . .’” *Id.* (quoting MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N, Proposed Final Draft 1981)). For a more detailed exploration of the constitutional right to discredit the truthful witness and present a false defense, see Part III.C.2.

Nevertheless, to Subin, criminal defense lawyers have a primary obligation to the truth, and tactics that distort or mislead the jury are inconsistent with this obligation.<sup>28</sup> Initially, Subin argued that when defense counsel knows the client is guilty, in such instances, he should be limited to a monitoring role to ensure that a conviction is based on an adequate amount of competent and admissible evidence.<sup>29</sup> Subin later modified his position, based in part on the defendant's constitutional right to challenge the state's case, and proposed that defense lawyers could argue carefully worded alternative inferences or explanations that the attorney knows are not true for the purpose of assisting the fact finder in measuring the weight of the evidence.<sup>30</sup> However, in Subin's view, the jury should be given an instruction that it is permissible for the defense to offer alternative versions of the facts, even if it has no good faith basis for believing the truth of its position.<sup>31</sup> Moreover, Subin rejects the assertion of the systemic justifications noted above, i.e., that truth subversion in an individual case is a necessary component of preventing governmental overreaching in the large scheme of the criminal justice system.<sup>32</sup>

Subin's view has been referred to as a form of "weak adversarial[ism.]"<sup>33</sup> Proponents of this type of lawyering suggest that it advances societies interests because

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28. See Subin, *supra* note 1, at 125 n.5, 149 (arguing that "a fundamental goal" of the criminal justice system "is determining the truth" and that when the truth is subverted, the justice system is properly considered a "victim").

29. *Id.* at 146. Subin argues:

Unless we abandon completely the notion that verdicts should be based upon the truth, we must accept the fact that there may simply be no version of the facts favorable to the defense worthy of assertion in a court. In such cases, the role of the defense attorney should be limited to assuring that the state adduces sufficient legally competent evidence to sustain its burden of proof.

*Id.* (footnote omitted).

30. Subin, *supra* note 27, at 689–90. Subin modified his position partly because he had come to believe his earlier monitor role formulation was unworkable. *Id.* However, in modifying his position, he also noted that defense counsel could suggest alternative explanations to test the weight of the government's evidence based on the constitutional principle that the defendant had the right to force the government to prove each element of the crime beyond a reasonable doubt. *Id.* at 690.

31. *Id.* at 698.

32. Subin, *supra* note 1, at 148–49.

33. Asimow & Weisberg, *supra* note 14, at 245–46. In addition to Subin, other legal theorists have also embraced a weak adversarial position. See David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90

[i]t is only when the judge and jury know the truth that society wins. Each time the lawyer uses talents and skills to pollute the courtroom with a lie, either explicit or implicit, the lawyer has intentionally diminished the chances that individual justice will be done. Thus society loses.<sup>34</sup>

As detailed above, much of the discussion relating to the ethics of arguing a false defense by discrediting the truthful witness does not focus on the trial advocacy techniques used to accomplish this task but instead addresses broader policy or philosophically oriented objectives. Indeed, thousands of pages have been written with regard to these types of arguments and the positions of Professors Subin and Mitchell have been prominently featured in the leading legal ethics casebooks.<sup>35</sup> However, despite the policy-oriented focus of these discussions, other legal commenters have rightly noted that, in the context of discrediting the truthful witness, criminal defense attorneys “do routinely use an arsenal of tricks to subvert the truth”<sup>36</sup> and that, for this reason, a significant problem in attorney ethics relates more directly to the various techniques that defense lawyers consistently use to conceal and distort the truth.<sup>37</sup>

When addressing the actual techniques of truth subversion, not only have most scholars simply glossed over their application to existing ethics rules<sup>38</sup> but, to the extent they have addressed them at all, there

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COLUM. L. REV. 1004, 1018–43 (1990) (favoring a position of weak adversarialism in cross-examining truthful witnesses in rape cases); Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1143 (1988) (arguing that cross-examination should be barred when the defense lawyer knows that the witness’s testimony regarding their self-perceived level of certainty is correct); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1710–12 (1993) (arguing that criminal defense lawyers should not engage in any form of deception).

34. Teresa Stanton Collett, *Understanding Freedman’s Ethics*, 33 ARIZ. L. REV. 455, 464–65 (1991).

35. See, e.g., STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 419–24 (5th ed. 1998); GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 437–38 (3d ed. 1999); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 279–305 (2d ed. 1995); RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 256–73 (1995).

36. Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel’s Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 619 (2005).

37. See *id.*

38. *Id.* at 636–38.

appears to be little consistency in their conclusions.<sup>39</sup> Professor Subin is of the view that “[t]o the extent that these techniques of legal truth-subversion have been addressed at all, most authorities have approved them.”<sup>40</sup> However, Professor Subin’s conclusion is drawn in a cursory manner, and he spends very little time engaged in any type of in-depth analysis of actual trial techniques or ethics guidelines.<sup>41</sup> Importantly, as this Article thoroughly details below,<sup>42</sup> Professor Subin’s contention is simply not accurate. Further, Professor Mitchell, in glossing over the trial techniques used to argue a false defense, appears to acknowledge the existence of some ethical limitations on how false defenses are presented.<sup>43</sup> In this sense, he suggests, without any discussion of existing ethical rules, that it is permissible to argue a false defense so long as the jury is not told a falsehood (“I will *not assert* that facts known by me to be true are false or those known to be false are true.”).<sup>44</sup> Other commenters have even less thoroughly addressed how current ethics rules limit the means by which truthful witnesses may be discredited by suggesting that, while it is ethically permissible to argue false inferences from true facts to test the prosecution’s case, it is only “more controversial” to make an explicit representation to the jury that defense counsel knows is false.<sup>45</sup>

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39. *Id.*

40. See Subin, *supra* note 1, at 127 (citing STANDARDS FOR CRIMINAL JUSTICE § 4-7.6 (AM. BAR ASS’N 1980 & Supp. 1986)).

41. *Id.* at 152–53.

42. See *infra* Part III.B.

43. Mitchell, *supra* note 17, at 344.

44. *Id.*

45. Myers & Ohlbaum, *supra* note 2, at 1059–65. In addition to the above, it is also worth noting that other scholars have addressed the issue of discrediting the truthful witness but in a manner that is less focused on the specific types of cross-examination and closing arguments that are used to argue a false defense. In exploring the ethical limitations of a false-defense theory from the perspective of current ethical guidelines, Professor Suni focuses on the ethics of blaming innocent third parties for the commission of a crime. Suni, *supra* note 9. However, Professor Suni’s analysis of the actual closing argument presented to the jury does not indicate exactly how the false theory of defense was communicated. *Id.* Professor Steven J. Johansen has explored the ethical limits of the false defense from the perspective of applied legal storytelling in his essay *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS’N LEGAL WRITING DIRECTORS 63 (2010). Professor Johansen argues that legal storytelling poses ethical challenges to lawyers in that stories may be persuasive that are not always true. *Id.* at 64. However, Professor Johansen does not explore the exact techniques that criminal defense attorneys use to advance false defenses and notes that “stories lawyers tell must reveal their clients’ good faith beliefs.” *Id.* at 65. In this regard, this Article explores the ethical limits of how criminal defense attorneys advance false defenses that are expressly premised on the absence of a good faith belief. See

This Article addresses this gap in scholarly literature by exploring the limits that current ethics rules place on the actual techniques that criminal defense attorney's use on cross-examination and closing argument to discredit the truthful witness. What follows is a demonstration of these techniques,<sup>46</sup> an exploration of their ethical parameters,<sup>47</sup> and an examination of current ethics rules from a normative point of view.<sup>48</sup>

### III. AN APPLIED APPROACH TO UNDERSTANDING THE ETHICAL STATUS OF DISCREDITING TRUTHFUL WITNESSES

#### A. *Methods for Discrediting Truthful Witnesses*

##### 1. Hypothetical Case: *Commonwealth v. Cassidy*

###### a. *The Facts*

To demonstrate the techniques used to discredit truthful witnesses and the ethical challenges associated with each technique, consider the following hypothetical case, which will be referred to as *Commonwealth v. Cassidy*.<sup>49</sup>

The below facts were testified to on direct examination and are substantially the same as the facts recounted in the police report provided to defense counsel prior to trial:

At 7:00 p.m. on February 14, 2000, Philadelphia police received a radio call that a man wearing a red T-shirt and blue sweatpants was in possession of a handgun.

At 7:03 p.m., Police Officer Frank Drebin arrived at the scene. Officer Drebin testified that he has worked in the area for

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*id.*

46. *See infra* Part III.A.

47. *See infra* Part III.B.

48. *See infra* Part III.C.

49. This example has been in large part adopted from an actual trial and represents the actual defense theory in the case. I should stress that I have no idea whether the theory that was ultimately advanced was known by defense attorney to be false. Also, I am uncertain as to how the actual defense theory was advanced, i.e., through the use of the ethical or unethical means. I was not involved in the preparation in this case and participated in no way. I was merely an observer of sorts. I have changed the names of the parties involved and added a few rhetorical flourishes for the reader's enjoyment. The liberties I have taken with certain facts in no way change the conceptual framework in which this defense theory was advanced.

many years and knows it to be an area with a high rate of violent crime. Illegal firearm possession is a common offense in the area as well.

When Officer Drebin arrived on the scene, he noticed the man, later identified as Mr. Quinton Cassidy, standing on the sidewalk. Mr. Cassidy immediately turned away from the officer and began to walk quickly in the opposite direction. Mr. Cassidy was wearing black sweatpants and had on a maroon colored T-shirt. In the back of the sweatpants the officer could see the outline of a handgun. The officer was forty-five feet away from the defendant. The officer drew his own weapon out of a concern for officer safety. The officer called for Mr. Cassidy to stop. At this point, Mr. Cassidy, with his back to the officer, reached his hand around his back and grabbed the handle of the gun and began to turn toward the officer. The officer, fearing that Mr. Cassidy was about to fire the weapon at him, fired his own weapon three times. Each bullet struck Mr. Cassidy in his leg. Mr. Cassidy was then arrested.

A firearm was recovered from the right hand of Mr. Cassidy. Mr. Cassidy's fingerprints were on the firearm. The gun weighed five pounds. Mr. Cassidy was arrested and charged with Unlawful Possession of a Firearm Without a License.<sup>50</sup>

Officer Drebin was cleared by internal affairs, which determined the shooting was justified.

No other witnesses, except Officer Drebin, were called at trial because they could not be located by either side.

The pre-trial discovery process reveals that Officer Drebin has a checkered past, most of which involves the questionable use of force. The most significant incident involved the shooting of five unarmed men in a park. Officer Drebin maintains that the shooting was justified because he saw several men in togas stabbing another man in view of 100 people. It was later revealed that Officer Drebin merely witnessed a

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50. 18 PA. CONS. STAT. § 6106(a)(1) (2008). "Firearms not to be carried without a license" reads in relevant part,

Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

*Id.*

“Shakespeare in the Park” production of *Julius Caesar*.<sup>51</sup> Officer Drebin is on employment-related probation as a result of the above incident. He has been notified that if Internal Affairs finds one more violation of police department policy, he will be dismissed.

Prior to trial, defense counsel interviews Mr. Cassidy. The police report is read to him, and he is asked to tell you his version of events. After reading the police report to Mr. Cassidy, he states, “That is what happened.” He never deviates from his admission. He refuses to entertain a plea bargain, insists on going to trial, and does not wish to testify.<sup>52</sup>

*b. Criminal Defendants Do Admit Their Guilt*

A popular myth has developed, no doubt fed in large part by movies, television shows, and literature, that criminal defense attorneys never ask clients what actually happened.<sup>53</sup> Instead, they say things such as, “Now I don’t want to know if you are guilty,” or “Before you begin, let me first tell you about the law.”<sup>54</sup> Some lawyers do in fact adopt this approach.<sup>55</sup> The logic of this approach seems to rest on the notion that, if a client admits his guilt, his lawyer cannot later allow him to change

51. This particular scenario was inspired by the movie *the Naked Gun*.

**Mayor:** Drebin, I don’t want any more trouble like you had last year on the Southside. Understand? That’s my policy.

**Frank:** Yes. Well, when I see 5 weirdos dressed in togas stabbing a guy in the middle of the park in full view of 100 people, I shoot the bastards. That’s my policy.

**Mayor:** That was a *Shakespeare in the Park* production of *Julius Caesar*, you moron! You killed 5 actors! Good ones!

THE NAKED GUN: FROM THE FILES OF POLICE SQUAD! (Paramount Pictures 1988).

52. The Fifth Amendment of the United States Constitution provides that the defendant cannot be made to testify at trial if he wishes not to. U.S. CONST. amend. V. The Fifth Amendment of the United States Constitution reads in relevant part, “No person . . . shall be compelled in any criminal case to be a witness against himself.” *Id.*

53. Perhaps the most famous example of this can be seen in the movie *Anatomy of a Murder*. Before asking his client, played by Ben Gazzara, to explain what occurred, the attorney, played by Jimmy Stewart, explains what the legal defenses to murder are in the state of Michigan and how those defenses can be advanced based on the proof that the police have accumulated. ANATOMY OF A MURDER (Columbia Pictures 1959); see also ROBERT TRAVER, ANATOMY OF A MURDER 37 (1958); Samuel Dash, *Ethical Defense of Accused Persons*, U.S. AIR FORCE JAG BULL., Jan. 1962, at 12, 13 (commenting on the “the best selling novel, ‘Anatomy of a Murder,’” and its effect on public perception of how lawyers conduct client interviews).

54. See Dash, *supra* note 53, at 13.

55. *Id.*

his story and testify to his innocence at trial, as that would be perjury.<sup>56</sup> Furthermore, if a client is made aware of the state's case prior to telling his lawyer what happened and is informed of possible legal justifications that might excuse his conduct, the client can then tailor, or invent, an exculpatory story that conforms to the state's evidence and testify accordingly.<sup>57</sup>

By in large, however, this approach is the stuff of popular culture more than the actual practice of law because defense attorneys understand the danger of this approach quite well.<sup>58</sup> When the lawyer only asks for the client's version of the facts after the client has been told how the state's facts relate to the law, or the lawyer tells his client he does not want to know if the client is actually guilty, the "client may be tempted to make up a story that is not totally consistent with what occurred."<sup>59</sup> As a result, the client's story may represent an exaggerated version of events that the jury sees as lying; may prevent defense counsel from learning about facts that would be important to address at trial (because witnesses in criminal cases do in fact testify to facts that are not always reflected in pre-trial discovery and the prosecution can call rebuttal witnesses); and may put defense counsel at a disadvantage in determining how hard he can press during his examination of the state's witnesses.<sup>60</sup>

Therefore, it is not surprising to hear Samuel Dash, the famed Chief Counsel for the Senate Watergate Committee, observe, "Any good defense lawyer wants to know from the start all the true facts known by the client concerning the charge against him without embellishment or distortion."<sup>61</sup> Certainly, if the client admits his guilt, in most circumstances (the exception being a version of diminished capacity or

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56. See MODEL RULES OF PROF'L CONDUCT *rr.* 1.2(d), 3.1, 3.3, 3.4 (AM. BAR ASS'N 2014).

57. Whether or not this approach is itself ethical is a matter about which legal commenters disagree. Professor Samuel Dash has referred to this approach as coaching the client and has opined that "the coaching of a client before he tells his story ethically improper." Dash, *supra* note 53, at 13. However, Professor Randolph Braccialarghe maintains that this type of client interview is ethically permissible because the lawyer is not "actively introducing false evidence or untruth into the system." Randolph Braccialarghe, *Why Were Perry Mason's Clients Always Innocent? The Criminal Lawyer's Moral Dilemma—The Criminal Defendant Who Tells His Lawyer He Is Guilty*, 39 VAL. U. L. REV. 65, 72–73 (2004).

58. See Dash, *supra* note 53, at 13.

59. See Braccialarghe, *supra* note 57, at 72–73.

60. See *id.* at 72–73; see also Dash, *supra* note 53, at 13.

61. See Dash, *supra* note 53, at 13.



self-defense), the client's attorney will not be able to put the client on the stand to tell a different story without committing perjury.<sup>62</sup> Nevertheless, legal commentators have observed that it is advantageous to permit a client to speak freely with his attorney, even to the point of the client admitting his guilt.<sup>63</sup>

It is certainly the case that, even if defense counsel makes clear to his client that he wants to know all of the bad facts (even if that means the client admits guilt), guilty clients nevertheless insist they are innocent.<sup>64</sup> However, unlike the fictional television shows in which most clients are actually innocent, the real-life experiences of lawyers do in fact involve representing admittedly guilty clients who insist on going to trial.<sup>65</sup> It is for this reason that Dash further observes that, when the attorney knows all of the true facts concerning the charge against the defendant, the attorney is then "able to make the soundest and most intelligent judgment concerning fact investigation, legal research and strategy."<sup>66</sup>

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62. See Braccialarghe, *supra* note 57, at 72.

63. See *id.* at 73 ("[T]here appears to be a certain advantage to permitting a client to speak freely with his attorney to the point of even admitting that he has committed the act he is accused of committing.").

64. See Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 9 (2010) (commenting on his experience at the Public Defender Service for the District of Columbia and observing that in his experience "those charged with very serious offenses do not readily admit guilt to their attorney" and that, in his opinion, often times "clients believe that defense attorneys will give better representation to clients whom they believe are innocent").

65. See Braccialarghe, *supra* note 57, at 69. Professor Braccialarghe uses the fictional Perry Mason television show as an example. *Id.* at 70. He laments that while Perry Mason's clients were always innocent, in the real life practice of law that is certainly not always the case. *Id.* Professor Braccialarghe comments,

Hence, if popular culture were to more accurately portray to the public the criminal defense attorney's function, one would have to rewrite those Perry Mason (and Ben Mattlock) television episodes to have Perry's secretary, Della Street, or his investigator, Paul Drake, congratulate Perry on having successfully convinced a jury to acquit a guilty client. And then, at the celebratory dinner when Hamilton Burger comes over to Perry's table, Hamilton could say something to the effect of, "Celebrate all you want now Perry, but we will pick him up the next time he kills somebody, and he probably won't have enough money to hire you a second time." It is unlikely that a television series that routinely shows lawyers using their skills to allow guilty clients to go free would have much success with the public. Nor would these shows do much for lawyers' self-esteem or their reputations with the public.

*Id.*

66. Dash, *supra* note 12, at 13. To that end, Professor Randolph Braccialarghe has made the following observation:

On several occasions, when speaking at continuing legal education seminars

*c. It Is Possible to Know That a Defense Theory Is Actually False*

Further, just as some believe that criminal defense attorneys do not know if their client is guilty, there is a myth that there is really no such thing as a false defense.<sup>67</sup> Therefore, no further discussion concerning the ethical limitations of how a false defense is advanced by discrediting a witness is necessary. These commentators reason that there is no such thing as a false defense or any attendant ethical prohibitions involved in its use (with certain obvious exceptions such as fabricating evidence) because an attorney can never really “know” that a particular theory of defense is actually false.<sup>68</sup>

Much of this argument is premised on what some scholars have called the “indeterminacy of truth.”<sup>69</sup> For example, perhaps the defendant never committed the crime but tells his lawyer that he is guilty to protect the actual guilty party. Perhaps the defendant is afraid that the guilty party will harm him or his family if the defendant refuses to “take the rap.” Or perhaps the defendant is not guilty but may be potentially embarrassed to admit the circumstances surrounding his arrest, even if they are exculpatory in nature. In this regard, whatever theory defense counsel comes up with may actually be true because the defense attorney does not actually know it is false. However, current ethical guidelines and decisional law have rejected this position.<sup>70</sup>

In terms of suggesting that an attorney can never actually know what really happened, assuming the defense attorney was not present at the scene of the crime, this is literally true. However, the *Model Rules of Professional Conduct* Model Rule 1.0(f), as well as *Restatement (Third) of the Law Governing Lawyers* section 120, have denoted that, while knowledge is to be considered “actual knowledge” of a fact in question,

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attended by criminal defense lawyers, I have asked the lawyers present for a show of hands of those who have succeeded in getting jury acquittals in the last year or so. I then asked those individuals how they had gotten those acquittals. The vast majority have said that they found it more successful to have their clients tell them everything, even if that meant that the client could not later take the stand. Client candor increases the attorney’s ability to meet and overcome the state’s evidence.

Braccialarghe, *supra* note 57, at 73 n.30.

67. See Mitchell, *supra* note 17, at 343.

68. See Schwartz, *supra* note 33, at 1140.

69. *Id.* at 1140–41; see also Freedman, *supra* note 2, at 1472.

70. See *Nix v. Whiteside*, 475 U.S. 157, 176 (1986); MODEL RULES OF PROF’L CONDUCT r. 1.0(f) (AM. BAR ASS’N 2014).

“[a] person’s knowledge may be inferred from circumstances.”<sup>71</sup> By making clear that knowledge can be inferred from circumstances, the rules ultimately demonstrate that current ethics guidelines have rejected the assertion that a lawyer must literally know something is false in order to constitute knowledge of a falsehood. Professor Steven Lubet has noted, “As an ethical matter . . . we should be more ready to assume that our client’s words—both helpful and damaging—are likely to be true. It is after all, the client’s case.”<sup>72</sup>

Further, in the seminal case of *Nix v. Whiteside*,<sup>73</sup> in which defense counsel threatened to withdraw from his client’s case if his client insisted on testifying falsely, the United States Supreme Court unanimously accepted the trial court’s conclusion that Whiteside’s lawyer knew that Whiteside intended to commit perjury.<sup>74</sup> Therefore, insisting that a

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71. MODEL RULES OF PROF’L CONDUCT r. 1.0(f) (AM. BAR ASS’N 2014); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c (AM. LAW INST. 2000) (“A lawyer’s knowledge may be inferred from the circumstances.”); Erin K. Jaskot & Christopher J. Mulligan, *Witness Testimony and the Knowledge Requirement: An Atypical Approach to Defining Knowledge and Its Effect on the Lawyer as an Officer of the Court*, 17 GEO. J. LEGAL ETHICS 845, 845–46 (2004) (quoting MODEL RULES OF PROF’L CONDUCT r. 1.0(f) (AM. BAR ASS’N 2014)). This is not to suggest that it is always easy to discern when knowledge may be inferred based on circumstantial evidence. Beyond the most obvious circumstances, courts have articulated different standards for what constitutes knowledge. Jaskot & Mulligan, *supra*, at 847. These definitions have ranged from circumstantial evidence, a good faith belief, proof beyond a reasonable doubt, to a “firm factual basis.” *Id.* (citing Brian Slipakoff & Roshini Thayaparan, Note, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935, 943–44 (2002)).

72. STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 5 (4th ed. 2009).

73. 475 U.S. at 172.

74. *Id.* at 161, 163. Immediately before his trial for murder, the defendant Whiteside told his court-appointed attorney Robinson that he intended to testify that when he stabbed the deceased, he thought the deceased was pulling out a pistol and that he had seen something metallic in the deceased’s hand. *Id.* at 161. His proposed testimony about “something metallic” was inconsistent with his prior statements to his attorney as well as the other evidence. *Id.* at 160–62. Robinson told Whiteside that such testimony would be perjury. *Id.* at 161. When Whiteside insisted that he intended to testify he had seen something metallic, Robinson responded that if Whiteside insisted on committing perjury, he would advise the court that Whiteside was committing perjury, seek to withdraw, and attempt to impeach Whiteside’s false testimony. *Id.* When Whiteside testified, he explained why he thought the deceased had a gun but admitted that he had not actually seen one and did not claim that he had seen something metallic. *Id.* at 161–62. The jury returned a verdict of second-degree murder. *Id.* at 162. In his attack on his conviction, Whiteside argued that he had been deprived of a fair trial by Robinson’s threats, which prevented him from testifying that he had seen a gun or something metallic. *Id.* Whiteside argued that his trial attorney’s threats to inform the court of his perjured testimony violated his Sixth Amendment right to effective assistance of counsel. *Id.* at 162–63. The Supreme Court analyzed this claim under

lawyer can never actually know what is true and what is false runs contrary to the Supreme Court's holding in *Nix v. Whiteside* in which "the Supreme Court established clear boundaries on when knowledge would be presumed."<sup>75</sup>

Therefore, both relevant ethics guidelines and the Court's holding in *Nix v. Whiteside* demonstrate that existing legal authority recognizes that defense counsel can in fact know that a particular defense theory is false and that a particular witness is telling the truth.<sup>76</sup> As will be seen shortly, however, knowledge that a defense is false in no way prevents a defense attorney from discrediting a truthful witness.<sup>77</sup> Instead, this knowledge only impacts the means by which a truthful witness may be discredited.<sup>78</sup>

*d. The False Theory of Defense in Commonwealth v. Cassidy*

Based on the hypothetical facts offered above, the defense attorney has invented the following trial theory knowing full well that it is not true because the defendant admitted he committed the crime.

Defense counsel will implore the jury to believe that the police officer is incompetent and quick to pull the trigger. In this telling, the officer overreacted (per his tendency) and shot an unarmed civilian, planted a gun on the defendant, and then lied about the defendant possessing the gun. The defense attorney will suggest such by insinuating that parts of the police officer's story are incredible (i.e., the ability to see the gun at a distance of forty-five feet at night in poor lighting conditions and that the five-pound gun could actually be held in the elastic waistband of the defendant's sweatpants). The defense attorney will argue that the police officer's version of events is untruthful because the police officer has a motive to fabricate and plant a gun on the person he shot. The officer must provide his own

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*Strickland v. Washington*, 466 U.S. 668 (1984), and its prejudice and performance standards. *Nix*, 475 U.S. at 175 (citing *Strickland*, 466 U.S. at 694–95). The Court held that Whiteside's contentions did not satisfy *Strickland's* prejudice standard and that Robinson's performance had satisfied *Strickland's* performance standard in that it had been well within the range of effective representation "in accord with professional standards." *Id.* at 175–76.

75. See Suni, *supra* note 9, at 1654 n.43 (citing Schwartz, *supra* note 33, at 1140).

76. See *Nix*, 475 U.S. at 176; MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2014).

77. See *infra* Part III.B.

78. See *infra* Part III.B.

exculpatory version of events to justify the shooting and to avoid losing his job or criminal prosecution.

To advance this particular trial theory, the defense attorney must first cross-examine the truthful prosecution witness with the goal of discrediting his version of events. Later the defense attorney will present a closing argument in which he argues that the police officer's version of events is not to be believed based on the facts established on cross-examination.

## 2. Cross-Examination Strategies

### *a. Cross-Examination Based on Eliciting True Facts*

The hallmark of this type of cross-examination is that defense counsel will only ask questions on cross-examination designed to illicit truthful responses from the prosecution witness. In some respects, this type of cross-examination may appear underwhelming and the theory of defense may not be readily apparent. However, during closing argument, defense counsel can later use these truthful answers to string together a series of inferences that collectively weaken the state's case.<sup>79</sup> In the context of the *Cassidy* case, this type of cross-examination would look something like this:

Q: Officer, when you arrived at the scene you parked your car about forty-five feet away from my client?

A: Correct.

Q: It was dark out, wasn't it?

A: It was.

Q: Wasn't the closest street light forty-five feet away from where the shooting took place?

A: That's about right.

A: You were not using your flashlight?

A: I never had my flashlight out.

Q: My client was wearing sweatpants, correct?

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79. An inference is defined as “[a] conclusion reached by considering other facts and deducing a logical consequence from them” or “[t]he process by which such a conclusion is reached; the process of thought by which one moves from evidence to proof.” *Inference*, BLACK'S LAW DICTIONARY (10th ed. 2014).

A: Yes.

Q: They have an elastic band?

A: Yes, I believe so.

Q: This gun weighed five pounds?

A: I believe that is correct based on what it says in the report.

Q: It's your testimony that the gun weighing five pounds was being held up by the elastic waistband of my client's pants.

A: That is what I saw.

Q: Officer Drebin, isn't it true that you previously shot numerous individuals in the park and only got a warning for it?

A: Yes, but that was justified. I thought they were stabbing that man to death and Internal Affairs understood. They only gave me a warning.

Q: You're currently on probation with internal affairs, aren't you?

A: Yes.

Q: They have told you that one more unjustified shooting and you'll be fired, correct?

A: Yes.

Q: In fact, if Internal Affairs doesn't clear the shooting, you can be charged criminally?

A: I suppose that's right.

*b. The False-Story Cross-Examination*

Unlike the "true answers" cross-examination detailed above, this particular type of cross-examination operates in exactly the opposite manner. In other words, it is premised on defense counsel asking the witness a series of questions in which defense counsel knows that the underlying factual predicate on which the question is based is false.<sup>80</sup> When defense counsel asks the witness a question, he expects the witness to deny the question's implication by answering in the negative.<sup>81</sup> As a result, the questions asked on cross-examination

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80. See Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 738-39 (1997).

81. See Subin, *supra* note 1, at 126.

amount to nothing more than innuendo the defense attorney knows to be false. However, unlike a cross-examination based on true facts, this type of cross-examination is generally not underwhelming. The “false-story” cross-examination allows the defense attorney to present the full theory of defense as an alternative story to the one being offered by the prosecution through the questions asked on cross-examination.<sup>82</sup> This type of cross-examination would look something like this:

Q: Officer Drebin, isn't it true that you never saw my client reach for the gun because it was too dark?

A: I did see him reach for the gun.

Q: Really, weren't you too quick to pull the trigger just like you were in the park incident?

A: Please, that was totally justified.

Q: In fact, isn't it true that my client never had a gun at all?

A: That is definitely not true.

Q: Listen—let's be honest. You knew you couldn't tell Internal Affairs the truth that you shot an unarmed man in the leg because you would lose your job, isn't that correct?

A: No, he was armed. I told Internal Affairs the truth.

Q: Weren't you afraid that if Mr. Cassidy died you would be charged with murder?

A: He tried to shoot me.

Q: You knew you had to plant a gun on him to justify the shooting, didn't you?

A: I don't know how many times I have to tell you this; he reached for his gun.

Q: After you shot him, you put the gun in his hand, didn't you?

A: You're a liar. I never did that.

The above cross-examination is referred to as the false-story cross-examination because its design closely adheres to the definition of a story.<sup>83</sup> Through the attorney's questions, the defense theory of innocence is presented as (1) a purposefully ordered sequence of events,

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82. *See id.* at 126, 133–35.

83. *See Posner, supra* note 80, at 738–39.

designed to achieve a specific goal,<sup>84</sup> while (2) explaining these events by focusing on characters, their goals, and their struggles to achieve their goals.<sup>85</sup> Thus, the above false-story cross-examination presents an alternative story to the jury (that the gun was planted on Quinton Cassidy), and this alternative version of events is explored from the perspective of Officer Drebin's penchant for incompetence and his motive to fabricate.

### 3. Closing Arguments

#### *a. The False-Implication Closing Argument*

This type of closing argument has two salient features. First, the defense attorney never explicitly says anything to the jury that he knows to be untrue.<sup>86</sup> Importantly, this includes not telling the jury that the defendant is innocent but merely that the defendant is not guilty.<sup>87</sup>

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84. *Id.*

85. Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1, 9 (2010). Professor Kenneth D. Chestek has noted, if all that is provided is a purposely ordered sequence of events, this is not so much a story as an "information-based narrative[]." *Id.* As a result, a true story needs "sufficient context to allow the reader to fully see and understand why the participants in the story behaved as they did, and what they were trying to accomplish in the face of various obstacles." *Id.* Professor Ruth Anne Robbins has further posited that

[w]ithin the legal framework, a story has a few key elements: character, point of view, conflict, resolution, organization, and description. The story must contain a cast of characters, and the author must choose to tell the story from someone's point of view. Each character has needs and goals. The author controls how much the audience knows about those needs and goals.

Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 772 (2006) (footnote omitted).

86. See Myers & Ohlbaum, *supra* note 2, at 1065; Subin, *supra* note 1, at 126–27, 134–35.

87. Being not guilty and being innocent are not the same thing. A finding of not guilty is a legal construct that relates only to forcing the state to prove each element of the crime beyond a reasonable doubt. However, asserting that the state cannot prove each element of a crime beyond a reasonable doubt is not the same as a specific declaration that the defendant never committed the crime in the first place. See Freedman, *supra* note 2, at 1471 ("The plea of not guilty does not necessarily mean 'not guilty in fact,' for the defendant may mean 'not legally guilty.'). Even the accused who knows that he committed the crime is entitled to put the government to its proof. Carl M. Selinger, *Dramatizing on Film the Uneasy Role of the American Criminal Defense Lawyer: True Believer*, 22 OKLA. CITY U. L. REV. 223, 227–28 (1997) ("In this country, there is no question that criminal defense lawyers may ethically plead admittedly guilty clients 'not guilty,' and argue that their guilt has not been proved."); see also Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 270 (2002) ("The criminal justice system is not designed to grant moral absolution or to declare innocence. While



Second, the jury is presented with an alternative explanation that exculpates the defendant without the trial attorney affirmatively telling the jury something he knows to be false.<sup>88</sup> As a result, the theory of defense is never explicitly told to the jury. Instead, the jury is only asked to draw false inferences from true facts and to evaluate the evidence through the prism of reasonable doubt.<sup>89</sup> As a result, the theory of defense is only implied—it is never actually stated.

In the *Cassidy* case, this type of closing argument might go as follows:

My client is not guilty of the crime with which he has been charged. I ask you ladies and gentleman of the jury to consider the following: The government must prove beyond a reasonable doubt that my client possessed a firearm. To do so, you must find beyond a reasonable doubt that the police officer saw the firearm on a dark street with poor lighting conditions. You should also ask yourself if my client was able to hold a five-pound handgun in the elastic of his waistband.

When deciding if they have proven their case beyond a reasonable doubt, you must ask yourself if you believe the evidence the government has presented without stopping, hesitating, or seriously considering that evidence before reaching a verdict of guilty.<sup>90</sup> In deciding whether to believe the police officer, you must also consider that this officer had a lot to lose if he was found to have shot an unarmed citizen. He is on probation for doing the same thing. He could lose his job. He could even be charged with murder or attempted murder. Officer Drebin has a much better chance of not being fired or charged with a crime if the person he shot just happened to have had a gun rather than if the officer had once again shot an unarmed civilian.

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innocence cannot necessarily be inferred from an acquittal, a conviction implies the certainty of guilt.” (footnote omitted)).

88. See Subin, *supra* note 27, at 690.

89. Mitchell, *supra* note 17, at 357.

90. See *Commonwealth v. Gibson*, 720 A.2d 473, 481–82 (Pa. 1998) (holding that a jury instruction which defines reasonable doubt as the type of doubt that causes a reasonable person to “stop, hesitate and seriously consider” whether he would do a certain thing before finally acting adequately conveys the legal principle that is reasonable doubt).

*b. The Evidence-Reflects Closing Argument*

The hallmark of the “evidence-reflects” closing argument<sup>91</sup> is that the lawyer makes sure to use a qualifying phrase when asking the jury to expressly draw an inference that the lawyer knows to be untrue.<sup>92</sup> This type of closing argument can more directly state the theory of defense simply by prefacing those statements with the appropriate qualifying language, as opposed to relying exclusively on implication.<sup>93</sup> By using these types of qualifying statements the lawyer is not expressly vouching for an alternative version of events to the one presented by the state, but merely stating that the evidence technically reflects such a possibility.

However, when making this type of closing argument, the lawyer need not preface every statement by qualifying it first with “the evidence reflects.” The lawyer can, of course, still continue to make the types of statements that are used in the false implication closing argument that are technically true and only imply the theory of defense. In this regard, the evidence-reflects type of argument is really a modified version of the false-implication closing argument.

In the *Cassidy* case, this type of closing argument might look something like this:

The evidence reflects that my client is innocent. The government must prove beyond a reasonable doubt that my client possessed a firearm. The evidence demonstrates that the police officer could not see the firearm on a dark street with poor lighting conditions. The evidence also shows that my client could not hold that five-pound gun in the elastic waistband of his sweatpants.

You have heard evidence relating to how much the police officer has to lose if he was found to have shot an unarmed citizen. He is on probation for doing the same thing. He could lose his job. He could even be charged with murder or attempted murder. Officer Drebin has a much better chance of not being fired or charged with a crime if the person he shot just happened to have had a gun rather than if the officer had once

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91. While this Article refers to this as the evidence-reflects closing argument, defense counsel could just as easily use interchangeable phrases such as “the evidence shows” or the “evidence demonstrates,” all of which connote the same point.

92. See JACOB A. STEIN, CLOSING ARGUMENTS: THE ART AND THE LAW § 1:17 (2015).

93. See *id.*

again shot an unarmed civilian. Officer Drebin has a motive to lie about what happened that day. The evidence reflects that Officer Drebin planted that gun on my client.

*c. The False-Story Closing Argument*

The “false-story” closing argument differs significantly from the false-implication and evidence-reflects types of closing arguments. While the defense attorney who uses the false-story closing argument also asks the jury to draw false inferences from true facts, in doing so, the attorney phrases that argument through a series of explicit statements that he knows to be false, without the use of any qualifying language.<sup>94</sup> This includes affirmatively stating that the defendant is actually innocent of the crime charged.<sup>95</sup>

All of the above types of closing arguments are designed to present an alternative version of what really happened.<sup>96</sup> However, because the false-story closing argument is not wed to true statements, the theory is told to the jury in the story form described previously, as opposed to suggesting to the jury in a series of carefully worded and qualified statements asking the jury to draw certain inferences.<sup>97</sup> It is for this reason that this technique is referred to as the false-story closing argument.

In the *Commonwealth v. Cassidy*, this type of closing argument looks like this:

Now, ladies and gentleman of the jury, my client is innocent. Officer Drebin has testified about his version of what happened. Officer Drebin is lying. Now let me tell you what really went down out there. Officer Drebin can't be believed when he says he saw my client with a gun. In those dark lighting conditions, he couldn't see anything. There is no way my client could carry a five-pound gun in the elastic of his sweatpants without it falling out. That version of events would be laughable if it wasn't for the fact that charging an innocent man with a crime is no laughing matter.

Here's what really happened. The police officer responded to the scene and saw my client minding his own business. My

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94. See Mitchell, *supra* note 17, at 357.

95. See Braccialarghe, *supra* note 57.

96. See Subin, *supra* note 27, at 689–90.

97. See Mitchell, *supra* note 17, at 357.

client turned to walk away from the officer, but the officer had a quick trigger finger, just like he has had before. Officer Drebin got scared out there on the street. When my client went to turn and respond to the officer, the officer couldn't see what was in my client's hands because of how dark it was. Drebin lost his cool. He shot first and decided he would deal with the consequences later.

After he realized my client never had a gun in the first place, Police Officer Drebin planted the gun on my client. Officer Drebin knew he was on thin ice. He put the gun in my client's hand. That's why the gun has my client's fingerprints on it. Anything to avoid losing his job or even being charged with murder.

### *B. The Ethical Status of Methods for Discrediting Truthful Witnesses*

#### 1. Governing Ethical Rules and Standards

The ethical limitations of the above types of cross-examinations and closing arguments can be examined from the perspective of the three primary sources of ethical guidance for American lawyers. These are the American Bar Association's (ABA) *Model Rules of Professional Conduct*,<sup>98</sup> the *Restatement (Third) of the Law Governing Lawyers*,<sup>99</sup> and the ABA's *Standards for Criminal Justice Prosecution Function and Defense Function*.<sup>100</sup> These guidelines fall into two general categories: rules and standards.<sup>101</sup> The primary difference between the two is that rules are binding and violating an ethical rule may lead to disciplinary action,<sup>102</sup> while ethical standards are non-binding resolutions that are primarily intended to act as a best-practices model.<sup>103</sup>

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98. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2014).

99. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. LAW INST. 2000).

100. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (AM. BAR ASS'N 1993).

101. Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915, 916 (2011).

102. Cecelia Klingele, *Confidentiality and Disclosure: What the New ABA Criminal Justice Standards (Don't) Say About the Duties of Defense Counsel*, 38 HASTINGS CONST. L.Q. 983, 984-85 (2011) (noting that the most influential source of guidance for attorney conduct "will be the rules of professional conduct that govern the behavior of lawyers within a specified jurisdiction: Because breach may result in professional sanction, lawyers are likely to pay close attention to the content of these rules"). Enforcement of formal ethics rules is

The most important set of ethics rules that regulate attorney conduct are the ABA's *Model Rules of Professional Conduct*. The *Model Rules* have been adopted, at least in part, as the formal ethics rules by every state in the country, with the exception of California.<sup>104</sup> A violation of these rules can result in a state authorized sanction.<sup>105</sup> While non-binding, the ABA Standards and the *Restatement (Third) of the Law Governing Lawyers* have also proven to be important, additional sources of guidance for administrative bodies and organizations tasked with issues of attorney discipline and ethics compliance.<sup>106</sup>

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largely done through formal disciplinary proceedings before a state bar or high court. MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 42–43 (8th ed. 2007); see also Medwed, *supra* note 101, at 916.

103. Medwed, *supra* note 101, at 916.

104. “The ABA *Model Rules of Professional Conduct* were adopted by the ABA House of Delegates in 1983. . . . Before the adoption of the *Model Rules*, the ABA model was the 1969 *Model Code of Professional Responsibility*. Preceding the *Model Code* was the 1908 *Canons of Professional Ethics*.” ABA *Model Rules of Professional Conduct*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) [<http://perma.cc/9ZJA-R4CZ>] (last visited Mar. 11, 2014) (providing a history of the evolution of ABA ethics codes). Oversight of attorney conduct in federal courts is not based on a uniform set of rules. Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 76 (2009). Instead, different federal courts regulate attorney conduct by picking and choosing between local state rules, their own standards, and ABA models. *Id.*

105. See Klingele, *supra* note 102, at 984–85.

106. The ABA's *Standards for Criminal Justice* have no legal authority unless adopted by a court or legislature. Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113 (2011); see also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Spring 2008, at 10, 11. Despite this fact, while generally non-binding, the *Standards for Criminal Justice* function as a potentially influential source of guidance in terms of defining the ethical limitations of attorney conduct. Klingele, *supra* note 102, at 985. While also non-binding, another important source of ethical guidance comes from the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*. The primary goal of the *Restatement* is not to supplant ABA ethics guidelines, but to complement them. The *Restatement*, therefore, is influenced not only by ABA ethics rules but also by decisional law and other statutory text. Lawrence J. Lato, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 712 (1998) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS at xxxvi (AM. LAW INST., Proposed Final Draft No. 1 1996)). In this sense, the *Restatement* reflects the drafter's objective “to clarify the law and to provide a text that courts and other legal bodies deciding contested cases can employ confidently as a general statement of relevant legal doctrine.” Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 541 (1997) (quoting Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 211 (1987)).

## 2. Applying Ethical Rules to Lawyer's Techniques

### a. *The True-Facts Cross-Examination Is Ethical*

In terms of cross-examination, perhaps the most important guiding principle emerging from each of the above three sets of ethical regulations is that, prior to questioning a witness, a good faith basis must exist to support the questions' underlying implication.<sup>107</sup> In terms of the *Model Rules of Professional Conduct*, the good faith basis requirement on cross-examination is found in Model Rule 3.4(e), providing that a lawyer may not "allude to any matter . . . that will not be supported by admissible evidence."<sup>108</sup> While Model Rule 3.4(e) does not use the actual words "good faith basis," or specifically reference cross-examination, commentators and courts have generally viewed Model Rule 3.4(e) as requiring a good faith basis for the questions asked on cross-examination.<sup>109</sup> While Model Rule 3.4(e) is silent with respect to

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107. MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107(2) (AM. LAW INST. 2000); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.6(d) (AM. BAR ASS'N 1993).

108. MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2014); *see also* Steven Lubet, *The Man Who Shot Liberty Valance: Truth or Justice in the Old West*, 48 UCLA L. REV. 353, 365 (2000) ("This principle, also referred to as the 'good faith basis' rule, provides that lawyers must build their cases on a foundation of truth. They are free to use their questions to intimate all manner of guilt-negating possibilities, but only on the basis of truthful answers.").

While legal commentators and courts agree that the good faith basis on cross-examination rule is encompassed in Model Rule 3.4(e), not all commentators agree. Daniel D. Blinka, *Ethics, Evidence, and Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 10 (2006). For example, one commentator says:

Rule 3.4(e) appears principally concerned with "allusions" and statements by counsel during opening and closing arguments, and not the evidentiary phase of trial. The opening clause's use of the future tense—"allude to any matter that the lawyer does not reasonably believe is relevant or *that will not be supported* by admissible evidence"—seems oriented toward counsel's opening statements. And the remainder of 3.4(e) is expressly limited to statements by counsel, which generally occur during the opening or closing argument.

*Id.* (quoting MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2004)). In light of Professor Blinka's contention, this Article will also apply Model Rule 3.4(e) to its analysis of the ethical limits of closing arguments.

109. *E.g.*, Lubet, *supra* note 108, at 365; *see also In re Zawada*, 92 P.3d 862, 867 (Ariz. 2004) (finding impermissible the prosecutor's questions implying a mental health expert had fabricated his diagnosis of the defendant in the absence of a good faith basis under several of Arizona's ethics rules, including its equivalent of 3.4(e)); *State v. Tosh*, 91 P.3d 1204, 1209, 1215 (Kan. 2004) (holding that it was a violation of Rule 3.4(e) of the Kansas Rules of

what level of proof constitutes “admissible evidence,” decisional law has provided that a “reasonable suspicion” that the facts implied by the question are true will suffice to satisfy an attorney’s ethical obligations.<sup>110</sup> Importantly, confidential statements made by a client during the attorney-client interview satisfy the good faith basis test.<sup>111</sup>

Restatement section 107(2) appears to be the *Restatement’s* version of Model Rule 3.4(e) and uses virtually identical language.<sup>112</sup> The

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Professional Conduct for the prosecution to ask the defendant if he ever intended to plead guilty without a factual basis for the question).

The good faith basis rule, in addition to being an actual ethics rule, also exists as a rule of evidence. Where evidentiary principles and legal ethics intersect, one scholar has noted that it may not always be clear which body of law preceded the other and, “[a]lthough it is difficult to tell which came first, certain well-established evidentiary principles seem to stem directly from professional standards.” Fred C. Zacharias, *Are Evidence-Related Ethics Provisions “Law”?*, 76 *FORDHAM L. REV.* 1315, 1317–18 (2007).

The evidentiary version of the good faith basis rule does not appear expressly in the *Federal Rules of Evidence*. Arguably, Federal Rule of Evidence 403 and its prohibition on evidence that would represent an unfair prejudice encompass the good faith basis rule. FED. R. EVID. 403. However, the rule clearly pre-dates the formal adoption of the *Federal Rules of Evidence* in 1975 and existed as a common law rule of evidence. See *Michelson v. United States*, 335 U.S. 469, 470–74 (1948); *United States v. Wells*, 525 F.2d 974, 977 (5th Cir. 1976); *United States v. West*, 460 F.2d 374, 376 (5th Cir. 1972); *United States v. Beno*, 324 F.2d 582, 588 (2d Cir. 1963); *Roberson v. United States*, 237 F.2d 536, 540 (5th Cir. 1956); see also *United States v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972); *United States v. Pugh*, 436 F.2d 222, 225 (D.C. Cir. 1970). All of these cases pre-date the formal adoption of the *Federal Rules of Evidence* and all hold that the prosecution must have some good faith factual basis for the incidents inquired about on cross-examination when impeaching a defense character witness. Both state and federal courts apply the good faith basis requirement. See *King v. State*, 89 So. 3d 209, 224 (Fla. 2012); *Chavies v. Commonwealth*, 374 S.W.3d 313, 322 (Ky. 2012); *Flowers v. State*, 773 So. 2d 309, 317 (Miss. 2000); *State v. Dawson*, 268 S.E.2d 572, 576 (N.C. Ct. App. 1980); *Commonwealth v. Wynter*, 770 N.E.2d 542, 546 (Mass. App. Ct. 2002) (citing *United States v. Sanchez*, 176 F.3d 1214, 1221–22 (9th Cir. 1999); *United States v. Hall*, 989 F.2d 711, 716–17 (4th Cir. 1993)) (noting not only that Massachusetts requires a good faith basis for questions asked on cross-examination, but that “Federal cases are in accord”). Additionally, courts have held that the prohibition against asking questions on cross-examination without a good faith basis does not violate the criminal defendant’s Sixth Amendment right to confrontation. See *United States v. Beck*, 625 F.3d 410, 417–20 (7th Cir. 2010).

110. See *State v. Marble*, 901 P.2d 521, 524–25 (Kan. Ct. App. 1995); see also *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980).

111. J. Alexander Tanford, *The Ethics of Evidence*, 25 *AM. J. TRIAL ADVOC.* 487, 501 (2002).

112. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107(2) (AM. LAW INST. 2000) (“In representing a client in a matter before a tribunal, a lawyer may not, in the presence of the trier of fact allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”).

commentary to this particular rule makes clear that, like its Model Rule counterpart, it also contains its own good faith requirement.<sup>113</sup>

For its part, the ABA Standards explicitly prohibit the asking of a question on cross-examination without a good faith basis.<sup>114</sup> ABA Standard 4-7.6(d) states, “Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.”<sup>115</sup> The comment to ABA Standard 4-7.6(d) defines what it means by a good faith basis by providing that a good faith basis does not exist when a cross-examiner asks a question “that would be advantageous to have answered in the negative” when the cross-examiner has no evidence to support the question’s implication<sup>116</sup> or innuendo.<sup>117</sup>

The underlying rationale for the good faith basis requirement stems from the concern that “[f]alse insinuations in a question, even if followed by an indignant denial from the witness, undoubtedly leave a trace of prejudice in the jury’s mind.”<sup>118</sup> As one court has sternly noted, “If this rule is breached, the violator should be severely censured. Such practice is impermissible and should not be tolerated.”<sup>119</sup>

A basic application of the above ethical standards indicates that the cross-examination, which is designed only to elicit true facts,<sup>120</sup> is ethically permissible, even though it will eventually be used to cast

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113. Under a heading entitled “‘Backdoor’ methods of proof of an inadmissible matter,” the commentary to this Restatement section notes disapprovingly that “[t]rial maneuvers can be calculated to suggest to the fact-finder (especially a jury) legally irrelevant and otherwise inadmissible evidence or considerations.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107 cmt. c (AM. LAW INST. 2000). For the purposes of the instant discussion, the most relevant of the commentary’s examples provides that “[a] lawyer may not offer evidence on the representation that a proper foundation will be laid for its admission when the lawyer has no reasonable basis for believing that . . . such a foundation can be provided.” *Id.*

114. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.6(d) (AM. BAR ASS’N 1993).

115. *Id.*

116. *Id.* § 4-7.6 cmt.

117. *Id.*

118. *United States v. Pugh*, 436 F.2d 222, 225 (D.C. Cir. 1970).

119. *United States v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972).

120. A cross-examination is defined as “[t]he questioning of a witness at trial or hearing by the party opposed to the party in whose favor the witness has testified” that is meant “to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony.” *Cross-examination*, BLACK’S LAW DICTIONARY (10th ed. 2014).



doubt on the witness's version of events. The reason for this is simply that every question that is asked is done so with a good faith basis. The crux of the good faith basis rule in each of the three sets of standards requires that a cross-examiner possess a certain degree of evidence that supports the underlying factual predicate upon which each question is based.<sup>121</sup> In the previously provided true-facts cross-examination,<sup>122</sup> every question asked is designed to elicit a truthful response and is supported by actual evidence. For example, when the lawyer asks, "It was dark out?"—the lawyer knows it was dark out at 7:00 p.m. in February. Or when the lawyer asks about Officer Drebin being on probation with Internal Affairs, the lawyer knows this is, in fact, true. While the lawyer may use the witness's truthful answers during closing argument to suggest both the implausibility of the witness's story and his motive to fabricate it, as Professor Steven Lubet has observed, the good faith basis rule allows lawyers "to use their questions to intimate all manner of guilt-negating possibilities, but only on the basis of truthful answers."<sup>123</sup>

*b. The False-Story Cross-Examination Is Unethical*

However, the previously provided false-story cross-examination that is designed to place before the jury a story in the form of explicit suggestions that defense counsel knows to be false is plainly unethical. This is because the defense attorney's questions are not premised on a good faith basis. Instead, defense counsel knows that he is planting a version of events in the jury's mind by forcing the witness to deny the answer suggested by each question.<sup>124</sup> For example, in the *Cassidy* case, when the defense attorney asks Officer Drebin a question about planting the gun on the defendant, or suggests that the defendant posed no danger to the officer because the defendant was never in possession of a gun in the first place, the attorney knows both of these suggestions

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121. See MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107(2) (AM. LAW INST. 2000); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.6(d) (AM. BAR ASS'N 1993).

122. See *supra* Part III.A.2.a.

123. Lubet, *supra* note 108, at 365.

124. See STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.6 cmt. (AM. BAR ASS'N 1993) (describing how such questioning is unethical).

are false. He most certainly, in the words of one court, does not have a “well reasoned suspicion that a circumstance is true.”<sup>125</sup>

*c. The False-Implication and Evidence-Reflects Closing Arguments Are Ethical*

In each of the three closing arguments thus far described in this Article, defense counsel is advancing a false defense by asking the fact finder to disbelieve the prosecution’s witness whom defense counsel knows is telling the truth. However, of these techniques, the false-implication and evidence-reflects techniques are ethically permissible, while the false-story technique is not.

In terms of the false-implication and evidence-reflects closing arguments, it is essential to note that the closing arguments only ask the jury to draw reasonable inferences based entirely on the existence of admissible evidence, without ever explicitly telling the jury something the defense attorney knows to be untrue. In this sense, both types of closing arguments present the jury with an alternative version of events, without technically asserting the truth of those alternatives. Even though these types of closing arguments attempt to create a false impression by asking the jury to draw a series of knowingly false inferences concerning the witness’s version of events, this attempt to mislead the jury is entirely within the limits of existing ethical guidelines.

Neither the false implication nor evidence reflects closing arguments violate Model Rule 3.4(e) or Restatement section 107 and their prohibition against alluding “to any matter . . . that will not be supported by admissible evidence.”<sup>126</sup> In fact, each false inference the jury is asked to draw in both types of closing arguments is supported by admissible evidence. For example, when defense counsel suggests that Officer Drebin’s story is incredible because of the difficulty of seeing the gun in dark lighting conditions and by pointing out that Officer Drebin had a motive to fabricate his testimony, those inferences are supported by the evidence in the actual trial record concerning the lighting conditions and the officer’s problems with Internal Affairs.

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125. *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir.1980).

126. MODEL RULES OF PROF’L CONDUCT r. 3.4(e) (AM. BAR ASS’N 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107(2) (AM. LAW INST. 2000); *see also* Blinka, *supra* note 108, at 10 (noting that some legal commentators believe that Model Rule 3.4(e) was intended to apply to opening and closing arguments).

Further, the false-implication and evidence-reflects closing arguments do not violate Model Rule 3.3(a)(1) or (3) regarding Candor to the Tribunal.<sup>127</sup> While the rule itself does not specifically indicate that it applies to closing arguments,<sup>128</sup> commentators and courts have interpreted the rule to apply to this particular phase of the trial process.<sup>129</sup> Model Rule 3.3(a)(1) provides that a “lawyer shall not knowingly make a false statement of fact or law to a tribunal.”<sup>130</sup> Model Rule 3.3(a)(3) provides that a lawyer cannot offer evidence that is known to be false.<sup>131</sup> A close examination of both types of closing arguments indicates that defense counsel attempted neither.

First, neither closing argument violates the plain language of Model Rule 3.3(a)(1) because defense counsel never makes any false statements of fact. In terms of the false-implication closing argument, when defense counsel states that in order to find the defendant guilty the jury “must find beyond a reasonable doubt that the police officer saw the firearm on a dark street,” that statement is undeniably true based on the facts of the case as developed on cross-examination. Defense counsel never explicitly states that the officer did not see the gun or that the defendant is factually innocent of the crime. Further, the lawyer does not state that the police officer actually planted the gun on the defendant. Instead, the lawyer only implies such by asking the jury to draw this inference. He does this by stating something that is technically true. He says, “You must also consider that this officer had a lot to lose if he was found to have shot an unarmed citizen,” and defense counsel also says, “Officer Drebin has a much better chance of not being fired or charged with a crime if the person he shot just so happened to have had a gun rather than once again shooting an unarmed civilian.” Indeed, most reasonable people can accept as a general truism that

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127. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1), (3) (AM. BAR ASS'N 2014).

128. *Id.*

129. See STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.7 cmt. (AM. BAR ASS'N 1993) (cross-referencing its regulation of closing argument with the Model Rule 3.3(a)(1)); see also *Castillo v. State*, 974 N.E.2d 458, 469 (Ind. 2012) (applying Indiana's adoption of *Model Rules of Professional Conduct* Rule 3.3(a)(1) to arguments made before the jury in the penalty phase of a death penalty trial); Myers & Ohlbaum, *supra* note 2, at 1063 (referencing Model Rule 3.3 and noting that “advocates may neither offer nor argue evidence they know to be false”); Suni, *supra* note 9, at 1662–64 (analyzing the application of the *Model Rules of Professional Conduct* Rule 3.3 to closing arguments in which defense counsel argues false inferences from true facts).

130. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2014).

131. *Id.* at r. 3.3(a)(3).

police officers who shoot unarmed citizens without sufficient justification can end up in serious trouble.

Admittedly, the evidence-reflects closing argument appears somewhat closer to making a false statement and, therefore, closer to the ethical line than the false-implication closing argument. However, an analysis of the evidence-reflects type of closing argument indicates that it does not contain statements that are false. In this regard, it is possible that the evidence produced at trial legitimately reflects a particular inference, even if that inference is, in actuality, false. So, when defense counsel states, “The evidence demonstrates that the police officer could not see the firearm on a dark street with poor lighting conditions,” or “The evidence reflects that Officer Drebin planted that gun on my client,” these are legitimate inferences that can be drawn from the evidence. Therefore, these are true statements, despite the fact that it may not have been what actually happened, or the fact finder may choose to believe otherwise. After all, it can be argued that the evidence does indeed demonstrate that a person would have difficulty seeing the handle of a gun on a dark street from forty-five feet away. Further, because of the officer’s motive to fabricate, coupled with questions regarding the lighting conditions and the heavy gun being held in the elastic waistband of the defendant’s sweatpants, an argument can be made that the evidence also reflects that the officer planted the gun to justify the shooting (even if in actuality this is not the case).

Second, while the false-implication and evidence-reflects closing arguments entail defense counsel stringing together a series of true facts in order to draw false inferences, the history of Model Rule 3.3 indicates that the rule itself was not intended to construe this type of potentially misleading argument as a false statement.<sup>132</sup> “An early draft of the Model Rules would have created an explicit obligation for lawyers to avoid creating misleading impressions through advocacy,” but this prohibition was deliberately not incorporated into the current version of the *Model Rules*.<sup>133</sup>

Lastly, in terms of Model Rule 3.3(a)(3), no matter how misleading a closing argument may be, a closing argument itself cannot be construed as an affirmative act of offering false evidence. This is because the rules

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132. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.3.4 (1986) (citing MODEL RULES OF PROF'L CONDUCT r. 3.1(a)(3) (AM. BAR ASS'N, Discussion Draft 1980)).

133. *Id.*

of trial practice make clear that a closing argument is not itself evidence.<sup>134</sup>

Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”<sup>135</sup> One could argue that attempting to convince the jury of an alternative version of events that the lawyer knows to be false, particularly when this alternative version of events involves implying misconduct and untruthfulness on the part of another, constitutes dishonesty or misrepresentation. While once again evidencing the vagueness of the *Model Rules*, the rule itself fails to define whether its application extends to cross-examination or closing argument.<sup>136</sup> However, it does not appear that lawyers are disciplined under Model Rule 8.4(c) for arguing false inferences, so long as they are based on true facts.<sup>137</sup> As Professor Ellen Yankiver Suni has noted, “It seems likely that . . . what is within the range of appropriate litigation conduct in criminal cases are incorporated into the interpretation of this Rule.”<sup>138</sup>

Restatement section 120 uses language very similar to that of Model Rule 3.3 in prohibiting lawyers from making false statements of fact or offering false evidence.<sup>139</sup> For the same reasons as those noted above, the carefully worded false-implication and evidence-reflects closing arguments contain no false statements of fact and do not involve the

134. The jury instruction in the Third Circuit is representative of the typical jury instruction addressing this point. THIRD CIRCUIT MODEL JURY INSTRUCTIONS: CRIMINAL, § 1.08 (2009). This particular provision of the Third Circuit jury instruction addressing closing argument reads in pertinent part, “The evidence from which you are to find the facts consists of the following: (1) The testimony of the witnesses . . . . The following are not evidence: (1) Statements and arguments of the lawyers for the parties in this case . . . .” *Id.*; see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3:3:208 (2d ed. Supp. 1998) (positing that “false evidence” in Model Rule 3.3 relates only to perjury and not to false implications from true facts).

135. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2014).

136. *Id.*

137. Suni, *supra* note 9, at 1663 n.91.

138. *Id.*

139. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (AM. LAW INST. 2000) reads in relevant part,

A lawyer may not: (a) knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence; (b) knowingly make a false statement of fact to the tribunal; (c) offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

lawyer offering any false evidence. In terms of the misleading argument fashioned out of the witness's truthful testimony, the comment to section 120 notes that "[a] lawyer may make conditional or suppositional statements so long as they are so identified and are neither known to be false nor made without a reasonable basis in fact for their conditional or suppositional character."<sup>140</sup> Professor Suni has further noted that the commentary to this section "supports the application" that Restatement section 120 was intended to apply "only to actual false evidence and false statements and not generally to false implications from true facts."<sup>141</sup>

ABA Standard 4-7.7 regulates defense attorney conduct during closing argument. ABA Standard 4-7.7 states, "In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw."<sup>142</sup> For example, in the *Cassidy* case, even though Officer Drebin testified truthfully, defense counsel's suggestions, made in both the false-implication and evidence-reflects closing arguments, are all reasonable inferences that can be drawn from the evidence. When the lawyer argues that Officer Drebin's testimony is incredible because he could not see a gun in the dark lighting conditions, because the weight of the gun was too much for the defendant to hold, and because Officer Drebin had a motive to fabricate his testimony, these are all "reasonable inferences" that could be drawn "from the evidence in the record."<sup>143</sup>

Further, the comment to ABA Standard 4-7.7 sheds light on what the standard means by "mislead[ing] the jury as to inferences it may draw."<sup>144</sup> The comment to ABA Standard 4-7.7 notes that "[t]he obligation to avoid misrepresentation is broad" and provides the

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140. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120, cmt. f, illus. 5 (AM. LAW INST. 2000).

141. See Suni, *supra* note 9, at 1663. Professor Suni's analysis relates to *Restatement* section 180, which at the time of analysis was only in the draft stages. *Id.* at 1663 n.92. *Restatement* section 120 is the current version of the old *Restatement* section 180. The language of the draft version, as well as the commentary, is nearly identical to the current version. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (AM. LAW INST. 2000); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 180 (AM. LAW INST., Tentative Draft. No. 8 1997).

142. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.7 (AM. BAR ASS'N 1993).

143. *Id.*

144. *Id.* § 4-7.7.

following example of misleading the jury: “An argument to the jury that the accused has a ‘clean record’ when counsel is aware of prior convictions, although the evidence is silent, is an affirmative misrepresentation of a fact.”<sup>145</sup> This example suggests that the ABA Standards’ view of misleading the jury as to inferences it may draw is defined as explicit statements made by defense counsel that he knows to be untrue, despite the fact that such an inference may find support in the trial record itself. In this sense, ABA Standard 4-7.7 appears to draw a parallel between itself and the reference to false statements contained in Model Rule 3.3(a)(1) and the comment even cites to Model Rule 3.3(a)(1) in providing the above example.<sup>146</sup> For reasons previously

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145. *Id.* § 4-7.7 cmt.

146. *Id.* § 4-7.7 cmt. n.2. It should be noted that during the writing of this Article the third edition of the ABA’s *Criminal Justice Standards for the Defense Function* were in effect. However, a fourth edition has been more recently released. As of this writing, the fourth edition of the ABA Standards has not been released with commentary. In some capacity, this makes it difficult to ascertain the true extent and meaning of each new or revised standard. With this in mind, the fourth edition has added the following standard: ABA Standard 4-1.4 Defense Counsel’s Tempered Duty of Candor, which states:

(b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.

CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.4 (AM. BAR ASS’N 2015), [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html) [perma.cc/GN76-DX2Z].

Further, ABA Standard 4-7.7 has been modified and renumbered as ABA Standard 4-7.8. This standard reads in relevant part:

(a) In closing argument to a jury (or to a judge sitting as trier of fact), defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should, to the extent time permits, review the evidence in the record before presenting closing argument. Defense counsel should not knowingly misstate the evidence in the record, or argue inferences that counsel knows have no good-faith support in the record.

*Id.* Again, the full meaning of these standards can be better understood when they are fully released with commentary. However, for the purposes of the instant discussion, it seems unlikely that the addition of ABA Standard 4-1.4 and the revisions contained in ABA Standard 4-7.8 are intended to materially change the third edition’s prohibition on misleading the jury through the use of explicitly false statements during closing argument—as doing so would place the ABA’s *Standards of Criminal Justice Prosecution Function and Defense Function* in sharp contrast to the ethical prohibitions against making false statements

noted in discussing Model Rule 3.3,<sup>147</sup> both closing arguments contain true statements and therefore do not violate the misleading the jury provision of ABA Standard 4-7.7.

*d. The False-Story Closing Argument Is Unethical*

Unlike the false-implication and evidence-reflects closing arguments, the false-story closing argument more strongly presents the defense theory in story form through a series of affirmative statements that defense counsel knows to be untrue.<sup>148</sup> For example, unqualified statements such as, “My client is innocent”; “Here’s what really happened”; “Officer Drebin is lying”; or “After he realized my client never had a gun in the first place, Police Officer Drebin planted the gun on my client,” are obviously not true as defense counsel knows that the version of events he is telling the jury is not what happened and that his client did in fact have a gun on his person. The entire false-story argument is premised on presenting an alternative version of events in which defense counsel explicitly asserts the truth of those alternatives, knowing them to be false.

In assessing whether this type of closing argument is ethical, the false-story closing argument does not appear to violate Model Rule 3.4(e) or Restatement section 107 and the prohibition against alluding “to any matter . . . that will not be supported by admissible evidence.”<sup>149</sup> In a technical sense, while the defense attorney may know the closing argument is based on untruths, each inference he is asking the jury to draw does, to the outside observer, appear to literally be supported by admissible evidence. For example, when the defense attorney affirmatively tells the jury that Officer Drebin planted the gun to avoid being fired, that inference is supported by the fact that the evidence on the record shows that Internal Affairs told Officer Drebin that one more unjustified shooting and his employment would be terminated.

However, the false-story closing argument is unethical because of the manner in which these inferences are phrased and presented to the jury. As detailed above, Model Rule 3.3(a)(1), Restatement section 120 and ABA Standard 4-7.7 all prohibit defense counsel from making false

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contained in Rule 3.3 (a)(1) of the ABA’s own *Model Rules of Professional Conduct*.

147. *Supra* Part III.A.2.a.

148. *See Mitchell, supra* note 17, at 344.

149. MODEL RULES OF PROF’L CONDUCT r. 3.4(e) (AM. BAR ASS’N 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107(2) (AM. LAW INST. 2000).



statements to the judge or jury.<sup>150</sup> For example, in addressing the specific issue of the defense counsel's explicit statement that the client is innocent, one legal commentator has stated, "In closing argument, because Rule 3.3 states that '[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal,' it would seem that a lawyer who knows her client is guilty cannot explicitly claim that he is innocent."<sup>151</sup> However, in addition to explicitly stating the client's innocence, the false-story closing argument presented above involves a host of other explicit statements the trial attorney knows to be untrue. Because the telling of this false story is based on a series of knowingly false statements, the structure of this type of closing argument violates each of the three ethical provisions identified above.<sup>152</sup>

Moreover, because the false-story closing argument clearly violates Model Rule 3.3(a)(1), it likely violates Model Rule 8.4(c) and its prohibition against engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation."<sup>153</sup> This is also true of Model Rule 8.4(d), which prohibits conduct that is prejudicial to the administration of justice.<sup>154</sup> A violation of Rule 3.3(a) may be prejudicial to the administration of justice in that a lawyer's dishonesty "may cause the public to lose confidence in both lawyers and the judicial system as a whole."<sup>155</sup> Indeed, numerous decisions have held that a lawyer who violates Model Rule 3.3(a) generally violates both 8.4(c) and (d).<sup>156</sup>

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150. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (AM. LAW INST. 2000); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.7 (AM. BAR ASS'N 1993).

151. K. Craig Welkener, Note, *Possible but Not Easy: Living the Virtues and Defending the Guilty*, 26 GEO. J. LEGAL ETHICS 1083, 1088 (2013) (alteration in original).

152. See MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (AM. LAW INST. 2000); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.7 (AM. BAR ASS'N 1993); see also *supra* notes 144-47 and accompanying text (indicating that ABA Standard 4-7.7 and its prohibition against misleading the jury as to inferences it may draw, references Model Rule 3.3(a)(1) and indicates that "an affirmative misrepresentation of a fact" is one in which defense counsel makes an explicit representation to the jury that they know to be untrue despite the fact such an inference could be drawn from the trial record).

153. Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 28 (2002) (quoting MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2014)).

154. See MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2014).

155. Richmond, *supra* note 153, at 28-29.

156. See, e.g., *In re Fee*, 898 P.2d 975, 980 (Ariz. 1995) (censuring lawyers who are not

*C. A Normative Critique of the Ethical Rules As Applied to Discrediting the Truthful Witness*

1. How to Ethically Discredit the Truthful Witness

The above exploration of existing ethical rules and standards makes clear that there is a perfectly ethical way in which to advance a false defense by discrediting the truthful witness on both cross-examination and closing argument. This can be done without running afoul of any existing ethical rules or standards by combining the true-facts cross-examination and the false-implication or evidence-reflects closing arguments. Of these two types of closing arguments, criminal defense attorneys can decide whether the false-implication or evidence-reflects type of closing argument is the most effective type of closing argument based on their own personal style and opinion.

For the reasons previously detailed, cross-examination that is designed to only elicit truthful responses from the witness, even if those responses may later be used to create a false impression during closing argument, will not violate the good faith basis rule that is at the core of the ethical guidelines regulating cross-examination.<sup>157</sup> Further, a closing argument that asks the jury to draw false inferences from true facts is ethically permissible so long as the attorney never explicitly makes a false statement of fact.<sup>158</sup>

2. Current Ethics Rules Reflect a Reasonable Compromise Between Competing Values

That the combinations of the ethical techniques described above, which allow for the truthful witness to be discredited without actually lying to the jury, happens to be ethically permissible is not surprising.<sup>159</sup>

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honest with settlement judge for violating Rules 3.3(a)(1) and 8.4(c)); *In re Hansen*, 877 P.2d 802, 804–06 (Ariz. 1994) (lawyer who lied to court about reason for witness's absence violated Rules 3.3(a)(1), 8.4(a), 8.4(c), and 8.4(d)); *People v. Reed*, 955 P.2d 65, 67–68 (Colo. 1998) (suspending lawyer who forged another lawyer's signature on court documents pursuant to Rules 3.3(a)(1), 8.4(c), and 8.4(d)); *Attorney Grievance Comm'n v. White*, 731 A.2d 447, 456–57 (Md. 1999) (holding that a lawyer who lied in deposition and lied to the judge violated Rules 3.3(a)(1), 8.4(c), and 8.4(d)).

157. See *supra* Part III.B.2.a.

158. See *supra* Part III.B.2.c.

159. It is worth noting that a certain inconsistency exists in terms of how current ethics rules allow for truthful witnesses to be discredited in the course of arguing false implications. A criminal defense attorney is required to ask questions that are premised on a good faith basis, yet with certain limitations, he can make closing arguments that are not supported by

For reasons further explained in this section, the combination of the true-facts cross-examination and these two types of closing arguments as a means of discrediting the truthful witness is consistent with the criminal defendant's constitutional right to challenge the weight of the state's evidence,<sup>160</sup> as well as the truth-seeking function of a criminal trial<sup>161</sup> and the lawyer's corresponding obligation of candor to the tribunal.<sup>162</sup> In this sense, the construction of current ethics rules in the context of discrediting the truthful witness represent a sound and reasonable balance between these competing interests.

Indeed, the American criminal justice system is defined by differing goals, which at times are in tension with each other. For the purposes of the instant discussion, there are two competing goals worth noting. The first goal relates to the criminal justice system's search for the truth.<sup>163</sup> However, this goal can at times be in tension with a second goal of the criminal justice system—the goal of protecting the innocent, even if that means vigorously defending the guilty and in the process obscuring the truth.<sup>164</sup>

The question of whether the central purpose of a criminal trial is to seek the truth is one that has pointedly divided legal scholars.<sup>165</sup> Some

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the same good faith basis and that he may know to be affirmatively false. However, this inconsistency can be explained in relation to the criminal defendant's constitutional rights. As noted previously, the good faith basis requirement for questions asked on cross-examination is not a violation of the defendant's constitutional right to confront their accuser. *See United States v. Beck*, 625 F.3d 410 (7th Cir. 2010). However, the criminal defendant does have a constitutional right to challenge the weight of the evidence presented by the state at closing argument—even if that means arguing a false implication from true facts. The contours of this constitutional right are explained in greater detail in this section.

160. *See supra* note 15 (defining what is meant by the term weight of the evidence); *see also* Subin, *supra* note 27 (noting the defendant's constitutional right to challenge the state's evidence). This point will also be greatly expanded upon in this section.

161. David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 494 (1992) (noting that of the goals that the criminal justice system is designed to promote “one goal emerges as preeminent: finding the truth”).

162. *See* MODEL RULES OF PROF'L CONDUCT rr. 3.3, 3.4 (AM. BAR ASS'N 2014).

163. Harris, *supra* note 161, at 494.

164. *Id.* at 496–97 (“Note that the goal of protecting the innocent may exist in tension with the goal of truth finding.”).

165. *See* Kenneth W. Starr, *Truth and Truth-Telling*, 30 TEX. TECH L. REV. 901, 902–903 (1999). Starr describes a 1997 debate at Yale Law School between Professor Alan Dershowitz and Akhil Reed Amar. *Id.* Professor Dershowitz argued that truth is an occasional byproduct of our criminal justice system, but not a goal in its own right. *Id.* 902–03. Professor Amar argued that truth is intended to the paramount objective of the criminal justice system. *Id.* at 903.

scholars contend that the primary purpose of the criminal justice system is to search for the truth.<sup>166</sup> These scholars find support for this position in noting the development of rules of procedure, substantive law, and rules of evidence (with the exception of excluding evidence obtained in violation of constitutional rights and evidentiary privileges), which they contend are primarily designed to advance the search for the truth.<sup>167</sup>

Despite this fact, the criminal justice system does endeavor to promote other non-truth related goals.<sup>168</sup> As noted previously,<sup>169</sup> one of these competing goals relates directly to protecting the innocent, which paradoxically can be achieved by zealously defending the guilty and, in the process, undermining the truth-seeking function of a criminal trial.<sup>170</sup> The argument that zealous defense of the guilty protects the factually innocent is premised on the belief that if the prosecutor knows that the defense attorney will vigorously attack the government's case, the prosecutor will either be unwilling to bring weak cases to trial in which the defendant may be innocent, or will alternatively seek the strongest evidence possible in order to ensure the accuracy of a guilty verdict.<sup>171</sup>

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166. See Harris, *supra* note 161, at 494.

167. See Starr, *supra* note 165, at 903; see also 1 MCCORMICK ON EVIDENCE § 72 (4th ed. 1992) ("The overwhelming majority of all rules of evidence have as their ultimate justification some tendency to promote the objectives set forward in the conventional witness' oath, the presentation of 'the truth, the whole truth, and nothing but the truth.'").

168. See Harris, *supra* note 161, at 494–503. These goals include protecting the innocent, respecting individual dignity, equal justice, and maintenance of an accusatorial system. *Id.*

169. See *supra* note 165 and accompanying text.

170. See *United States v. Wade*, 388 U.S. 218, 257–58 (1967) (White, J., dissenting in part, concurring in part) ("Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth."); see also Harris, *supra* note 161, at 496 (noting that in defending the guilty we "seek to minimize the chances of the erroneous conviction of an innocent person, even at the price of a greater chance that a jury may acquit a guilty person").

171. See Subin, *supra* note 1, at 148–49; see also Mitchell, *supra* note 17, at 347 ("By pushing hard in every case (whether the client is factually guilty or not) and thereby raising 'reasonable doubts' in the prosecution's case whenever possible, the defense attorney helps 'make the screens work' and thus protects the interests of the factually innocent."). It should be noted the above justifications relate only to vigorously defending the guilty. The importance of challenging the state's case when the defendant insists on his innocence is that in vigorously confronting the accusation made against the accused, the truth can ultimately be exposed and the innocent protected from undue punishment. Perhaps this logic is best articulated in this well-known maxim: "cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'" *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). Of course, rarely are those who insist on defending the innocent asked to justify such actions for obvious reasons.

While rules of procedure, substantive law, and evidentiary rules may be designed to further the truth-seeking function of a criminal trial, the goal of protecting the innocent at the expense of punishing the guilty, even to the detriment of the truth, is enshrined in the Constitution itself.<sup>172</sup>

First, the Constitution dictates that government is required to meet the high burden of proving its case beyond a reasonable doubt, even if that means that a guilty defendant may go free, in order to ensure that an innocent defendant is not wrongfully convicted.<sup>173</sup> Second, the defendant is given the right to actively participate in the trial process by challenging the weight of the state's evidence in order to convince the fact finder that the state has not met this burden.<sup>174</sup> Importantly, this constitutional right is extended in equal measure to the guilty and innocent alike.<sup>175</sup> The criminal defendant's right to actively challenge the weight of the state's evidence, specifically on cross-examination and

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172. See Harris, *supra* note 161, at 496–97 (noting that, in addition to the proof beyond a reasonable doubt standard, “[a] number of rules of constitutional dimension protect the innocent”). This Article offers its own analysis of what those other constitutional dimensions are in greater detail in this section.

173. *Patterson v. New York*, 432 U.S. 197 (1977) (“[T]he prosecution must bear the burden of proving beyond a reasonable doubt ‘the existence of every fact necessary to constitute the crime charged.’” (quoting *In re Winship*, 397 U.S. 358, 363 (1970))). “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.” *In re Winship*, 397 U.S. at 363. The *Winship* Court further held that the

use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

*Id.* at 364; see also Harris, *supra* note 161, at 496 (noting that the reasonable doubt standard reflects our “fundamental value determination” that “it is far worse to convict an innocent man than to let a guilty man go free.” (quoting *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring))).

174. Mitchell, *supra* note 17, at 344 (“Under our constitutional system, I do not need to try to convince the factfinder about the truth of any factual propositions. I need only try to convince the factfinder that the prosecution has not met its burden.”).

175. *Wade*, 388 U.S. at 256–57 (White, J., dissenting in part, concurring in part) (“[Defense counsel] must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.”); *United States v. Thoreen*, 653 F.2d 1332, 1338 (9th Cir. 1981) (“[W]e agree that defense counsel should represent his client vigorously, regardless of counsel’s view of guilt or innocence . . .”).

closing argument, is found in two separate, but related, aspects of the Sixth Amendment.<sup>176</sup>

The first of these rights is the right to confront one's accuser through the use of cross-examination.<sup>177</sup> As the United States Supreme Court noted in *Davis v. Alaska*,<sup>178</sup> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."<sup>179</sup> The *Davis* Court went on to note that "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness."<sup>180</sup>

The second of these Sixth Amendment rights relates to the defendant's ability to challenge the strength of the state's case at closing argument, which has generally been found within the Sixth Amendment's right to counsel.<sup>181</sup> The right to be heard at closing argument further allows defense counsel to argue all reasonable inferences that can be drawn from the evidence contained in the trial record.<sup>182</sup>

Therefore, because the above rights are constitutional mandates, the guilty defendant's right to challenge the weight of the state's evidence must be incorporated into existing ethics rules.<sup>183</sup> As noted by the

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176. U.S. CONST. amend. VI; *see supra* note 121, 160 and accompanying text.

177. The Confrontation Clause found within the Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

178. 415 U.S. 308 (1974).

179. *Id.* at 316. Of course, there are reasonable limits placed on the right of cross-examination. For the purposes of the instant discussion, *see supra* note 159 (noting that the requirement that one have good faith basis for questions asked on cross-examination does not violate the Sixth Amendment right to confrontation).

180. *Davis*, 415 U.S. at 316.

181. *See Herring v. New York*, 422 U.S. 853, 860 (1975) ("The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem . . . ." (quoting *Yopps v. State* 178 A.2d 880 (Md. 1962))).

182. *See Dessaure v. State*, 891 So. 2d 455, 468 (Fla. 2004) ("Closing argument presents an opportunity for both the State and the defendant to argue all reasonable inferences that might be drawn from the evidence.").

183. The United States Supreme Court has previously invalidated state rules of professional conduct that unduly restricted a constitutional right. Notably this occurred in the Court's landmark decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), where the Court held that blanket state prohibitions contained in Arizona's attorney discipline rules on lawyer advertising were unconstitutional violations of free speech.

drafters of the *Model Rules* themselves, the construction of the *Model Rules* reflects the “constitutional principle that the state must prove every element of the crime charged and may not, by procedural rule or otherwise, shift its burden to the defendant.”<sup>184</sup> For its part, Model Rule 3.1, relating to frivolous legal arguments, provides that, even if counsel knows his client is guilty, “[a] lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established.”<sup>185</sup> Restatement section 110 uses virtually identical language to Model Rule 3.1.<sup>186</sup>

While the ABA Standards do not directly address defense counsel’s role in requiring that the state prove each element of the crime beyond a reasonable doubt,<sup>187</sup> ABA Standard 4-7.6, relating to cross-examination, cites approvingly to Justice White’s often quoted opinion in *United States v. Wade*<sup>188</sup> in which he states that defense counsel may test the quality of the prosecution’s evidence on cross-examination even if the defense attorney knows his client is guilty and the witness has testified truthfully.<sup>189</sup> Justice White famously wrote of the defense lawyer:

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. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense

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184. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N, Proposed Final Draft 1981).

185. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2014).

186. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 (AM. LAW INST. 2000). The commentary to this section notes:

[A] lawyer defending a person accused of a crime, even if convinced that the guilt of the offense charged can be proved beyond a reasonable doubt, may require the prosecution to prove every element of the offense, including those facts as to which the lawyer knows the accused can present no effective defense.

*Id.* § 110 cmt. f.

187. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (AM. BAR ASS’N 1993).

188. 388 U.S. 218 (1967).

189. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-7.6 cmt. (AM. BAR ASS’N 1993) (citing *Wade*, 388 U.S. at 257–58 (White, J., dissenting in part, concurring in part)).

counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.<sup>190</sup>

The example provided in this Article demonstrates how existing ethics rules must allow defense counsel to challenge the weight of the evidence by discrediting the truthful witness and arguing a false defense. After all, doing so is a constitutional right.<sup>191</sup>

In *Commonwealth v. Cassidy*, the evidence presented by the State is legally sufficient in that, if the police officer's testimony is believed, it proves every element of the crime charged.<sup>192</sup> The defense attorney knows his client is guilty and the defendant insists on a trial and will not testify. Because the evidence is legally sufficient if believed, the only possible theory of defense is to convince the fact finder that the officer's testimony is not worthy of belief.

However, this cannot be done through the false-story cross-examination and false-story closing arguments because they are ethically prohibited.<sup>193</sup> Further, the defendant would not prevail on a claim that he had a constitutional right to an attorney who makes knowingly false statements of fact to the jury.<sup>194</sup> Therefore, if the defense attorney could not attack the weight of the state's evidence—by eliciting only truthful answers on cross-examination and then arguing that the jury should draw certain inferences based only on defense counsel's true statements—the defense attorney would have no way of challenging the weight of the prosecution's evidence once he knows his client is guilty. Such a predicament would be inconsistent with the long held constitutional principle that even the guilty defendant is entitled to force the state to prove every element of the crime charged beyond a

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190. *Wade*, 388 U.S. at 257–58 (White, J., dissenting in part, concurring in part) (footnotes omitted).

191. See *Mitchell*, *supra* note 17, at 344.

192. For the difference between sufficiency of the evidence and weight of the evidence, see *supra* note 15.

193. See *supra* Part III.B.2.b, d.

194. See *Nix v. Whiteside*, 475 U.S. 157 (1986).



reasonable doubt<sup>195</sup> and that in doing so defense counsel may, in the Justice White's famous words, attempt to put the "State's case in the worst possible light, regardless of what he thinks or knows to be the truth."<sup>196</sup>

Additionally, attacking the credibility or accuracy of a truthful witness is not only ethically permitted using the techniques demonstrated in this Article, in some instances, it is even ethically required.<sup>197</sup> When challenging the weight of the evidence by discrediting the truthful witness is the best or the only possible defense, the prevailing view is that defense counsel is ethically required to do so in order to fulfill the obligation of zealous advocacy owed to one's client.<sup>198</sup>

However, current ethics rules do more than simply reflect the defendant's constitutional rights to challenge the quality of the state's evidence by discrediting the truthful witness.<sup>199</sup> These rules are also designed to further the truth-seeking function of the criminal trial that is reflected in the development of substantive criminal law, rules of

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195. *Wade*, 388 U.S. at 256–58 (White, J., dissenting in part, concurring in part).

196. *Id.* at 258.

197. *See* Henning, *supra* note 8, at 271.

198. *Id.* ("The duty of zealous representation calls for the attorney to use all legal means to obtain a favorable outcome for the client, which can include using tactics that lead a jury to conclude mistakenly that the person is not guilty of the offense, because the government has not met its burden of proof beyond a reasonable doubt. To achieve that result, the defense lawyer may try to have the jury draw a false inference, perhaps by calling into question a witness's credibility or by convincing the jury of an alternate theory of what actually happened—or why—that precludes a finding of guilt."); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2014). A previous formulation of the ABA's ethics code described an attorney's obligation to his client by using the phrase "zealous advocacy" in Canon 7. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 1979); George A. Riemer, *Zealous Lawyers: Saints or Sinners?*, OR. ST. B. BULL., Oct. 1998, at 31. However, in the most recent formulation, Canon 7 has been replaced with Model Rule 1.3, which replaced the word "zealous" with the word "diligence." *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2014). Nevertheless, it is common practice for attorneys to refer to the obligation to zealously represent their clients. In all likelihood this is because far from truly abandoning the concept of zealous advocacy, four references are made to the concept of zeal in the preamble, commentary, and legal background material within the overall text of the *Model Rules*. MODEL RULES OF PROF'L CONDUCT pmbl. & scope, r. 1.3 cmt. (AM. BAR ASS'N 2014).

Further, while beyond the scope of this particular Article, it is worth noting that in such a predicament, defense counsel's failure to challenge the weight of the evidence by discrediting the truthful witness may not only violate the ethical obligation of diligent or zealous advocacy, it might also represent a violation of the defendant's Sixth Amendment right to effective assistance of counsel.

199. *See* Henning, *supra* note 8, at 210 ("The regulations for lawyers must deal with every type of legal representation, and not simply when a lawyer stands up in court.").

procedure, and rules of evidence.<sup>200</sup> Ethics rules accomplish this task by mandating that the lawyer is an officer of the court and, therefore, must exercise candor in his dealings with the judge and jury.<sup>201</sup> Therefore, in his role as an officer of the court, the lawyer's responsibilities in defending his client cannot be entirely divorced from the truth-seeking function of a criminal trial.<sup>202</sup>

Presumably, ethics rules could be written to expressly allow attorneys to ask questions on cross-examination in the absence of a good faith basis and to likewise make false statements to the tribunal during closing argument. Constitutional concerns dictate only that ethics rules be written in such a way as to ensure that the defendant is able to force the government to prove every element of its case beyond a reasonable doubt.<sup>203</sup> Consistent with this constitutional dictate, even the guilty defendant must be allowed to challenge the weight of the state's evidence.<sup>204</sup> While the defendant has no constitutional right to have his lawyer knowingly lie to the jury,<sup>205</sup> or to ask questions in the absence of a good faith basis,<sup>206</sup> if ethics rules expressly allowed for such, the defendant's constitutional rights would not be harmed. The criminal defendant's constitutional rights are not violated when the defendant is given more robust means to challenge the state's case than required by law.<sup>207</sup>

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200. See *supra* note 163 and accompanying text.

201. See Angela Dawson Terry, Note, *What's a Lawyer to Do?: The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct*, 21 AM. J. TRIAL ADVOC. 357, 359 (1997) (citing MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983)) ("The primary characteristic of the lawyer's role as an officer of the court is the duty to subordinate the interests of the client and the interests of the lawyer to the interests of the judicial system and the public."); see also MODEL RULES OF PROF'L CONDUCT pmb. & scope, r. 3.3(a)(3) cmt. (AM. BAR ASS'N 2014) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.")

202. See Freedman, *supra* note 2, at 1470 ("The attorney is indeed an officer of the court, and he does participate in a search for the truth."); see also Henning, *supra* note 8, at 211.

203. See *In re Winship*, 397 U.S. 358, 364 (1970).

204. See *supra* notes 174–76 and accompanying text.

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

206. *State v. Marble*, 901 P.2d 521, 524 (Kan. Ct. App. 1995); see also *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980).

207. See Kimberly S. Keller, *Privacy Lost: Comparing the Attenuation of Texas's Article I, Section 9 and the Fourth Amendment*, 34 ST. MARY'S L.J. 429, 430 & n.3 (2003) ("The federal constitution sets the floor for individual rights" and that state's may provide their citizens with greater rights (quoting *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App.

But current ethics rules are obviously not written in such a way,<sup>208</sup> and need not be. Instead, these rules constrain the means by which criminal defense attorneys undermine the search for the truth and, in the process, reflect the relevance of the truth-seeking function of a criminal trial and the lawyer's related obligation of candor to the tribunal.

To that end, current ethics rules endeavor to strike a balance between the truth-seeking function of a criminal trial and the defendant's constitutional right to challenge the weight of the state's evidence by arguing a false defense. That balance can best be summed up in the following manner: Lawyers are not required to search for the truth and at times may actively work to obscure its discovery, but they cannot do so by telling lies.<sup>209</sup> In this regard, current ethics rules undoubtedly reflect a fair and reasonable compromise between the important competing goals and interests that define the contours of the American system of criminal justice identified above.

### 3. Arguments Against the Balance Reflected in Current Ethics Rules

It should be noted that not all scholars so readily embrace the balance current ethics rules intelligently reflect.<sup>210</sup> It may be suggested that legitimate and important justifications exist for allowing defense attorneys to argue a false defense without regard to the good faith nature of the questions being asked on cross-examination and in particular for eliminating the requirement that defense counsel not make false statements during closing argument. However, an analysis of these arguments demonstrates that they are ultimately unpersuasive.

To that end, some may contend that ethics rules that require different forms of rhetoric on cross-examination and closing argument when the client has confessed his guilt punish the client for being honest

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1991))). As explained previously, ethics rules, while largely based on a version of the ABA's *Model Rules of Professional Conduct* are enacted by individual states. See *supra* note 106. Therefore, federal constitutional concerns are implicated only when a state's ethics code otherwise restricts rights that are provided for in the Constitution, not when a state provides an individual with more expanded rights pursuant to state law.

208. MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2014).

209. This description of defense counsels' dual role as an advocate on behalf of the guilty and as an officer of the court exemplifies one scholar's observation that the "art" of the advocate is "the art of misleading an audience without telling lies." C.P. HARVEY, *THE ADVOCATE'S DEVIL* 1-2 (1958).

210. See Schwartz, *supra* note 33, at 1140-43.

with his lawyer.<sup>211</sup> This point is worth noting in light of the fact that the proceeding section of this Article posits that attorneys frequently adopt unethical forms of cross-examination and closing argument because they tend to be more effective from a trial advocacy standpoint.<sup>212</sup>

It follows that if the defendant knows that his lawyer must use a less effective form of trial advocacy once he has confessed his guilt, the defendant would be discouraged from being open and forthright with his lawyer. Not only would this punish the client for being honest with his lawyer, it would also cut against the client's interests because it might deprive counsel of favorable information and prevent the lawyer from being fully prepared to address the introduction of unfavorable evidence.<sup>213</sup>

However, the Supreme Court in *Nix v. Whiteside*<sup>214</sup> rejected the validity of these arguments when it held that the defendant suffered no legally cognizable harm when his lawyer threatened to expose his false testimony.<sup>215</sup> In drawing a parallel between the issue of punishing the client by threatening to expose his false testimony and placing limits on the means by which the truthful witness is discredited, Professor Murray L. Schwartz has argued, "It is hard to see why the client should fare any better with respect to impeachment of a truthful witness if the lawyer's knowledge of the truthfulness of that testimony is based substantially, if not wholly, upon the client's disclosure."<sup>216</sup>

Further, it may be suggested that restricting or requiring the use of certain words or phrases based upon whether the defendant confessed his guilt to his lawyer poses the practical problem of potentially signaling to the fact finder during closing argument that the defendant is guilty. For example, the lawyer's failure to directly state that the client is actually innocent may signal to a knowledgeable fact finder that the defense attorney knows his client is guilty because the defense attorney chose to either preface that statement with qualifying language, or chose to state that the client was only "not guilty." While concern regarding linguistic signaling may be most acute in the context of explicitly stating the client's innocence, it may be suggested that in any given case the use

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211. *Id.*

212. *See supra* Part IV.A.1, 2.

213. Scholars have made a similar point specifically in the context of preventing client perjury. *See Schwartz, supra* note 33, at 1141.

214. 457 U.S. 157 (1986).

215. *Id.* at 161, 176.

216. *See Schwartz, supra* note 33, at 1140–41.

of qualifying language in the evidence-reflects closing argument, or argument by implication in the false-implication closing argument, may potentially signal to the knowledgeable fact finder that defense counsel is aware of his client's guilt.

However, in other aspects of the trial process precedent exists for advancing ethical considerations over concerns regarding how a jury might interpret defense counsel's specific advocacy techniques. An example of this paradigm can be found once again in the context of client perjury, specifically in the narrative approach to the use of perjured testimony. Under this approach, in order for the lawyer to avoid condoning perjury, when the lawyer knows the client will present perjured testimony, the client is called to the witness stand and allowed to testify in narrative form.<sup>217</sup> The lawyer is then prohibited from arguing during closing argument those portions of the defendant's testimony that they know to be perjured.<sup>218</sup> However, it is understood that the awkward presentation of the defendant's testimony, as well as defense's counsel's failure to argue such testimony, may send a signal that the testimony is not truthful and the defendant's protestations of innocence are not to be believed.<sup>219</sup>

Regardless of this concern, the use of the narrative approach to potential client perjury enjoys widespread use.<sup>220</sup> And, once again, as noted above, legal commentators have posited there is little compelling reason why ethical concerns in the context of client perjury should be treated differently than ethical concerns that may arise in the context of discrediting the truthful witness.<sup>221</sup>

It may also be suggested that, in allowing for truthful witnesses to be discredited while constraining the type of language used during closing argument, current ethics rules place undue emphasis on linguistic

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217. See Raymond J. McKoski, *Prospective Perjury by a Criminal Defendant: It's All About the Lawyer*, 44 ARIZ. ST. L.J. 1575, 1623–25 (2012).

218. *Id.* at 1623.

219. See *Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978) (observing that a knowledgeable judge or juror might infer from counsel's minimal involvement in the presentation of the defendant's testimony that counsel did not believe the witness); Patrick R. Grady, *Nix v. Whiteside: Client Perjury and the Criminal Justice System: The Defendant's Position*, 23 AM. CRIM. L. REV. 1, 10–11 (1985) (arguing that the narrative approach "signals to the jury the lawyer's disbelief of his or her client's testimony."). Regardless of this concern, the use of the narrative approach to potential client perjury enjoys widespread use. McKoski, *supra* note 217, at 1624.

220. McKoski, *supra* note 217, at 1624.

221. See Schwartz, *supra* note 33, at 1140–41.

precision. In other words, because ethics rules still allow for attorneys to argue false defenses, requiring that they do so through carefully crafted rhetoric unnecessarily promotes form over substance.

However, emphasis on the use of carefully crafted language is a necessary component of maintaining the proper balance between the defendant's right to argue a false defense and the defense attorney's role as an officer of the court. In this regard, scholars have recognized that the subtle differences in the rhetoric that may be used to argue the same false defense represents the dividing line between an appropriate challenge to the prosecution's case and an inappropriate misrepresentation.<sup>222</sup>

Moreover, the alternative, i.e., giving criminal defense attorneys the express right to make false statements of fact, would not only disturb this important balance, it would prove untenable. In the eyes of many, lawyers are already untrustworthy and the legal profession is one of low moral and ethical standards. In fact,

[t]he popular image is that lawyers, and trial lawyers in particular, are cunning deceivers and misleaders, flimflam artists who use sly rhetorical skills to bamboozle witnesses, turning night into day. In this conception, lawyers tell stories only in order to seduce and beguile the hapless jurors who fall prey to the advocate's tricks.<sup>223</sup>

If ethics rules were written in such a way that lawyers could ask questions in the absence of a good faith basis or make explicit statements during closing argument that the lawyer knew to be untrue, the standing of the legal profession would suffer even more dramatically and such rules would further undermine public confidence in the profession as a whole.

#### IV. THE (LIMITED) POTENTIAL TO CURB UNETHICAL BEHAVIOR

##### A. *Understanding the Persistence of Unethical Techniques*

Despite the fact that the truthful witness can be discredited through entirely ethical means, courtroom observers have noted that criminal

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222. *E.g.*, Myers & Ohlbaum, *supra* note 2, at 1064–65.

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

defense attorneys frequently employ what this Article has termed the unethical false-story cross-examination and closing argument.<sup>224</sup>

To that end, one of the more frequent ethical abuses that occurs on cross-examination is the use of the false-story cross-examination and its heavy reliance on asking questions in the absence of a good faith basis.<sup>225</sup> In listing the common “tricks” employed by trial attorneys on cross-examination, Professor Richard H. Underwood observes that lawyers frequently ask questions despite the fact that “the lawyer has no good faith basis for asking a question that is suggestive of improper conduct by the witness. The lawyer simply invents an outrageous scenario and presents it to the jury by way of question.”<sup>226</sup> Another commentator has referred to the type of cross-examination questions that form the basis of the false-story cross-examination as “[o]ne of the more insidious tools in the cross-examiner’s arsenal,”<sup>227</sup> while noting that, “[a]lthough we expect attorneys to adhere to the rules of evidence and confine their strategies to the ethical boundaries of the rules, they often bend the rules and stretch the strategies.”<sup>228</sup>

Further, Professor Harry I. Subin has described as “sanitized” closing arguments in which defense counsel refuses to “‘assert’ that facts known to him to be false are true.”<sup>229</sup> (While Subin has not provided a term for these types of closing arguments, this Article has termed them the false-implication closing argument.) Professor Subin then went on

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224. It should be noted that the author’s own experience as a practicing criminal defense attorney with over a decade of experience further confirms the observations of the legal commenters that are referenced in this section.

225. Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 124–25 (1997); see also Saul M. Kassin et al., *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV. 373, 373–75 (1990) (referring to cross-examination by innuendo as a frequently employed “dirty trick”); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 121 (1996) (discussing common ethics violations that occur on cross-examination and referring to the types of questions that form the basis of this Article’s characterization of the false story cross-examination as a “presumptuous cross-examination question”).

226. Underwood, *supra* note 225, at 124–25.

227. See Strier, *supra* note 225, at 120–21 (“During cross-examination, attorneys employ a plethora of nasty and dirty tricks. Interrogated witnesses are to be pitied, for cross-examination questions ‘are loaded with unsupported insinuations of improper motives, negligence, incompetence, perjury or, worse, suspicion of guilt of the crime for which the defendant is on trial.’” (quoting *Commonwealth v. Rooney*, 313 N.E.2d 105, 112 (Mass. 1974))).

228. *Id.* at 221.

229. Subin, *supra* note 27, at 691.

to observe that this type of closing argument “*is much more forthright than those which most attorneys would give.*”<sup>230</sup>

Why then do criminal defense attorneys employ the unethical false story techniques to advance a false defense when ethical means are available? There are several answers to this question. As discussed below,<sup>231</sup> these reasons range from effective trial advocacy and the pressures and culture of criminal defense lawyering to the fact that it is almost impossible to get caught.<sup>232</sup>

### 1. The Importance of Narrative Structure

As noted previously, a story or narrative is defined by two important elements in that a story or narrative represents a purposefully ordered sequence of events designed to achieve a particular goal that explains these events by focusing on characters, their goals, and their struggles to achieve their goals.<sup>233</sup> However, it is not necessary in every case for the defense theory to consist of an alternative story to the one being offered by the prosecution.

For example, defense counsel may advance a false defense by arguing only that the defendant was misidentified when he was randomly picked out of a photo array. Or the defense attorney may argue that the witness is not worthy of belief without offering an alternative explanation to the one offered by the state. In both types of scenarios, the defense theory is only that the evidence offered by the prosecution is simply not strong enough to conclude, beyond a

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230. *Id.* (emphasis added).

231. *See infra* Part IV.A.1–4.

232. There is also the possibility of an additional explanation. Using 105 Williams College undergraduate students, researchers attempted to determine if “negative presumptuous questions” impacted a witness’s credibility. *See* Kassin, *supra* note 225, at 375–76. These questions were very similar to this Article’s descriptions of the false-story type of questions asked on cross-examination in that the questions implied negative facts and sought to damage the credibility of the witnesses through innuendo. Students read these questions in a mock trial transcript. *Id.* at 375. The witnesses were a rape victim and a psychological expert. *Id.* at 375, 380. The results of the study are inconclusive. *Id.* at 381. The negative presumptuous questions did in fact have a negative impact on the expert witness’s credibility but appeared to have no impact on the rape victim’s. *Id.* at 380–81. While the researchers attempted to reconcile these results, they ultimately concluded that “[f]urther research is needed, however, to determine the factors that moderate these results. Further research is also needed to evaluate the extent to which our findings generalize to real juries.” *Id.* at 381. Because of the inconclusive nature of these results, it is the author’s opinion that while worth noting, further discussion of this study is not warranted in the body of this Article.

233. *See* Posner, *supra* note 80, at 738–39; *supra* note 85 and accompanying text.



reasonable doubt, that the defendant was the perpetrator of the crime. From a trial advocacy perspective, these types of defenses represent a one-dimensional challenge to the state's case because they only suggest the evidence alone is too weak to justify a conviction, without offering the fact finder an alternative story.

These types of one-dimensional challenges can be advanced through both ethical and unethical means. In this sense, the telling of a false story is not the only unethical way to weaken the testimony of the state's truthful witness. Pursuant to this Article's previous discussion,<sup>234</sup> even if defense counsel chooses not to tell the jury a story, it is still unethical for the defense attorney to ask a question without a good faith basis, or to explicitly tell the jury something he knew was false.

However, in order to comport with current ethics rules, the defense attorney advancing a one-dimensional challenge to the state's case in the form of a false defense can use the ethical forms of cross-examination and closing arguments described previously. Defense counsel need only phrase his questions in such a way as to satisfy the good faith basis requirement on cross-examination and during closing argument to avoid explicitly telling the fact finder something is true that he knows to be false.

Despite the fact that a one-dimensional challenge can be advanced through both ethical and unethical means, the one-dimensional challenge is not commonly employed.<sup>235</sup> The reason for this is simple: defense attorneys have long recognized that it is essential to tell the jury a story and, therefore, infrequently launch one-dimensional attacks on the prosecution's evidence.<sup>236</sup>

This is because "[w]e are typically able to doubt an explanation only when we are persuaded, at least provisionally, of an alternative explanation. Thus, the effective defender cannot simply protest that the prosecution has not made its case. Rather, she must introduce and embellish plausible alternatives to the prosecutor's explanations."<sup>237</sup> To that end, narrative structures are a natural mode for understanding the human experience.<sup>238</sup> In fact, "[p]sychologists are moving towards the

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234. See *supra* Part III.B.2.

235. THOMAS A. MAUET, TRIAL TECHNIQUES 27 (8th ed. 2010).

236. *Id.* ("Effective storytelling is the basis for much of what occurs during trial . . . . Small wonder, then, that good trial lawyers are invariably good storytellers.")

237. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1760 (1993).

238. J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*,

conclusion that all of our knowledge is contained in stories and in the mechanisms to construct and retrieve them.”<sup>239</sup>

It is difficult to understate the importance of narrative in the context of a criminal trial. Indeed, “[i]t is now widely accepted, and empirical research demonstrates, that narrative plays an important role throughout the entire trial process.”<sup>240</sup> This is true for two primary reasons.<sup>241</sup>

First, jurors organize and interpret the evidence presented at trial into a story format.<sup>242</sup> The process by which evidence is presented in a typical criminal trial can be fragmented, often times being presented out of logical order and accompanied by discussion concerning evidentiary foundations that are themselves unrelated to the case.<sup>243</sup> Because stories are the most common form of communication, to better understand the evidence presented at trial, jurors reduce that evidence into story form.<sup>244</sup> Story structure also helps jurors reduce the risk of information overload “by making it possible to continuously organize and reorganize large amounts of constantly changing evidence.”<sup>245</sup> Researchers have noted, “Stories provide useful structures: plot, characters, time frames,

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14 LEGAL WRITING 53, 57 (2008); *see also* Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 239 & n.2 (2012) (noting that storytelling has an almost “primal” relationship to the human condition). Van Patten supports his description of storytelling as “primal” using a passage from Gerry Spence:

Of course it is all storytelling—nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening . . . the shivers racing up your back to the place where the scalp is made, and then the breathless climax, and the sadness and the tears with the dying of the embers, and the silence.

Gerry L. Spence, *How to Make a Complex Case Come Alive for a Jury*, A.B.A. J., Apr. 1986, at 62, 63.

239. Robbins, *supra* note 85, at 772.

240. John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1088 (2007).

241. For an excellent discussion concerning why narrative plays such an important part in the trial process, *see id.*

242. *Id.* at 1088.

243. John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 612 (2005).

244. Blume, *supra* note 240, at 1088 (citing W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 164–68 (1981)).

245. *Id.*

motives, and settings, which help jurors process and understand what is otherwise complex and sometimes unfamiliar information.”<sup>246</sup>

Second, during deliberations, juries “re-story” the evidence presented during the trial.<sup>247</sup> In deciding who should win the case, jurors tend to argue with one another in story format.<sup>248</sup> What this means is that trials are essentially story battles, with the side that tells the best story being declared the victor.<sup>249</sup>

The above reasons explain why criminal defense attorneys choose trial theories that revolve around storytelling and also explain, in part, why trial attorneys gravitate toward the false-story techniques.

However, this Article’s example demonstrates that the ethical forms of cross-examination and closing argument can also be used to tell the same story as the false-story techniques. It should be noted that both the ethical and unethical types of cross-examinations and closing arguments can be designed to advance the same theory of defense—for example, in *Commonwealth v. Cassidy* this theory of defense is that Officer Drebin framed Quinton Cassidy. In both the ethical and unethical sets of techniques, this theory is advanced in story form in that it is presented as a purposefully ordered sequence of events and explained from the perspective of Officer Drebin, the story’s main character. In this sense, beyond simply a one-dimensional challenge, ethical forms of cross-examination and closing argument can also be used to advance a two-dimensional challenge, in that defense counsel can use these techniques to argue not just that the prosecution’s evidence is weak but also to imply an alternative story to the one being presented by the State.

Despite this fact, defense attorneys infrequently use ethical forms of cross-examination and closing argument when the defense theory consists of an alternative story.<sup>250</sup> This is because the false story techniques represent a better way to tell the story than their ethical, but not nearly as effective, storytelling counterparts.<sup>251</sup>

In his book, *Storytelling for Lawyers*, Professor Philip N. Meyer noted, “[S]torytellers have understood for millennia, there *is* a powerful

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246. *Id.* (citing SUNWOLF, PRACTICAL JURY DYNAMICS 271 (2004)).

247. *Id.* at 1089.

248. SUNWOLF, *supra* note 246, at 272–80.

249. *See* Blume, *supra* note 240, at 1089.

250. *See supra* Part III.B.2.

251. *See* Rideout, *supra* note 238, at 57; *see also* Blume, *supra* note 240, at 1090.

and well-defined narrative architecture or structure in stories.”<sup>252</sup> Professor Meyer suggests that the DNA of a story largely consists of five interrelated components.<sup>253</sup> In the best stories, these five components fit together seamlessly.<sup>254</sup> These components are: (1) Scene, (2) Cast and Character, (3) Plot, (4) Time Frame, and (5) Human Plight.<sup>255</sup>

To that end, it may be difficult to tell that the true-facts cross-examination is telling any story at all. The questions may be asked in such a way as to intimate the story of Quinton Cassidy being framed, but the story is to some extent buried beneath all of the truthful answers. This is especially clear when compared to the false-story cross-examination.<sup>256</sup> The false-story cross-examination is principally designed to tell the story of how the defendant was framed through the questions defense counsel asks. The fact finder can easily discern the alternative story and identify the five interrelated components of the story from the questions alone. In fact, this is so much so that Officer Drebin’s answers are basically irrelevant.

The role of narrative is also important with respect to the types of closing arguments that are used to raise doubts about a witness’s testimony. While the false-implication closing argument may be used to tell a story, because the defense is constrained by making only technically true statements, the story is more difficult to detect. After all, it is only implied, not stated. Further, having to tell a story frequently qualified by the language “the evidence reflects that” or “the evidence demonstrates that” also hampers the trial attorney’s ability to seamlessly integrate the five component pieces of a story together.

However, with respect to the false-story techniques, because the defense attorney is willing to make statements he knows are not true, he can tell the story of how the defendant was framed by easily fitting the five components of effective storytelling together. He does this by

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252. PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* 3 (2014).

253. *Id.* at 4.

254. *Id.*

255. *Id.*

256. It is worth pointing out that it is not necessary to use the false-story cross-examination to advance a false story, although as pointed out in this section, this false-story cross-examination is frequently used. However, a false story can be told by using the answers elicited on the true-facts cross-examination and then using the false-story closing argument. Some litigators may in fact prefer such a method. However, for the reasons previously detailed in Part III of this Article, this would mean that half of their conduct was ethical and half was not.

telling the story in a way that most listeners would immediately grasp as a story of the defendant's innocence.

Additionally, because the false-story closing argument is not bound by technically true statements, the trial attorney can tell the story using not only stronger language but language that represents a more authentic way of describing real human events. For example, the lawyer can say, "Now let me tell you what really went down out there. Officer Drebin can't be believed when he says he saw my client with a gun. In those dark lighting conditions, he couldn't see anything." If defense counsel uses the false-implication closing argument, he can express the same point, but in a less natural way. The lawyer must say something like, "The government must prove beyond a reasonable doubt that my client possessed a firearm. To do so, you must find beyond a reasonable doubt that the police officer saw the firearm on a dark street, with poor lighting conditions." Moreover, in terms of the evidence-reflects type of closing argument, it is not natural to tell stories by frequently qualifying statements using legal sounding phrases such as "the evidence reflects," or the "the evidence demonstrates that."

In light of the above observations, it is not surprising that the false-story cross-examination and closing argument techniques are commonly used to discredit the truthful witness.<sup>257</sup> When criminal defense attorneys choose trial theories, when possible, they choose to tell stories.<sup>258</sup> Therefore, it is also not surprising that when defense counsel attempts to cast doubt on a witness's testimony by presenting an alternative story to the one offered by the prosecution (and the trial has essentially been reduced to a story battle), defense counsel frequently chooses the best storytelling techniques available.<sup>259</sup>

## 2. The Importance of Explicitly Stating That Your Client Is Innocent

Another important difference between the ethical forms of closing arguments and the unethical false-story closing argument technique relates to how the client's innocence is presented to the fact finder. Because the false-story technique disregards the ethical requirement of making technically true statements, this technique allows the trial attorney to tell the jury his client is innocent.<sup>260</sup> This is a necessary

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257. See *supra* pp. 332–35.

258. See MEYER, *supra* note 252, at 2.

259. See *id.* at 3.

260. See Braccialarghe, *supra* note 57.

component of the false story as the defendant's innocence is deeply woven into the fabric of the alternative explanation offered to the fact finder.

However, with respect to the ethical false-implication closing argument, the client's innocence is only implied and, because defense counsel will not say something they know to be explicitly untrue, the jury is told that the state cannot prove its case beyond a reasonable doubt and, therefore, the defendant is "not guilty."<sup>261</sup>

Legal commentators have long suggested that, from the perspective of sound trial advocacy, it is folly for the criminal defense attorney to tell the jury his client is not guilty as opposed to actually innocent.<sup>262</sup> In 1966, Professor Monroe H. Freedman observed,

Criminal defense lawyers do not win their cases by arguing reasonable doubt. Effective trial advocacy requires that the attorney's every word, action and attitude be consistent with the conclusion that his client is innocent. As every trial lawyer knows, the jury is certain that the defense attorney knows whether his client is guilty. The jury is therefore alert to, and will be enormously affected by, any indication by the attorney that he believes the defendant is guilty. Thus, the plea of not guilty commits the advocate to a trial, including a closing argument, in which he must argue that "not guilty" means "not guilty in fact."<sup>263</sup>

More recently, Ann Roan, articulated the difference between what she calls "negative case analysis" and "building the positive case for innocence."<sup>264</sup> Roan argues that a defense theory that is premised on what the state cannot prove represents negative case analysis.<sup>265</sup> However, she suggests defense theories in criminal cases should never be framed in this way.<sup>266</sup> Instead, she argues that every client should be presented as innocent.<sup>267</sup>

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261. See *supra* note 87 (noting the factual difference between a plea of not guilty and the defendant being actually innocent of the crime with which he is charged); see also Welkener, *supra* note 151, at 1088 (noting that stating a client is innocent when the defense counsel knows otherwise violates Model Rule 3.3(a)(1)).

262. E.g., Freedman, *supra* note 2, at 1471–72.

263. *Id.*

264. Ann M. Roan, *Building the Persuasive Case for Innocence*, CHAMPION, Mar. 2011, at 18, 19.

265. *Id.*

266. *Id.*

267. *Id.* As a result, she argues that every case can be fit into one of six categories of

Roan suggests that juries perceive negative case analysis as a combination of lawyer tricks and legal technicalities.<sup>268</sup> In Roan's view,

[w]hen a defense lawyer says, "The state cannot prove each and every element beyond a reasonable doubt," juries hear, "Ladies and gentlemen, my client is guilty. Guilty, guilty, guilty. But you're going to let him go anyway. Why? Because of technical legal mumbo-jumbo. That's why." No wonder lawyers lose cases when they prepare them using a negative case analysis.<sup>269</sup>

It is true that the evidence-reflects type of closing argument allows defense counsel to say, "The evidence reflects my client is innocent," as opposed to saying only that "My client is not guilty." However, even using this type of closing argument, defense counsel is not actually telling the jury his client is innocent. Instead, every time the jury hears his client is innocent that statement is accompanied by a qualifying phrase such as "the evidence reflects that my client is innocent." In this regard, the observations of one trial attorney regarding effective closing argument are worth noting: "The language in closing arguments is entirely different from the ambiguity normally used by lawyers. The lawyer can no longer afford to speak in alternatives or uncertainties. In the closing argument, he must speak in absolutes. There must be no doubting his position."<sup>270</sup>

Ultimately, the observations of the above commentators plainly capture the reasons why criminal defense attorneys choose to discredit honest witnesses through the false-story closing argument technique. Put simply, trial lawyers use the false-story technique because they can tell the jury an actual story in which the client is innocent and the story of their client's innocence can be told most persuasively.<sup>271</sup>

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innocence. These six categories are: (1) "It never happened (full denial)"; (2) "It happened, I didn't do it (e.g., mistaken identity)"; (3) "It happened, I did it, but it was not a crime (e.g., self-defense)"; (4) "It happened, I did it, it was a crime, but it was not this crime (lesser offense)"; (5) "It happened, I did it, it was this crime, but I'm not responsible (e.g., entrapment; duress; choice of evils; insanity)"; and (6) "It happened, I did it, it was this crime, and I'm responsible—so what?" *Id.* Interestingly, Roan's article never addresses any of the potential ethical implications of stating a defendant is innocent when defense counsel knows this to be untrue.

268. *Id.*

269. *Id.*

270. James H. Roberts, Jr., *The SEC of Closing Arguments*, 23 AM. J. TRIAL ADVOC. 203, 209 (1999).

271. It is worth noting that in the specific context of stating that the client is innocent, the above argument essentially boils down to the concern that use of different rhetoric,

### 3. The Culture of Criminal Defense Work

A legal scholar once noted, “One of the most difficult tasks of a criminal defense attorney . . . is to determine ‘how far he may go’ in addressing the court.”<sup>272</sup> Admittedly, in the heat of battle, even for the most ethically conscious trial attorneys, it may be difficult to avoid crossing the fine line between zealous advocacy and personal endorsement of facts known to be untrue.<sup>273</sup> Because of the slight differences in the techniques used to discredit the honest witness, invariably even the most well-meaning attorney may inadvertently cross over into in the unethical phrasing of questions or argument.

However, it is doubtful that once a criminal defense attorney has decided to argue a false defense and discredit a truthful witness, he will think much about the strictures of the numerous ethical provisions cited in this Article when preparing cross-examination and closing argument.<sup>274</sup> Instead, when possible, he will choose to tell a false story and not think much about it.<sup>275</sup> The overarching reason for this is that many criminal defense attorneys feel a special responsibility for their client’s fate.<sup>276</sup> It is not uncommon for the inspired criminal defense attorney to feel as though he is “the final, and perhaps only, bulwark between the client and the rest of the world.”<sup>277</sup>

In this regard, it is essential to note that the rules promulgated in ethics codes generally fail to take into account the social contexts in which professional decisions are made.<sup>278</sup> In fact, some legal ethicists

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depending upon whether the defendant confesses his guilt to his lawyer, poses the practical problem of potentially signaling to the fact finder during closing argument that the defendant is guilty. The ethical justification for prohibiting explicitly untrue statements referencing the client’s innocence, despite the potential for linguistic signaling, was addressed in *supra* Part III.C.2.

272. Harvey A. Schneider & Stephen D. Marks, *The Contrasting Ethical Duties of the Prosecutor and Defense Attorney in Criminal Cases*, 7 U.W.L.A. L. REV. 120, 131 (1975).

273. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 167 cmt. b (AM. LAW INST., Tentative Draft No. 8 1997) (“It may be difficult in practice to maintain the line between permissible zealous argument about facts and inferences to be drawn from them and impermissible personal endorsement.”).

274. See Fritz Scheller, *Cutting Bait*, 7 OHIO ST. J. CRIM. L. 673, 673 (2010).

275. See *id.*

276. The famous criminal defense attorney, Edward Bennett Williams, once said, “I protect my clients against criminal guilt; judgment I leave to the power of almighty God.” BRIAN C. DRUMMOND, *THE IMPORTANCE OF PREPARATION IN DEVELOPING A CRIMINAL DEFENSE STRATEGY* 89 (Aspatore 2010).

277. Scheller, *supra* note 274, at 673.

278. Robert Granfield & Thomas Koenig, *It’s Hard to Be a Human Being and a*



posit that the root cause of professional misbehavior does not result from lawyers being unaware of the applicable disciplinary rules or because these rules are too difficult to understand,<sup>279</sup> but rather because of “rampant excesses of the ‘lawyering skills’ that every law student manages to acquire—namely rationalization and denial—that leave them either unable to discern their true ethical situation or unable to conform their conduct to known standards of professional behavior.”<sup>280</sup>

With respect to the unethical means of casting doubt on the testimony of honest witnesses by telling a false story, this rationalization includes believing that whatever type of cross-examination or closing argument is used, the theory of defense is still the same. It is not as if the choice of techniques has the effect of casting the witness in the light of either a saint or a sinner. In other words, the criminal defense attorney has already passed his own personal Rubicon in which he has no qualms about making the honest witness appear unsure of his testimony or even made to look like a liar. Yet, exactly how defense counsel chooses to discredit the truthful witness can impact the outcome of the case.

Further, these rationalizations relate to the subtle differences between the ethical and unethical techniques that can be used to make the honest witness appear incredible. Admittedly, whether these techniques are ethical or unethical turns on the subtle phrasing of questions and carefully worded statements asking the jury to find reasonable doubt. In light of the heavy responsibility criminal defense attorneys feel, many have no difficulty justifying what they view as a minor indiscretion in light of the fact that their client may be facing significant consequences.<sup>281</sup>

Some defense attorneys may embrace the false-story techniques by rationalizing that this particular indiscretion is extremely minor in light of their view that prosecutors frequently engage in far worse unethical behavior that is entirely inconsistent with achieving a just result.<sup>282</sup>

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*Lawyer*”: *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 505 (2003) (“Codes of ethics have typically ignored the social context in which professional decisions are made.”).

279. Schuwerk, *supra* note 6, at 795.

280. *Id.* The same author posits that other reasons for unethical behavior relate to other “individual pathologies” such as mental or emotional illness or substance abuse. *Id.*

281. See DRUMMOND, *supra* note 276, at 89.

282. For a complete discussion of one defense attorney’s view of the numerous unfair and potentially unethical practices that prosecutors continually engage in, see Abbe Smith,

Many defense attorneys may feel that the culture of the prosecutor's office has now come to reflect a "win-at-all-costs" mentality.<sup>283</sup> Professor Abbe Smith provides the most compelling emotional example of this point of view when observing, "There is a courthouse saying—known by anyone who has ever practiced criminal law—that expresses the ethos of winning over everything else in a grisly, sardonic way: 'Any prosecutor can convict the guilty. It takes real talent to convict the innocent.'"<sup>284</sup> The criminal defense attorney might reason, "So what if the truthful witness is made to look untruthful. If the prosecution is willing to convict an innocent person, then what's the big deal if I discredit a truthful witness by telling a false story as opposed to implying one, or if I forget to state that 'the evidence demonstrates' before every inference I ask the jury to draw."

Moreover, some criminal defense attorneys might embrace the most effective, but unethical, way of arguing a false defense for no other reason than they too just want to win. Indeed, the win-at-all-costs mentality is alive and well in the contemporary practice of law, and not only at the prosecutor's office.<sup>285</sup> Criminal defense attorneys are certainly not immune from this temptation. In her famous article describing the different motivations that drive individuals to become criminal defense attorneys, Professor Barbara Allen Babcock observed that for some, ego is what drives their choice of profession.<sup>286</sup> Referring to these types of attorneys as the "egotist," Professor Babcock notes, "And winning, ah winning has great significance because the cards are

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*Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

283. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 16 (2009) ("The pressure to bring and win cases has infiltrated the very culture of the prosecutor's office. Prosecutors may have once believed their role to be like that of a judge—to evaluate and determine when it is fair to bring criminal charges or pursue a conviction. Now the primary purpose of the prosecutor is to seek as many convictions as possible. In turn, the pressure to produce wins has led to a 'win-at-all-costs' mentality, which pushes prosecutors toward misconduct as a means to an end.").

284. Smith, *supra* note 282, at 389.

285. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 20–22 (1st ed. 1999) (positing broadly that the contemporary practice of law has redefined what "truth and justice" mean in representing clients). No longer does zealous representation entail a broad understanding of what these words mean. *Id.* Instead, zealous advocacy has been turned into an "Adversary Theorem," which defines "Truth" and "Justice" as "win at any cost." *Id.*

286. Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983–1984).

stacked for the prosecutor. To win as an underdog, and to win when the victory is clear—there is no appeal from a ‘Not Guilty’ verdict—is sweet.”<sup>287</sup>

#### 4. The Lack of Consequences

As this Article has shown, criminal defense attorneys choose to discredit the honest witness through the unethical use of the false-story techniques because telling a good story, using persuasive language, and stating their client is actually innocent makes for the most effective type of trial advocacy.<sup>288</sup> Furthermore, the culture and pressures of being a criminal defense attorney provide additional temptation to eschew the selection of ethical trial techniques in the context of discrediting the truthful witness.<sup>289</sup>

What undoubtedly enhances this temptation is the fact that, from a practical standpoint, current ethics rules are completely unable to prevent criminal defense attorneys from selecting these unethical techniques.<sup>290</sup> There are three reasons for this: (1) attorney-client confidentiality/privilege and the Fifth Amendment right against self-incrimination in criminal cases,<sup>291</sup> (2) the rules of trial practice,<sup>292</sup> and (3) the fact that defense attorney conduct at the trial level remains largely unchecked because of the impossibility of the government’s appealing the defendant’s acquittal.<sup>293</sup>

Ethical rules and standards are intended to be self-policing.<sup>294</sup> If an ethics rule prohibits an attorney from engaging in a certain type of conduct, the attorney should voluntarily refrain from doing so.<sup>295</sup> Whether the attorney would “get caught” or not is beside the point. If

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287. *Id.* at 178.

288. *See supra* Part IV.A.1–2.

289. *See Scheller, supra* note 274, at 674.

290. *See infra* Part IV.B.

291. *See* MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 2014) (noting that with some exceptions not applicable to the current issue, “[a] lawyer shall not reveal information relating to the representation of a client”); *see also* U.S. CONST. amend. V.

292. *See MAUET, supra* note 235, at 255–58.

293. *See* Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1315 (1996).

294. *See* MODEL RULES OF PROF’L CONDUCT pmb. & scope (AM. BAR ASS’N 2014) (“Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”).

295. *Id.*

an attorney is unwilling to police himself at trial, the only way that particular type of conduct can be curtailed is through an objection by opposing counsel, either during cross-examination or closing argument.<sup>296</sup>

If an attorney chooses the false-story type of cross-examination and is therefore unwilling to voluntarily refrain from asking questions without a good faith basis, the prosecutor can object to the nature of the questioning.<sup>297</sup> However, prosecutors (like all attorneys) are ethically prohibited from making objections without their own good faith belief that the objection is legally valid.<sup>298</sup> While there are certainly factual scenarios in which a prosecutor might object to defense counsel's questions on cross-examination by asserting a lack of good faith basis, in most situations, the prosecutor, ironically, has no good faith basis for making such an objection.<sup>299</sup> This is because confidential statements made by a client during the attorney-client interview clearly satisfy the good faith basis test,<sup>300</sup> and the prosecutor has no idea what the client told his attorney due to the protections afforded by attorney-client confidentiality and its accompany evidentiary privilege.<sup>301</sup> This is also true because of the criminal defendant's Fifth Amendment right against self-incrimination.<sup>302</sup> Therefore, and with the ultimate twist of irony, it is unethical for the prosecution to object to defense counsel's lack of a good faith basis on cross-examination when the prosecution has no good faith basis to make such an objection.

Further, even if the prosecutor made such objections, defense counsel could properly claim that the nature of these objections actively

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296. See Nidiry, *supra* note 293, at 1308.

297. See *supra* note 109 (explaining that this objection can be lodged as both an ethical violation and a standalone rule of evidence).

298. See Blinka, *supra* note 108, at 34; see also Tanford, *supra* note 111, at 521–27 (discussing the good faith basis principle).

299. See Tanford, *supra* note 111, at 501.

300. *Id.*

301. See MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2014) (noting that, with some exceptions not applicable to the current issue, "[a] lawyer shall not reveal information relating to the representation of a client"); see also Inbal Hasbani, *When the Law Preserves Injustice: Issues Raised by a Wrongful Incarceration Exception to Attorney-Client Confidentiality*, 100 J. CRIM. L. & CRIMINOLOGY 277, 282 (2010) ("Client confidentiality has both evidentiary and ethical components. The attorney-client privilege, which is the evidentiary doctrine, is the oldest common law privilege of the various confidential communications."). The evidentiary component of attorney-client privilege is found in Federal Rule of Evidence 501.

302. See *supra* note 52.

sought to intrude on the attorney-client privilege.<sup>303</sup> Indeed, the attorney-client privilege shields a client's confidential statements to an attorney that relate to the client's past criminal misconduct.<sup>304</sup> While an assertion of the privilege typically allows a court to require disclosure of the privileged communication in order to rule on the validity of the privilege claim, an exception to this rule exists when the privileged communication between attorney and client implicates the defendant's past criminal wrongdoing.<sup>305</sup> Therefore, because of the protections afforded by attorney-client privilege, prosecutors are unable to force defense counsel to reveal the good faith basis for the questions asked on cross-examination through the use of an evidentiary objection. As a result, prosecutors are unable to discover if defense counsel has a good faith basis for the cross-examination in the first place.

Not surprisingly, when prosecutors do object, asserting the lack of a good faith basis, to defense counsel's questions on cross-examination, research has failed to reveal any case in which the prosecutor alleged that defense counsel knew a question's implication was false because he was told such by his client.<sup>306</sup> Rather, when the prosecution objects, citing defense counsel's lack of a good faith basis, these objections usually arise because the questions themselves do not appear to have much possibility of being supported by what the defendant might have told his defense attorney in confidence.<sup>307</sup> In other words, the

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303. See *United States v. Zolin*, 491 U.S. 554, 562 (1989).

304. *Id.* (noting that attorney-client privilege allows clients to "make full disclosure to their attorneys' of past wrongdoings" (quoting *Fisher v. United States*, 425 U.S. 391 (1976))).

305. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 1.12 (5th ed. 2012) ("When privilege claims are made, and the purpose of the hearing is to determine the validity of these claims, the court may require disclosure of the material in order to rule except when the claim asserts the privilege against self-incrimination."). It should be noted that the court may require disclosure of the communication that is subject to the privilege claim when the party seeking the communication is claiming the crime-fraud exception to the attorney-client privilege. *Id.* § 5.22. The crime fraud exception requires an allegation that the client sought the services of the attorney with respect to ongoing or future crimes or frauds. *Id.* § 5.22. And even when asserting the crime fraud exception to attorney-client privilege, before a court can require disclosure of requested communications, it is necessary for the requesting party to make a showing supporting a good faith belief that the crime-fraud exception applies. *Zolin*, 491 U.S. at 572.

306. See *supra* note 109. This research includes an extensive search of annotated ethics codes, attorney disciplinary hearings, formal ethics opinions, court opinions and numerous secondary sources including scholarly articles and bar publications.

307. For an example of a scenario in which a prosecutor might object to defense counsel's questions because they do not have a good faith basis, see *United States v. Taylor*, 522 F.3d 731 (7th Cir. 2008). In *Taylor*, crack cocaine was seized in a car following a traffic

prosecution had a good faith basis for believing the defense attorney's questions were not supported by a good faith basis. When the theory of defense could reasonably be supported by something told to the attorney by his client, prosecutors seem to allow defense attorneys almost free rein on cross-examination.<sup>308</sup>

In terms of the false-story closing argument, the rules of trial practice regulate attorney conduct during closing argument.<sup>309</sup> The rules of trial practice are largely enforced through adversarial objections made before the trial judge.<sup>310</sup> What an attorney may or may not say during closing argument is grounded in the constitutional right to a fair

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stop. *Id.* at 733. At trial, the passenger in the defendant's car testified for the government and told the jury that the defendant indicated he was planning to sell drugs during their trip. *Id.* at 735. The defense attorney attempted to cross-examine the passenger concerning whether the government had quashed state warrants before trial in exchange for her cooperation. *Id.* at 736. Defense counsel had learned that the passenger had outstanding state warrants that had been quashed and suspected that a deal had been made for the passenger's testimony. *Id.* The trial court held a hearing on the issue and the passenger testified that she did not know why the warrants had been quashed. *Id.* An investigator also explained that no promises had been made to quash the warrants. *Id.* The prosecutor informed the judge that there was no federal government role in quashing the warrants. *Id.* Perhaps the most interesting case in which a defense attorney had to answer for bad faith cross-examination can be found in the 1945 case of *United States v. Pugliese*, 153 F.2d 497 (2d Cir. 1945). In *Pugliese*, defense counsel attempted numerous times to question a witness regarding her hospitalization for a mental illness. *Id.* at 498 & n.1. The court actually allowed the prosecutor to then question defense counsel about the evidentiary basis for this line of questioning. *Id.* at 498–99. However, the court's reasoning was premised on the notion that the prosecution "might probe for any that existed, for, if there was any, certainly it was not privileged." *Id.* at 499.

308. See, e.g., *Pugliese*, 153 F.2d at 498–99.

309. The rules of trial practice are closely related to evidentiary rules, but are conceptually distinct. See Dale Alan Bruschi, *Evidence: 1992 Survey of Florida Law*, 17 NOVA L. REV. 255, 323–24 (1992). While evidentiary rules regulate the admission of evidence into the trial record itself, the rules of evidence do not technically address an attorney's conduct during opening or closing statements. *Id.* Instead, attorney conduct during opening and closing statements is governed by the rules of trial practice. See *id.* The rules of evidence do not apply to opening and closings statements because at these stages in the proceedings the trial court is not receiving evidence. *Id.* Rather, on opening, the attorneys are only addressing what evidence they believe will be presented during the trial and at closing the attorneys are only asking the jury to draw inferences based on the evidence that has, or has not, already been entered. *Id.* As a result, the majority of objections made during an opening statement or closing argument are not related to a specific evidentiary rule or code provision. *Id.* Instead, what an attorney may or may not say on opening and closing is regulated by the rules of trial practice, which are grounded in the constitutional right to a fair trial. See *id.*

310. Nidiry, *supra* note 293, at 1308.

trial, which is largely defined in appellate decisions and enforced by the trial court.<sup>311</sup>

As it relates to permissible closing arguments, courts have generally mandated that defense counsel provide a basic evidentiary foundation for the inferences he is arguing.<sup>312</sup> Arguing without this evidentiary foundation is considered objectionable.<sup>313</sup> However, as explained above, with respect to the ethical limits of the false-story closing argument, while the defense attorney knows it to be false, the false story is nevertheless supported by an evidentiary foundation.<sup>314</sup> Frankly, it is the existence of this foundation that makes the overall theory of defense compelling in the first place. In this sense, the rules of trial advocacy provide very little basis upon which opposing counsel can ferret out this type of ethically inappropriate conduct.<sup>315</sup>

Further, because of the protections afforded by the doctrine of attorney-client confidentiality and the Fifth Amendment right against self-incrimination, there appear to be no instances in which defense attorneys have been brought before disciplinary committees when they have asked questions on cross-examination or have inappropriately argued false inferences from true facts when it was revealed that the defense counsel had knowledge of the defendant's guilt.<sup>316</sup> Only the defendant and his attorney know that questions may have been asked without a good faith basis and that an argument may have been presented to the jury by altering certain words and phrases in an inappropriate way. And neither of them are talking.

While both defense attorneys and prosecutors are held to the same ethical standards,<sup>317</sup> a defense attorney is unlikely to ever have his

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311. See Bruschi, *supra* note 309, at 323–24; see also J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 108–09 (1986) (“A party who loses at trial and believes that infractions of closing argument rules contributed to that loss, may appeal. Theoretically, a party appeals because the trial judge failed to properly enforce the rules of argument, not because the other attorney broke the rules. The appellate courts are supposed to decide whether the trial judge ruled correctly on objections and responded appropriately to errors.” (footnote omitted)).

312. Nidiry, *supra* note 293, at 1315.

313. *Id.*

314. See *supra* Part III.A.3.c.

315. See *supra* notes 309–311 and accompanying text.

316. Once again, this research includes an extensive search of annotated ethics codes, attorney disciplinary hearings, formal ethics opinions, court opinions and numerous secondary sources including scholarly articles and bar publications.

317. *United States v. Young*, 470 U.S. 1, 8 (1985).

unethical behavior on cross-examination or closing argument reviewed by a higher court.<sup>318</sup> Due to the Double Jeopardy Clause of the Fifth Amendment, the prosecution does not have the availability of appealing a not guilty verdict.<sup>319</sup> As a result, there is almost no case law discussing defense attorney misconduct.<sup>320</sup>

*B. The Limits of Reforming Ethical Rules to Prevent Unethical Behavior*

Not only are existing ethical rules unable to prevent the use of the false-story techniques but little can be done in the way of reforming the rules themselves so that they can more effectively regulate the unethical means by which honest witnesses are made to look untruthful.

For the reasons extensively detailed in Part III of this Article, there is little doubt that current ethics rules and standards do prohibit the unethical false-story techniques. As a result, little could be gained by amending existing ethics rules to regulate behavior that the rules already clearly regulate. To that end, it is worth noting once again the observation of legal ethicists who believe that the root cause of “professional misbehavior” does not result from lawyers being unaware of the applicable disciplinary rules or because these rules are too difficult to understand.<sup>321</sup> Instead, lawyers choose to ignore ethical rules by rationalizing away their dictates to such an extent that some lawyers are simply “unable to conform their conduct to known standards of professional behavior.”<sup>322</sup>

If the ethical rules as currently constructed rely so heavily on self-policing and attorneys are unwilling to do so, why not simply change the law in a way that would allow the competing parties to more effectively police each other and discover unethical conduct? Undoubtedly, insurmountable hurdles exist in this regard. It appears highly unlikely that there would be much support in almost any segment of the legal community for eliminating the protections afforded by attorney-client

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318. *See id.* at 9 n.6.

319. “Of course, when defense counsel employs tactics which would be reversible error if used by a prosecutor, the result may be an unreviewable acquittal.” *Id.* The Fifth Amendment reads in relevant part, “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.” *See* U.S. CONST. amend. V.

320. *See* Nidiry, *supra* note 293, at 1315 (“Unlike prosecutorial misconduct, defense attorney excess in closing arguments are rarely documented. Because of the absence of appellate review of improper acquittals, case law almost never discusses defense misconduct. It is thus much more difficult to find examples of such improprieties.” (footnote omitted)).

321. Schuwerk, *supra* note 6, at 795.

322. *Id.*



privilege, the Fifth Amendment right against self-incrimination, the defendant's Double Jeopardy protections, or for allowing attorneys to make evidentiary objections without a good faith legal basis.

Society has long ago decided that, similar to the guilty defendant's Sixth Amendment right to cross-examination and closing argument, the values advanced by the attorney-client privilege, the right against self-incrimination, double jeopardy protections, and the rules of evidence outweigh the fact that in any given instance they allow the truth to be obscured and the guilty to go free.<sup>323</sup> As a result, because of the importance of these rules of law, it is extremely unlikely that these rules will be changed so that the defendant's guilt can be revealed and, correspondingly, whether defense counsel has employed unethical tactics in the course of advancing a false defense may be discovered as well.

After all, if society is willing to accept that those who have engaged in criminal wrongdoing, even to the point of committing the most morally reprehensible crimes, may go free in order to protect the innocent, it would seem society is also willing to accept that criminal defense attorneys may not be disciplined for subtly altering rhetoric in such a way as to advance a false a defense through the use of words and phrases that may cross an ethical line.

In terms of attorney-client privilege, a client's ability to communicate confidentially with his attorney, and the related evidentiary privilege protecting that right, have long been deemed a "bedrock principle" of our justice system,<sup>324</sup> being formally recognized by the United States Supreme Court over a century ago.<sup>325</sup> The value of attorney-client confidentiality stems from the fact that competent representation requires that a lawyer be "fully informed of all the facts of the matter he is handling."<sup>326</sup> "[Because] clients are not likely to give full, candid, and possibly incriminating or embarrassing facts to their lawyers unless they are confident that the lawyer will keep the

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323. See Mitchell, *supra* note 17, at 341.

324. Andrew S. Bolin, *A Troubling Invasion into the Attorney-Client Privilege: Shands Teaching Hospital and Clinics v. Dannemann Asks the United States Supreme Court to Consider a Physician's Right to Counsel in Florida*, TRIAL ADVOC. Q., Spring 2011, at 7, 8 ("The protection of communications between client and lawyer, as embodied in the attorney-client privilege, is a bedrock principle of our justice system.").

325. See Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

326. Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (quoting MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (AM. BAR ASS'N 1979)).

information confidential,” attorney-client confidentiality has been deemed an essential means of ensuring the effective assistance of counsel.<sup>327</sup>

However, a tension exists between the values advanced by attorney-client confidentiality and a search for the truth.<sup>328</sup> Nevertheless, courts have acknowledged that this “is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure.”<sup>329</sup> The “social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence.”<sup>330</sup>

As a result, it appears a virtual certainty that the over-century-old guarantee of confidentiality afforded to attorney-client communications will not be disturbed in order to determine if the client has confessed to his attorney and the attorney is therefore knowingly making untrue statements during closing argument or asking questions without a good faith basis. Society has determined that the good advanced by protecting attorney-client confidentiality is outweighed by the fact that such confidentiality may operate to hide the truth from being discovered.<sup>331</sup>

It is also a virtual certainty that there will not be a constitutional amendment eliminating the Fifth Amendment right against self-incrimination. The right against self-incrimination can be traced back as far as the twelfth century, and by the seventeenth century, the privilege against self-incrimination was firmly established in England and the American colonies.<sup>332</sup> The primary purpose of the privilege against self-

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327. Hasbani, *supra* note 301, at 283–84 (citing *In re A John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990)).

328. *Id.* at 284 (“Despite the benefits of confidentiality, it can produce some friction with the search for truth.”).

329. *In re A John Doe Grand Jury Investigation*, 562 N.E.2d at 70.

330. *Id.* (quoting *Commonwealth v. Goldman*, 480 N.E.2d 1023, 1028–29 (Mass. 1985)).

331. There are exceptions to this rule. The most obvious exception is the presentation of false evidence or allowing the client to commit perjury. See MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3), (c) (AM. BAR ASS'N 2014). The crime fraud exception discussed at greater length in *supra* note 305 is also an exception. A far less common exception to attorney-client confidentiality has been adopted in twenty-six states and allows attorneys to divulge confidential communications that would prevent wrongful incarceration or execution. See Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 393 (2008).

332. Mary A. Shein, Note, *The Privilege Against Self-Incrimination Under Siege*:

incrimination is to “avoid confronting the witness with the ‘cruel trilemma’ of self-accusation, perjury or contempt.”<sup>333</sup> Further, “the privilege plays an important role in preserving the accusatorial nature of the American criminal justice system.”<sup>334</sup> Preserving the right against self-incrimination ensures that the state bears the burden of establishing guilt and helps maintain a fair balance between the power of the state and the autonomy of the individual.<sup>335</sup> The right against self-incrimination is equally applicable to both the guilty and innocent alike.<sup>336</sup> Courts have noted, “[It is] better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.”<sup>337</sup>

Therefore, it seems highly unlikely that a right that has been deemed fundamental since colonial times<sup>338</sup> will be changed in such a way as to allow the government to force the defendant to reveal his guilt, admit the government’s witness is telling the truth, and consequently expose the existence of a knowingly false defense.

Further, like the right against self-incrimination, the origins of the Double Jeopardy Clause of the United States Constitution predate the Constitution itself and can trace its modern origins to seventeenth century English common law.<sup>339</sup> The principle justification for the

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Asherman v. Meachum, 59 BROOK. L. REV. 503, 507 (1993).

333. Martin-Trigona v. Belford (*In re Martin-Trigona*), 732 F.2d 170, 174 (2d Cir. 1984) (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

334. Shein, *supra* note 332, at 510.

335. *Id.* (“Accusatorial procedures ensure that the state bears the burden of establishing guilt and help maintain a ‘fair-state-individual balance.’”).

336. See Craig Peyton Gaumer & Charles L. Nail, Jr., *Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings*, 76 NEB. L. REV. 497, 498 n.4 (1997) (“Unlike the Fourth Amendment, which serves to protect both the guilty and the innocent from unreasonable searches and seizures, the Fifth Amendment privilege against self-incrimination primarily serves to protect the guilty.” (citing *Marine Midland Bank, N.A. v. Endres (In re Endres)*, 103 B.R. 49, 53 (Bankr. N.D.N.Y. 1989)).

337. *United States v. Yurasovich*, 580 F.2d 1212, 1215 (3d Cir. 1978) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

338. Shein, *supra* note 332, at 507 (“Throughout the colonies the general principle that individuals should not be compelled to give evidence against themselves emerged as a fundamental right.”).

339. See William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414 (1993) (“While the origin of double jeopardy protection might be found in early Roman or canon law, and it may have appeared in embryonic form in England in the fourteenth century, by the seventeenth century the basic modern rule against double jeopardy

Double Jeopardy Clause is that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.”<sup>340</sup> While the focus of the Double Jeopardy Clause appears to be principally concerned with protecting the innocent, it nevertheless also serves to protect the guilty from successive trials and punishment.<sup>341</sup>

It is highly doubtful that a constitutional provision of such magnitude, applying with equal force to the guilty as well as to the innocent, would be so easily cast aside to allow the prosecution the right to appeal a verdict of not guilty.<sup>342</sup> And without this right to appeal, the prosecution has little ability to have an appellate court review the conduct of defense counsel.<sup>343</sup> Even in the extremely unlikely event that the prosecution was ever able to appeal an acquittal, there would be little for the prosecution to protest in terms of how defense counsel sought to discredit the truthful witness on cross-examination and closing argument.<sup>344</sup> For the reasons previously discussed relating to attorney-client privilege and the right against self-incrimination, the prosecution would simply have no idea whether defense counsel employed unethical forms of cross-examination or closing argument in the first place.<sup>345</sup>

Lastly, it is unlikely that courts would be willing to embrace evidence or ethics rules that allow for unrestrained objections in the absence of a good faith belief that the objection was legally proper. The reason for this is primarily a pragmatic one: the rules of evidence are in part designed to control the scope and duration of trials, even if that means

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was well established and encompassed within the common-law pleas of *autrefois acquit*, *autrefois convict*, *autrefois attain* (literally, other times acquitted, convicted, or attainted—*i.e.*, had one’s goods declared forfeited), and former pardon.” (footnotes omitted)).

340. *Green v. United States*, 355 U.S. 184, 187 (1957).

341. Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 *YALE L.J.* 1807, 1815 (1997) (“Here we see how the Double Jeopardy Clause, via the constitutionally guaranteed plea of *autrefois convict*, protects even the guilty. But the Clause is more precious for its protection of the innocent, via the constitutionally grounded plea of *autrefois acquit*.”).

342. *See supra* notes 317–20 and accompanying text; *see also* *United States v. Ball*, 163 U.S. 662, 671 (1896) (verdict of acquittal at the hands of the jury is not subject to review by appeal).

343. *See supra* notes 317–20 and accompanying text.

344. *See Nidiry, supra* note 293, at 1315.

345. *See supra* notes 317–20 and accompanying text.

that the outcome of a trial is imperfect.<sup>346</sup> Additionally, even if a prosecutor could object to a line of questioning in the absence of a good faith basis, attorney-client privilege and the constitutional right against self-incrimination would ensure that such objections would ultimately be unable to reveal whether defense counsel's questions were premised on a good faith basis and whether defense counsel was knowingly stating untruths to the jury.<sup>347</sup>

Even more to the point, if we lived in a society where none of the above legal protections applied, the criminal defendant might also live in a society where the guilty defendant had no right to any defense at all, let alone the right to an attorney who discredited the truthful witness and argued a false defense on their behalf.

In light of the above, ethics rules that define the parameters of how the truthful witness can be discredited will remain very much dependent upon attorneys policing themselves, despite this obvious shortcoming.

### C. *Culture Change as an Alternative Route*

This Article has demonstrated that there are both ethical and unethical types of cross-examinations and closing arguments that can be used to discredit the truthful witness and advance a false theory of defense.<sup>348</sup> To be fair, this Article has certainly detailed the flaws associated with the ethical types of cross-examination and closing arguments that can be used to accomplish this task and how these techniques are likely to be less effective than their unethical, false storytelling counterparts.<sup>349</sup> Nevertheless, if criminal defense attorneys wish to cast doubt on the testimony of an honest witness, ethical means are available to do so. And while these means might not be nearly as effective as their unethical counterparts, they still allow the criminal defense attorney to advance a false defense by discrediting the truthful witness.<sup>350</sup>

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346. See MUELLER & KIRKPATRICK, *supra* note 305, § 1.1.

347. See *United States v. Zolin*, 491 U.S. 554, 562 (1989).

348. See *supra* Part III.A.–B.

349. See *supra* Part IV.A.

350. While this Article has pointed out that unethical forms of cross-examination and closing argument are generally more effective than their unethical counterparts, this is not to suggest that the ethical means of discrediting the truthful witness cannot be persuasive as well. For example, as pointed out previously, some trial attorneys may prefer the true-facts cross-examination to the false-story cross-examination as a matter of personal style. *Supra* note 256. Further, it is possible for a persuasive closing argument to be crafted by arguing inferences that can be drawn from true facts while making only true statements. Professors

However, if contemporary ethics rules cannot adequately prevent criminal defense attorneys from choosing unethical means to advance a false defense, what, if anything, can be done to convince them to voluntarily choose the ethical means of doing so? Perhaps the answer lies in bringing about a change in the culture of criminal defense lawyering.

A counter-rationalization to the ones noted above should be presented to those present and future practicing defense attorneys who will find themselves in the trenches of America's criminal courtrooms. This counter-rationalization should relate to imploring criminal defense attorneys to recognize the normative value of ethics rules that, in allowing for the presentment of a false defense while ensuring that the attorney does not explicitly make untrue statements, represent a fair balance between the guilty defendant's constitutional right to force the state to meet its burden of proof, zealous advocacy, and the defense attorney's role as an officer of the court dedicated to the search for the truth.

How to bring about a change in the culture of criminal defense lawyering, in which the value of these ethics rules and ultimately the ethical practice of law are advanced over the objective of winning, is a question of great importance and worthy of a detailed analysis of its own. While this Article cannot fully endeavor to answer this question in the space provided, it is worth exploring a few potential areas of focus.

First, it should be noted that, while attorneys may recognize that current ethics rules place limits on certain forms of cross-examination and closing arguments, more focus should be directed at emphasizing the reasonableness of those limits and the ideals the rules are designed to promote. As a result, a change in the culture of criminal defense lawyering must begin in earnest with those segments of the legal community that not only teach lawyers about the ethical limitations of discrediting the truthful witnesses but also are in a position to stress that contemporary ethics rules represent a fair compromise between competing interests and values.

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Ohlbaum and Myers provide two such examples in crafting ethically permissible cross-examinations closing arguments that advance false defenses in the form of misidentification and consent in a rape case. See Myers & Ohlbaum, *supra* note 2, at 1060–70. Moreover, if criminal defense attorneys more earnestly endeavored to craft persuasive and ethical cross-examinations and closing arguments they would likely find ways to minimize the shortcomings associated with lack of narrative structure and the inability to vouch for your client's innocence that are associated with ethical forms of trial advocacy.

In light of this observation, any future discussion relating to this topic should undoubtedly address the important role of our nation's law schools in training future practitioners.<sup>351</sup> Legal educators have long recognized the importance of law schools in training ethical lawyers.<sup>352</sup> It is in law school that future lawyers are first exposed to the legal profession and may take lessons learned regarding the ethical practice of law directly into their future practice.<sup>353</sup>

However, courses designed to teach legal ethics infrequently explore the ideals behind the construction of current ethics rules.<sup>354</sup> In this regard, a criticism of law school ethics courses is that, rather than focus on the values reflected in ethics rules, these courses tend to be geared toward teaching students how to pass the Multistate Professional Responsibility Examination.<sup>355</sup>

In the context of discrediting the truthful witness, the ethical practice of law can best be taught by addressing the advocacy techniques that are used in the real-world practice of law. In doing so, not only should the ethical limitations of certain types of cross-examination and closing argument be defined but also the value of these ethical limitations from a normative standpoint should be stressed.<sup>356</sup>

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351. Once again, this Article leaves for another day a discussion concerning how best to teach legal ethics and how to structure the law school curriculum in this regard. Legal educators have advanced numerous opinions relating to this issue and this discussion is a vibrant one. How best to focus on the ethical parameters of the techniques used to discredit the truthful witness in the context of teaching legal ethics is a topic that I imagine would be subject to much debate amongst those teaching professional ethics and trial advocacy. For an excellent discussion concerning the numerous approaches law schools use in teaching professional responsibility, see Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998).

352. See Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIRCUIT B.J. 683, 695 (2001–2002) (“Lawyers are usually first introduced to the profession as students in law school. It is in law school that lawyers first learn rules of law, are introduced to the practice of law, and the ideals of law as a profession.”); see also Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 42 (1992) (“The rationale for addressing professional responsibility issues in some form is to increase students’ awareness, analytic skills, and ultimately, if indirectly, to influence their future conduct.”).

353. Re, *supra* note 352, at 695.

354. See Jeffrey A. Maine, *Importance of Ethics and Morality in Today’s Legal World*, 29 STETSON L. REV. 1073, 1078–79 (2000).

355. *Id.* at 1078 (noting that law-school ethics courses are often geared to preparing students to pass the Multistate Professional Responsibility Examination).

356. This is not to say that the ethical parameters of the techniques used to argue a false defense on cross-examination and closing argument are never addressed in law school courses. For an example, Professors Edward Ohlbaum and Eleanor Myers describe a course in which the ethics of discrediting the truthful witness on cross-examination and closing

Moreover, these lessons should be incorporated into professional responsibility courses, as well as courses which address the issue of arguing a false defense in the context of trial advocacy<sup>357</sup> as the question of how to ethically make the true look false and the false look true squarely sits at the intersection of both.<sup>358</sup>

In addition to America's law schools, other potential avenues of exploration in terms of their effect on the culture of criminal defense lawyering are professional bar associations<sup>359</sup> and continuing legal education courses that are required for practicing lawyers,<sup>360</sup> as well as focusing on those who train criminal defense attorneys specifically at large institutional public defenders offices.<sup>361</sup>

It should be acknowledged that stressing the fairness of the ethical constraints associated with discrediting the truthful witness and arguing a false defense may not serve to completely counterbalance the reasons

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argument are taught through demonstrations of different types of trial advocacy techniques. See Myers & Ohlbaum, *supra* note 2.

357. For example, this may include a standalone trial advocacy class or may occur in the context of a law school clinic where this type of issue may emerge in the course of discussing trial theory or preparing for trial. Additionally, some institutions coordinate their ethics course with trial advocacy and evidence courses, as was done at Northwestern University School of Law. Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 702–03 (1996); see also *supra* note 351 (noting the vibrant discussion concerning how best to teach legal ethics in law school).

358. See Green, *supra* note 351, at 359.

359. See Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 211–18 (1996) (noting the important role that professional bar associations play in terms of encouraging and enforcing ethical and professionally responsible behavior by members of the bar).

360. "During the past quarter-century, most American states have adopted continuing education requirements for lawyers. . . . In many states, some portion of the continuing legal education requirements must be devoted to legal ethics." Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 59 (2005) (footnote omitted).

361. The impact of focusing on those who most directly train criminal defense attorney's at large public defenders offices may result in a cultural change with respect to what is considered ethically acceptable practice within that office. Scholars have noted that the culture of ethical lawyering that exists in individual prosecutor's offices can impact the conduct of prosecutors. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 351–53 (2001). There is little reason to believe that a public defender's office would be different. Moreover, while not specific to a culture of ethical lawyering, numerous commentators have described the effects of the office culture on the behavior of those working in a particular public defenders office. See Professor Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 60 (1998).



defense attorneys choose unethical trial techniques. However, if defense attorneys come to see these rules as representing a balance between important, but often times competing, values, as opposed to unreasonable constraints placed on defending their clients, they will be far more likely to follow their dictates.

## V. CONCLUSION

This Article has demonstrated that while there are both ethical and unethical forms of cross-examination and closing argument that can be used to discredit the truthful witness and argue a false defense, criminal defense attorneys frequently choose the latter.<sup>362</sup> The reasons for this phenomenon range from effective trial advocacy, the culture of criminal defense lawyering, to the fact that it is almost impossible to get caught.<sup>363</sup>

Moreover, not only are current ethics rules unable to prevent the use of these unethical techniques, it is extremely unlikely these rules will ever be amended in order to more effectively prevent their use.<sup>364</sup>

As a result, the culture of criminal defense lawyering must change in such a way that criminal defense lawyers recognize the normative value of ethics rules that allow for truthful witnesses to be discredited, while placing reasonable constraints on the types of cross-examinations and closing arguments that are used to accomplish this task.

By shedding light on how criminal defense attorneys choose to discredit honest witnesses through unethical means, this Article hopes to begin a dialogue concerning how our profession can best respond to this particular reality and ultimately ensure more forthright compliance with the ethical dictates that govern the practice of law.

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362. See *supra* Parts III.A, III.B., IV.A.

363. See *supra* Part IV.A.

364. See *supra* Part IV.B.