A Trial Judge’s Perspective - Promoting Justice and Fairness While Protecting Privilege

Honorable Marian Blank Horn*
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Abstract

This Article discusses the topic of privileged communications and ethics in the courtroom. The Article offers the unique perspective of a trial judge and his courtroom interactions with lawyers and witnesses alike. It discusses cases relating to established courtroom privileges, such as marriage, attorney/client and priest/penitent, as well as qualified privileges such as the journalism privilege. Further, it discusses the potential for new or novel privileges, such as the accountant/auditor-client work product privilege and the academic peer review privilege. Finally, the Article lays out suggestions for trial judges for how to best utilize the privilege rules while simultaneously promoting fairness and justice.

KEYWORDS: privilege, lecture, work product
A TRIAL JUDGE'S PERSPECTIVE —
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Honorable Marian Blank Horn**

Let me start this evening by saying how happy I am to be here with you tonight. I feel fortunate to have been chosen to follow in the proud tradition of Maureen McNamara and to deliver this lecture in her honor. I take my place behind Ms. McNamara and the other distinguished women who have preceded me.

Unlike some of my predecessors, however, I am made even more humble by having to walk up the front steps into this building, the same way I did on my first day of law school as a terrified 1L. All my old insecurities flooded back into my consciousness. In the audience are a number of my law school classmates, and my husband who graduated two years ahead of me, also from the law school. I suspect not one of us would have guessed I would be lucky enough to be a federal judge and to be standing here with you tonight. I also want to acknowledge one of my daughters, who is in the audience. Of all the jobs I have held, and the brochure announcing tonight's program is far too flattering, the most important and the most enjoyable job on my resume is that of mother to my three accomplished daughters.

For the students in the audience, I have to tell you, based on everything I have seen and heard — and I have visited the law school from time to time in the intervening years — this is a far more user-friendly place than it used to be. I believe the strength of today's Fordham Law School is due in large part to the leadership of your Dean, John Feerick. I am proud to call him a friend

* The following lecture was presented at the Fordham University School of Law as the Annual Maureen E. McNamara Memorial Lecture on October 6, 1998. The goal was to offer an audience of students, faculty and practitioners a judge's perspective on litigation, and also to discuss from a somewhat more academic perspective a related legal issue. As a speech, it was never intended as an exhaustive legal treatise, but rather as a way to spark interest in the topics covered and to lay a foundation to further the practice of law. Moreover, to promote the delivery of her remarks, the lecturer did engage in extemporaneous additions and deletions during the course of the evening's presentation.

** Judge, United States Court of Federal Claims, Washington, D.C. The lecturer, an alumnus of the Fordham University School of Law, acknowledges and is grateful for the assistance of her law clerk, Andrew M. Goldfrank, a member of the New York Bar and a 1996 Fordham University School of Law graduate.
and one whom I admire. John Feerick exemplifies the best in law school leadership. His commitment to the school, to the individual student, to the community, and to the improvement of the practice of law through teaching and doing is a model for all of us.

I am a judge on the United States Court of Federal Claims, which is a federal trial court located in Washington, D.C.\(^1\) I love my current job, in part because each day is different and each day is a combination of the practical and the academic. You never know what will happen in the courtroom or in any phase of litigation. To sit on the court, one has to be appointed by the President and confirmed by the United States Senate.\(^2\) It is a federal trial court with nationwide jurisdiction, which handles civil suits brought against the United States — no criminal matters. Many of the cases involve large dollar claims and complex litigation. Our cases include contract,\(^3\) tax\(^4\) and patent\(^5\) cases, takings cases under the Fifth Amendment to the Constitution,\(^6\) Native American claims,\(^7\) military and civilian employee pay cases,\(^8\) and vaccine compensa-


\(^3\) The principal statute governing the jurisdiction of the Court of Federal Claims is known as the Tucker Act, 28 U.S.C. § 1491 (1994 & Supp. III 1997). Pursuant to this statute, the court possesses jurisdiction to entertain any suit for money damages against the United States which does not sound in tort and which is founded upon the United States Constitution, an act of Congress, an Executive Order, a regulation of an Executive Department or any express or implied-in-fact contract with the United States. See id.

\(^4\) See supra note 3. This jurisdiction is concurrent with the jurisdiction that is possessed by United States District Courts, pursuant to 28 U.S.C. § 1346(a)(1) (1994), to entertain tax refund suits. In order to obtain jurisdiction a taxpayer is required to file a claim for a refund with the Internal Revenue Service. See 26 U.S.C. § 7422(a) (1994).


\(^6\) See supra note 3.


\(^8\) Jurisdiction over military pay cases, for service members involuntarily retired, separated or discharged, is found in the money-mandating provisions of the Military Pay Act, 37 U.S.C. § 204 (1994 & Supp. III 1997).

Pursuant to the general principles delineated by the U.S. Supreme Court in United States v. Wickersham, 201 U.S. 390 (1906), federal civilian employees and former federal civilian employees may file suit in the Court of Federal Claims to seek monies allegedly due to them arising out of their employment relationship with the United
We have a few other areas of assigned jurisdiction, but these are the major ones.

Moreover, I have been fortunate in previous jobs to have had the opportunity to travel, especially in the Pacific region, including the former Trust Territories of the Pacific, and to help set up court systems in vastly different cultures. This has given me an additional perspective on how courts run and how we might wish them to operate.

When I was asked to do this lecture, I started by doing some research on past lectures and on the goals of the lecture series. I tried to select a topic which would be meaningful to the audience and to which I could contribute. I have been interested in the developing law of privileged communications, and whether recent developments are to our benefit or detriment. Thus, I decided this was an opportunity to review what was happening in the law of privileged communications, a subject which is present in virtually every case on my docket, either during discovery or trial.

Shortly thereafter, I left Washington for an out-of-town location, to conduct the remaining two weeks of a seventeen-week government contracts trial having to do with a major construction project at a national landmark. After fifteen weeks of trial, all the lawyers and experts involved in the litigation knew each other well. Our greetings at the start of each trial segment had become friendly and relaxed.

When I walked into court and welcomed everyone back, one of the lawyers for the plaintiff said with a smirk, followed by a laugh: “Big doings in Washington. We can all learn lessons about perjury and useful tips for deposition and courtroom demeanor from our Chief Executive.” As he finished, I realized that the very next thing I was about to do was to swear in a key expert witness. What I am describing was a flash in the pan, informal moment — but, I recognized that I needed to respond. I could not let the moment pass and conduct business as usual after the comment that the attorney had made for all to hear. Current events had intruded into our courtroom. It was not a partisan, political issue; it had become

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a serious practical problem. It was up to me to take charge and it was necessary to remind everyone present of the seriousness of the oath to tell the truth each witness must take before offering testimony, and which is at the root of our system of fairness and justice. I was compelled to offer a lecture on the consequences in my courtroom if I even suspected the possibility of perjury. I began, “Here in this court we take perjury seriously.” With a stern expression, I continued to lecture for a few moments before I said “Mr. [Jones], please take the stand. Raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?” I hoped that I had chosen the right words and communicated how serious I was about the significance of sworn testimony. Imagine in how many other courtrooms around the country similar encounters or thoughts were intruding.

Later, during our next courtroom break, I called my liaison at the law school, who had been wonderful to work with, but who, politely, was breathing down my neck to finalize the topic for the McNamara Lecture. In addition to addressing the law of privileged communications, I decided to include discussion about the role of trial judges to promote truth, fairness and morality in the courtroom, and the dangers to our judicial system if the sanctity of the oath to tell the truth in legal proceedings is allowed to erode.

The topics of privilege and courtroom ethics are related. At some point in virtually every case on my docket, whether during discovery or at trial, both are involved. Moreover, the sanctity of the oath to tell the truth and the recognized right of citizens to preserve the privacy of certain types of communications, even during litigation, are both fundamental to our system of justice. Like so many lawyers and members of the public, I have been troubled by the impact of current events on our system of justice. I was being given an opportunity to think about issues and interact with a sophisticated audience on topics of importance.

Tonight’s discussion does not address the politics of recent events. I know some of the principals in the drama and, like everyone in this room, I have definite views on both the issues and the personalities. What is important is that, as attorneys — and those about to become attorneys — we support and enhance a system which has worked well for this country. Our legal and judicial system is not perfect. Although we each have personal gripes and suggestions for reforms to improve the system, such as how to limit litigation expenses and how to speed up the process, few of us want a radical change in how we conduct the resolution of legal conflicts.
As a society, we share the fundamental ethical and moral values which form the basis for our system of laws, and we believe in our legal system. The law students would not be enrolled here, nor would the law professors be teaching, if they did not endorse the system.

We must hold on fiercely to the ethical and moral values which are embedded in our system of conflict resolution and adjudication and upon which our organized and civilized society is based. Quoting a source from 1894, Justice Benjamin Cardozo, in his collection of lectures titled *The Nature of the Judicial Process*, pointed out: "'Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live.'"\(^{10}\)

We live in a chaotic world. Read the newspapers and you cannot miss the worldwide turmoil. We also live in a far more pluralistic and diverse society than our ancestors. In our modern, secular society, the common denominator rules are often increasingly difficult to discern. We do not want the truth to become ephemeral, malleable, or subjective. We do not want truth to become too pragmatic, too subjective, or too situational. If one applies situational ethics, we are left with no basic, fundamental ethics. If pushed to the extreme, we have ended our right to say we have a system of truth and justice. In our legal system, the courts, based on a framework of fundamental values and a dedicated search for the truth, have provided the stability for conflict resolution. Although litigants challenge individual decisions, even negative results are accepted by all but a few.

In the past, an oath was viewed as sacrosanct. Many thought literally that God would strike you dead if you lied under oath. Well, even if you do not believe that today, one still ought to believe that the oath to tell the truth is sacred. For some, perhaps, the greater deterrent is the fear of prosecution for perjury.\(^{11}\) Regardless, the goals which law students and attorneys are pursuing become meaningless if people can come to a trial feeling justified that it is permissible to lie or to shave the truth. At that point, we endorse self-interest as the higher goal to the detriment of the community.

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The purpose of the legal system on which we all rely is to sort out the rights of men, women, children and institutions, and to promote peaceful co-existence in society. Statutes and regulations are developed, within the context of a fundamental sense of what is right and wrong, to announce the applicable rules and to guide these relationships. Long before judges get involved, citizens, sometimes with the assistance of lawyers, try to establish relationships in their business and private lives. For example, they enter into contracts to develop commercial opportunities, to build houses, and to seal marriages. The goal is to foster honest interactions and to ensure consistency and predictability. All citizens can then understand and rely upon the rules, thereby providing a uniform legal system, including a fair process for conflict resolution.

Judges and courts get involved when those relationships break down. People go to court when they have irreconcilable differences. The vast majority of judges will urge you never to come see them. Unfortunately, we have become a society too prone to litigation. Business is way too good in the court system. Yet, despite the litigious nature of our society, what is laudable about our system of laws is that generally we do not resort immediately to guns or other means of force to resolve disputes. The majority of our citizens rely on peaceful means to resolve their disagreements. The vanguards of protection for our judicial system and society are you, the lawyers or soon-to-be lawyers. For society to succeed, every one of you must bring to your jobs the highest ethical and moral standards each and every day. If you do your jobs well, we judges will see you and your clients, whether it be in the criminal or civil system, far less frequently.

The role of a trial judge is more like that of the practitioner than that of an appellate judge. As judges, we have all taken the same oath, and on the federal level, have all gone through the same confirmation process. We all wear the same black robes and approach our jobs, hopefully, with the same seriousness of purpose to uphold the Constitution and the laws of the jurisdiction in which we sit. Yet, when appellate courts speak, they do not always worry about how their legal wisdom will impact the rest of us down in the trenches. They are encouraged by our system to be legal purists.

Standing in the halls of the law school in which I got my start, I am reminded of the many times that, as law students, we intently debated the meaning of individual legal points for hours. We became caught up in the minor nuances of a single sentence, often without remembering that the cases we were intellectualizing in-
volved real plaintiffs and real defendants. I still enjoy the intellectual debate and have ample opportunity to exercise my intellectual curiosity along with my research and writing skills as an adjunct law professor, teaching third-year law students; during my tours as a visiting fellow on university campuses, teaching on the undergraduate level; and while crafting the complex bench trial and motion practice opinions we generate in our court.

However, I started my legal career as an Assistant District Attorney here in New York City. I like it where the real people are. I like the calculated chaos of the trial court. I like the unpredictability of witnesses, who often bring excitement to cases by offering insights and surprising testimony they may not have previously shared with their attorneys. I welcome the puzzle-like challenge of unscrambling the testimony and exhibits of lengthy and complex cases. Frankly, I enjoy the challenges of the unpredictable and the requirement to make on-the-spot decisions, such as momentary evidentiary rulings.

Perhaps I flatter myself, but I believe that the trial judge has a key role in our society. The role of the trial judge is to be a combination gatekeeper and referee on the adjudicatory ballfield on which claimants face off against each other. It is the mandate of the trial judge to strip the emotions out of the case and to provide guidance on how to resolve the issues in contention, sometimes with the help of a jury and sometimes on his or her own. Ultimately, the trial judge must take the panoply of facts and apply them to a rational framework, either issuing jury instructions or, in the case of a bench trial, by issuing final opinions.

If we, the trial judges, do our jobs well, we can resolve the cases without the need for further adjudication. As trial judges, we can meet our obligations by disposing of as many cases as possible during pretrial proceedings, and by conducting supportable, focused trials which result in decisions that reflect the absence of reversible error. I know in my chambers, one of our goals is to issue well-reasoned and well-written decisions, which fully find and articulate the essential facts and recite and apply the applicable law, so that the need for expending additional time and money on appellate reviews or remands will be kept to a minimum. The losers should be able to easily understand the basis of the decision. The hope is that appeals will be lodged only when there is a clear legal issue on which reasonable men and women can disagree. If the trial judge does a proper job, even if an appeal is filed, the scope of the appellate review will be carefully delineated and minimized.
from an appellate court for arbitrary and capricious fact-finding are a sure sign that the trial court has failed and not done its job well.

To promote a continued belief in and reliance on our legal and judicial system, what is the role of the trial judge? As members of the bar and under the additional governance of the Canons of Judicial Ethics, trial judges need to be sure that we not only facilitate the resolution of litigation, but that we also do so in ways which are consistent with our moral and ethical obligations. In the search for the truth, judges must remain the stalwart defenders of the fundamental values our justice system seeks to preserve.

There are tensions inherent in an adversarial system. Litigants sometimes become consumed with winning, regardless of the method. Judges must provide guidance to ensure that society’s values are not eroded, even when, on occasion, to do so might impede litigation. The need in the courtroom to balance the hunt for information, as part of the search for the truth, against intrusion into acknowledged privacy rights, which are also central to our society, is an example of when judicial intervention is required. As a trial judge, I have a hunger for information. I want to decide cases for the right reasons. I do not want the parties to withhold relevant information. I do not want to be fooled because one party has deliberately withheld critical information, because one party has been able to hire better experts, because one party has had more financial resources for investigation, or because one attorney simply was a better advocate. Missing important, relevant information is one of a trial judge’s biggest fears.

Almost each day, I find myself having to balance my need and thirst for information, against the possibility of allowing inappropriate intrusions into areas society has traditionally and properly considered private for good reasons, such as the right to avoid self-incrimination, the right to the protection of trade secrets, or the right for citizens to have privileged communications. Tonight I will explore with you one such exemplary area of the law that frequently arises during the pretrial discovery proceedings and at trial, namely, the issue of privileged communications.

Historically, society has placed value on privacies such as the right to consult an attorney without oversight, the privileges of government officials to deliberate and reach difficult decisions in private, the right to seek certain types of medical assistance in private, the ability to seek religious counseling in confidence, and the sanctity of marital relations. The invocation of these rights in a courtroom falls under the term “privileged communications.” A
number of the recent challenges involving the law of privilege, however, have suggested to some that we are approaching a merger of necessity and law, and that we should be wary of allowing our legal system of conflict resolution to become captive to the needs of the moment. For example, some have questioned whether a federal secret service agent should have been forced to testify against a President, whom he or she is protecting in the interests of national security.\footnote{12} At the same time, a difficult dilemma arises for an attorney representing a client. The attorney is obligated to represent the client to the best of his or her ability. Thus, an attorney may attempt to avoid privilege protection, attempt to assert inapplicable privileges, or even attempt to create new privileges to protect his or her client.

It is the role of the courts to depoliticize the issues and to create rational and positive rules of process for use in litigation, including those in the area of privileged communications. These procedural guidelines must make long-term sense and uphold our traditional values. We need rules to conduct litigation, and we need predictability regarding those rules. Appellate courts can help us to define the rules of privilege. Trial courts, such as the federal trial court in which I preside, must apply those rules and continue to identify issues which need further definition by appellate courts.

Regarding the rules of privilege, which I will review as defined in the federal courts, one must start with the basic principal that no one can exercise the privilege to lie. Even in a criminal proceeding, a defendant has the right not to respond by invoking the Fifth Amendment protection against self-incrimination, but not the right to lie. The obligation to tell the truth during the course of litigation is not negotiable. The oath a witness takes, whether at a deposition, in an affidavit, or during a trial, must have meaning.

At the core of the current, and continuing, controversy surrounding the evolving law of privilege is the idea that certain communications should remain confidential and outside the purview of litigation. "Privilege is 'rooted in the imperative need for confidence and trust.'"\footnote{13} This principal is juxtaposed against the normally predominant rule that all relevant and vital evidence is to be presented to the trier of fact in order to ascertain the truth.\footnote{14} The public's expectation that certain communications will remain in

\footnote{12. See In re Sealed Case, 148 F.3d 1073, 1078 (D.C. Cir. 1998).}
\footnote{14. See Trammel, 445 U.S. at 50.}
confidence creates an absolute need for reliability and certainty in
the law of privilege and the ability to predict that particular discus-
sions will remain protected. As emphasized by the United States
Supreme Court: "An uncertain privilege, or one which purports to
be certain but which results in widely varying applications, is little
better than no privilege at all."15

Federal Rule of Evidence 501 focuses on the doctrine of privi-
lege in the federal courts. It is a general rule which does not iden-
tify specific codified privileges, but which provides that privileges
will be recognized under the federal common law in light of reason
and experience.16 The United States Supreme Court, in Jaffee v.
Redmond, promoted the notion that the federal courts could define
new privileges, and stressed that Rule 501 "did not freeze the law
governing the privileges of witnesses in federal trials at a particular
point in our history, but rather directed federal courts to 'continue
the evolutionary development of testimonial privileges'"17 based
on "reason and experience."18

This recognition of the power of the federal courts to adopt new
confidential communication privileges, however, should not be in-
terpreted to suggest that the courts intend to embrace liberally var-
ious proposed privileges. In 1990, the United States Supreme
Court emphasized that "although Rule 501 manifests a congres-
sional desire not to freeze the law of privilege but rather to provide
the courts with flexibility to develop rules of privilege on a case-by-
case basis, we are disinclined to exercise this authority expan-
sively."19 This judicial resolve, coupled with the established legal

16. See FED. R. EVID. 501:
Except as otherwise required by the Constitution of the United States or
provided by Act of Congress or in rules prescribed by the Supreme Court
pursuant to statutory authority, the privilege of a witness, person, govern-
ment, State, or political subdivision thereof shall be governed by the prin-
ciples of the common law as they may be interpreted by the courts of the
United States in the light of reason and experience. However, in civil ac-
tions and proceedings with respect to an element of a claim or defense as to
which State law supplies the rule of decision, the privilege of a witness, per-
son, government, State, or political subdivision thereof shall be determined
in accordance with State law.

Id.
(1958)).
mel, 445 U.S. at 47); see also United States v. Nixon, 418 U.S. 683, 710 (1974) (stating
that "these exceptions to the demand for every man's evidence are not lightly created
nor expansively construed, for they are in derogation of the search for truth").
hurdles that a newly created privilege must surmount, indicate that the addition of new absolute privileges in the federal courts will not be frequent. For example, the United States Supreme Court has rejected a university's assertion of privilege for academic peer review process files after finding no constitutional, statutory or historical basis for the creation of a privilege; has rejected an accountant/auditor-client work product privilege; has rejected a state legislator's speech and debate privilege; has rejected a "privilege to the editorial process of a media defendant;" and the United States Court of Appeals for the District of Columbia Circuit has rejected a Secret Service protective function privilege.

A litigant who seeks to invoke a novel privilege in federal court has the burden of establishing the privilege. This burden involves demonstrating that the asserted privilege "promotes sufficiently important interests to outweigh the need for probative evidence." The United States Supreme Court has noted that "an asserted privilege must also 'serve[e] public ends.'" In addition to these significant private and public interests, it is likewise important for a federal court to consider the "reason and experience" of the states in enacting or recognizing a privilege.

The well-accepted privileges embraced by our society and endorsed by the courts are rooted in goals in which our society places special values; for example, the sanctity of marriage, the priest/penitent relationship, the right to counsel, and the national security of the country. has articulated four prerequisites to establish a privilege against the disclosure of communications: (1) the communication must originate in a communication that will not be disclosed; (2) the elements of confidentiality must

23. See Gillock, 445 U.S. at 373.
24. Herbert, 441 U.S. at 169.
28. Id. at 12-13 ("We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.").
be essential to the full and satisfactory maintenance of the relationship between the parties; (3) the relationship must be one which the community believes ought to be fostered; and (4) the injury from disclosure to the relationship would be greater than the benefit gained for the correct disposition of the litigation.29

One privilege that warrants discussion is the attorney-client privilege, which is not only one of the most frequently invoked privileges, but also one of the oldest of the confidential communications privileges.30 The United States Supreme Court has emphasized that the attorney-client privilege’s “purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”31 This privilege is premised on the rationale “that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.”32 Commentators note that the attorney-client privilege is both intellectually and contextually understood by lawyers and judges, rendering these practitioners sympathetic to applying and enforcing the doctrine.33

Under the attorney-client privilege, a client seeking legal advice has a permanent protection from disclosure of confidential communications with an attorney acting in her or his legal capacity.34 Likewise, it has been accepted for a long time that, except in limited circumstances generally in the criminal justice context, that the attorney-client privilege survives the death of the client.35 The privilege attaches once a client communicates with an attorney for the purposes of seeking legal services or advice even if the lawyer is not retained.36 The privilege, however, may not be invoked by a client who hires an attorney to seek services or advice that a non-lawyer could readily handle. The privilege “protects only those dis-

29. See 8 WIGMORE ON EVIDENCE § 2285 (McNaughton rev. 1961).
32. Id.
34. See id. (citing 8 WIGMORE, EVIDENCE §§ 2290-92).
35. See Swidler & Berlin, 118 S. Ct. at 2088.
36. See, e.g., In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124 n.1 (3d Cir. 1986).
closures necessary to obtain informed legal advice.”37 For example, “[a] business that gets marketing advice from a lawyer does not acquire a privilege in the bargain; so too a business that obtains the services of a records custodian from a member of the bar.”38

The attorney-client privilege may not be invoked by the client if the communication is later disclosed to a third-party, not an agent of the attorney from whom advice was sought, and if the client either did not wish to keep the materials confidential or the client did not take adequate measures under the circumstances to prevent disclosure of the privileged communications.39 An exception to the general rule against invoking the privilege for disclosure to third-parties is the “common-interest” doctrine which extends the attorney-client privilege to multiple clients pursuing a common interest, who are represented by separate attorneys and who jointly compile communications that would otherwise qualify as privileged.40 Any such “common-interest” client may invoke the privi-

38. In re Feldberg, 862 F.2d 622, 626-27 (7th Cir. 1988).
40. See, e.g., In re Regents of the Univ. of Cal., 101 F.3d 1386, 1389-90 (Fed. Cir. 1996), cert. denied sub nom. Genentech, Inc. v. Regents of the Univ. of Cal., 520 U.S. 1193 (1997); United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997); United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989).

The United States Court of Appeals for the Eighth Circuit in a recent decision addressed the definition of common-interest in In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied sub nom. Office of President v. Office of Gen. Counsel, 521 U.S. 1105 (1997). The Office of the Independent Counsel, on behalf of the grand jury, sought notes from meetings, held after the grand jury testimony of Hilary Rodham Clinton, that were attended by the First Lady, members of the White House Counsel's Office and the First Lady's personal attorney. See id. at 913-14. The court suggested that the First Lady attempted to invoke the common-interest doctrine by arguing that she and the White House were pursuing a common interest that “involved Mrs. Clinton in her personal capacity, her personal attorney, Mrs. Clinton as a representative of the White House . . . , and the White House's official attorneys.” Id. at 922. The court stated that:

there is lacking in this situation the requisite common interest between clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's [Office of the Independent Counsel] investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest.

The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution. Certainly action by the OIC may occupy
lege, unless it is waived by the individual who contributed the confidential communication.\textsuperscript{41}

Recent decisions have placed in the news headlines the question of to what extent the attorney-client privilege applies in the context of advice sought from government attorneys. In a civil action, when the government is the client, and government officials make confidential communications to government attorneys for the purpose of eliciting legal advice as opposed to for policy-making purposes, it appears that the government client may invoke the attorney-client privilege.\textsuperscript{42}

A government attorney-government client privilege, however, does not appear to apply in the context of a criminal grand jury proceeding because, "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials."\textsuperscript{43} Thus, "[a]n official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney."\textsuperscript{44}

Society and the courts also have embraced a psychotherapist-patient privilege. The United States Supreme Court, in \textit{Jaffee v. Redmond}, recognized that confidential communications to licensed psychologists and psychiatrists, and even to "licensed social workers in the course of psychotherapy," were entitled to protection from testimony as privileged.\textsuperscript{45} The Supreme Court, however,

\begin{itemize}
\item the time of White House staff members, may vacate positions in the White House if any of its personnel are indicted, and may harm the President and Mrs. Clinton politically. But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake. \textit{Id.} at 922-23. The court closed the discussion on common-interest by stating that "the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests." \textit{Id.} (noting White House's citation of \textit{Nixon v. Administrator of Gen. Servs.}, 433 U.S. 425, 449 (1977)).
\item See \textit{Town of Norfolk v. United States Army Corps of Eng'rs}, 968 F.2d 1438 (1st Cir. 1992); \textit{Coastal Corp. v. Duncan}, 86 F.R.D. 514 (D. Del. 1980).
\item Id.
\item Jaffee v. Redmond, 518 U.S. 1, 15-16 (1996). The holding of the case appears to apply solely to statements made for the purposes of therapy:
\end{itemize}
qualified the invocation of the privilege when stating that "we do not doubt that there are situations in which the privilege must give way, for example, if a serious harm to the patient or to others can be averted only by means of a disclosure by the therapist." 46

A logical extension of this decision might be the validation of a physician-patient privilege. In Jaffee v. Redmond, however, the Supreme Court specifically distinguished the role of a physician from that of a psychotherapist by suggesting that confidential communications were not imperative to the physician-patient relationship. 47 Nonetheless, almost every state has legislatively approved some form of a physician-patient relationship, 48 despite the fact that the doctor-patient privilege has not been recognized in the federal courts. 49

Dating back to medieval English roots, the federal courts also recognize a marital privilege, but have rejected a parent-child privilege. The marital privilege began as a spousal disqualification from testifying on the theory that "since husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one." 50 This rule evolved into a privilege that

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46. Id. at 10. In asserting that the privilege is in the public interest, the Supreme Court stated:

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

47. Id. at 10 ("Treatment by a physician for physical ailments can often proceed successfully on the basis of the physical examination, objective information supplied by the patient, and the results of diagnostic testing.").

48. See 2 FEDERAL RULES OF EVIDENCE MANUAL 731 & n.137 (citing Developments in the Law: Privileged Communications, 98 HARV. L. REV. 1450, 1533 (1985)).


allowed either spouse, no longer considered one entity, to prevent the other from giving adverse testimony unless both consented.\textsuperscript{51}

There are two recognized interspousal privileges that arise from a marital relationship: the adverse testimonial privilege and the confidential communications privilege.\textsuperscript{52} The basic premise of the adverse testimonial privilege is to foster the sanctity and harmony of the marriage relationship at the time that testimony is demanded.\textsuperscript{53} In contrast, the confidential communications privilege, which is intended to protect marital communications at the time that they are made from one spouse to another, may be invoked by either spouse, even if the other spouse is willing to give testimony.\textsuperscript{54} There are, however, several exceptions to the confidential communications privilege, such as the crime-fraud exception.\textsuperscript{55} Moreover, in the event that a spouse is prosecuted or sued for victimizing a family member, in the case of both marital privileges, there exists an exception that allows the testimony.\textsuperscript{56} Despite the similarities to the sanctity of the privileges adherent to the spousal relationship, however, the federal courts uniformly have rejected a parent-child privilege, thereby opening the door for a parent to testify against or about a child, and vice-versa, for a child to testify about a parent.\textsuperscript{57}

The federal courts consistently have recognized a clerisy-communicant privilege. The case law regarding clergy-communicant communications, however, distinguishes between religious or pastoral counseling, as opposed to nonreligious counseling.\textsuperscript{58}

\textsuperscript{51} See id. at 43-46.
\textsuperscript{52} See id. at 40.
\textsuperscript{53} Id. at 44.
\textsuperscript{54} See United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992).
\textsuperscript{55} See United States v. Estes, 793 F.2d 465, 467 (2d Cir. 1986).
\textsuperscript{56} United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992).
\textsuperscript{57} See In re Grand Jury, 103 F.3d 1140, 1150 (3d Cir.), cert. denied sub nom. Roe v. United States, 520 U.S. 1253 (1997). In the wake of the Office of Independent Counsel's various efforts to investigate the President, public concern arose over the lack of a parent-child privilege after Monica Lewinsky's mother was subpoenaed to testify before the grand jury. The concern resulted in a proposed bill in the in the 105th Congress, specifically H.R. No. 3577, that would have amended Federal Rule of Evidence 501 to include a parent-child privilege. A similar bill was introduced in the 106th Congress into the House of Representatives on February 3, 1999 (H.R. 522). The current proposed bill would not alter the common law approach under Federal Rule of Evidence 501, but would add a single codified privilege protecting the parent-child relationship, to be titled Federal Rule of Evidence 502.
\textsuperscript{58} Compare In re Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990) (holding discussions during pastoral family counseling session were privileged), with United States v. Dube, 820 F.2d 886, 889 (7th Cir. 1987) (holding conversations with pastor regarding avoidance of tax liability were nonreligious and not privileged).
To promote our fundamental belief in protecting free speech, the federal courts have recognized a qualified journalism privilege. In 1972, however, the United States Supreme Court in *Branzburg v. Hayes*, held that a journalist must provide a grand jury with information relevant to an investigation, including confidential sources. In the federal court system, the holding of *Branzburg v. Hayes* has been limited to the grand jury context. A journalist’s privilege, however, is qualified and “the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist’s, and the public’s, interest in non-disclosure.” For example, in *Herbert v. Lando*, the Supreme Court reaffirmed that this qualified privilege is outweighed in libel cases because otherwise the privilege would be the equivalent of a reporter’s or editor’s immunity from suit.

The federal courts also have recognized a number of different government privileges, beyond the government attorney-government client privilege discussed above. These include a state and military secrets privilege, a deliberative process privilege, an executive privilege, and a law enforcement privilege. A number of these privileges have been invoked during investigations by the Office of Independent Counsel.

The courts have shown deference to privilege claims that are premised upon state or military secrets in which national security is implicated. Moreover, when the a state secrets privilege is triggered, the privilege is absolute, whether claimed in a civil suit or a criminal prosecution. The privilege also may be invoked by those for whom the exposure of state secrets is required for the purposes of putting on a defense, thereby precluding the litigation or prosecution altogether.

An Executive Branch agency or governmental entity may invoke the deliberative process privilege that is intended to protect a government’s decision-making process by precluding disclosure of

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61. Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993).
63. See id. at 169-71.
64. See, e.g., United States v. Reynolds, 345 U.S. 1, 9-10 (1953); Bareford v. General Dynamics Corp., 973 F.2d 1138, 1141 (5th Cir.), *opinion vacated in part* (1992).
predecisional government communications. The deliberative process privilege is designed so that

it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided[,] not for matters they considered before making up their minds."66

The courts routinely apply the privilege to shield intra-government documents. Exercise of the privilege, however, does have limitations so that a document only may qualify for protection under the privilege if it is both predecisional and deliberative. Therefore, "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery."71

Moreover, when the deliberative process privilege is invoked, the need to protect the intra-governmental information is balanced against the citizen's need for the information. Some of the factors to be considered to assess the requisite balancing are:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.73

69. See, e.g., EPA v. Mink, 410 U.S. 73 (1973); Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552 (1st Cir. 1992); Quarles v. Department of the Navy, 893 F.2d 390 (D.C. Cir. 1990).
70. Quarles, 893 F.2d at 392.
71. EPA v. Mink, 410 U.S. at 87-88.
72. See id. at 89.
The privilege must be invoked by the head of an agency or department that controls the desired government information and not by the government attorney that is litigating the case.\textsuperscript{74} The logic of this requirement stems from the fact that the withholding of government documents is at odds with the concept of open governance and access to the government by the citizenry.

A \textit{Presidential privilege} is also available in appropriate circumstances. The United States Supreme Court has held that there is a presumptive, albeit qualified, privilege for Presidential communications made in confidence\textsuperscript{75} and in the course of performance of official duties by the Chief Executive.\textsuperscript{76}

The rationale has been explained by the Supreme Court as based on possible foreign policy involvement and implication of state secrets,\textsuperscript{77} as well as on the Chief Executive’s role in governmental decision-making, in which there is necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.\textsuperscript{78}

The invocation of the Presidential privilege by an occupant of the White House was examined by the United States Court of Appeals for the District of Columbia Circuit and found to encompass factual and deliberative communications.\textsuperscript{79} Despite the unique role and relationship of the Chief Executive, the court, however, held that “the deliberative process privilege can be overcome by a sufficient showing of need.”\textsuperscript{80} The fact that the evidence sought was the sole source for a grand jury criminal investigation was found to outweigh the White House’s interest in confidentiality.\textsuperscript{81} This balancing is not dissimilar to that undertaken when considering the broader Executive Branch, governmental deliberative process privilege.\textsuperscript{82}

\textsuperscript{76} See In re Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997).
\textsuperscript{77} See Nixon, 418 U.S. at 710-11.
\textsuperscript{78} Id. at 708.
\textsuperscript{79} See In re Sealed Case, 121 F.3d at 737.
\textsuperscript{80} Id. at 737.
\textsuperscript{81} See id.
\textsuperscript{82} See id.
The law enforcement privilege is intended to “prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” This privilege is qualified in that the state interest must be balanced against an individual’s right to mount an effective defense. “Where the disclosure of an informer’s identity, or the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way.” In an informant case, the presumption of confidentiality is removed, instead the onus is placed upon the government to establish that an informant expected the communications to be in confidence and his or her identity anonymous.

Having briefly reviewed the law of privilege, we return to the role of the trial judge who must utilize the privilege rules and others which have been developed for use in court proceedings. Let me offer a few thoughts on how judges can utilize those rules of process, while at the same time promoting fairness and the search for the truth.

First, the trial judge should be the role model in the courtroom through his or her personal demeanor and work habits. The judge must be courteous to all and treat everyone with respect. The judge must ensure that lawyers are deferential to one another and to the witnesses. Civility in the courtroom should not just be an often-pronounced goal, it must become a reality. The judge also must be willing to work as hard as the attorneys and everyone else in the courtroom. For example, abbreviated trial hours or long breaks for lunches protract trials and give a bad name to the profession. The judge must come into the courtroom, whether for pre-trial proceedings or for trial, well-prepared to discuss the issues and to receive the evidence. This includes familiarity with the facts of the case and the applicable law. The parties will be able to tell if the judge is prepared or not.

Second, judges should retain the formalism, the familiar practices and the efficiencies of the courtroom, although not as goals in

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83. In re Dep’t of Investigation v. Myerson, 856 F.2d 481, 484 (2d Cir. 1988) (citations omitted).
85. Id.
and of themselves. Remember, fifty percent of the people who come to court will lose. Those litigants are more likely to believe that they have received a fair trial if the court follows comfortable, predictable and established patterns. If courtroom practice becomes too informal or too uncontrolled, if the case takes too long, or if those in the courtroom are not treated with respect, the loser is more likely to believe that the trial was not fair.

Formalism, however, does not mean arrogance or stuffiness. Lawyers and judges must speak plain English. An attorney who liberally sprinkles his or her speech with Latin phrases or long uncommon words engages in a dangerous practice. As a judge, I might get annoyed, but juries and witnesses may not understand or be receptive to the unfamiliar words or Latin phrases and may dismiss the argument.

Third, in law school, and thereafter as lawyers, we are trained to split hairs and play word games, for example, when we engage in statutory construction or the interpretation of a contract. Lawyers are proud of themselves when they can distinguish their case from otherwise adverse precedent or statutes. If fairness and the betterment of society are our basic goals, the over-legalization and the hairsplitting should be of concern to all. We should question whether to teach our students to parse sentences the way one witness, a member of the bar, did during testimony. Without allowing our personal politics to enter into our understanding, should we not question ourselves when we are quibbling about the definition of the words “is” and “was,” as follows: “It depends upon what the meaning of the word is means. If ‘is’ means ‘is, and never has been,’ that’s one thing. If it means, ‘there is none,’ that was a completely true statement.” Fortunately, the average jury is not generally comprised of lawyers. Juries are excellent antidotes to our profession because they often see beyond the legalistic word games.

Many members of the public unfortunately see lawyers as the ultimate pragmatists, who will say anything to protect a client. Some attorneys are comfortable with that image as part of their representational duties, some are not. If anyone testifying in my courtroom were to play with the definitions of the words “is” and “was,” my ears would immediately perk up and I would be carefully assessing that witness’s credibility. So, I think, would the av-

average juror. There is danger in appearing too cute. Therefore, even if ethics and morality fail to deter an attorney or a witness from cutting fine lines, those same individuals should be forewarned that over-legalization and over-definition of words often backfire on a witness.

*Fourth,* judges should not promote doing things the way they have always been done merely for that reason. The technological revolution has hit the courtroom. For example, we now have modern capabilities such as smart courtrooms, real-time reporting, the ability to conduct electronic discovery without the exchange of paper documents, teleconferencing of witnesses during depositions and trials, and electronic filing. Technology should be used to facilitate and speed up trials within the formal and familiar context.

Judges have an obligation to promote fairness by keeping cases on their docket moving. Litigation is expensive and generally comes into court only after the issues have been percolating for a considerable length of time. Each of us have those embarrassing cases that for one reason or another have gotten bogged down for too long. And, while judges are, "so to speak," on permanent retainer, time is money for those involved in the litigation. Faith in our legal system is eroded when the expectation is that going to court is almost useless because it will take so long to resolve a dispute through the judicial process. Moreover, if a trial takes too long, it is harder and harder to bring the parties together for a possible settlement. Positions harden, so much money has already been invested that a little more hardly matters, and attorneys' fees sometimes become the problem. For example, even if the parties want to settle at a late stage in the litigation, the attorneys may be the last ones willing to bend.

The new technology can be a boon to those judges who are ready to embrace it. Utilization of technology can make our system far more efficient, and after an initial investment, less costly. For example, I am involved in a large military contract litigation, with millions of pages of documents which are classified for national security purposes. We are conducting paperless discovery by exchanging tapes of scanned documents electronic briefing. This facilitates security protection, avoids exchanging an original and two copies of millions of pages of written material, and, because of research software, makes searching the documents far more efficient.

*Fifth,* judges must take control of the courtroom. Judges have an obligation to assure fair, expeditious litigation opportunities for all
parties. Sometimes in our adversarial system this becomes a true challenge for the judge. Hard-fighting adversaries can get carried away, either on purpose or for effect, while playing to the judge and/or the jury, or because they lose control. Often, there is a vast disparity between the skill levels of litigators. A judge also has special responsibilities with non-attorney pro se litigants, who have a hard time understanding and complying with the rules we lawyers have developed for the orderly processing of litigation.\footnote{\textit{See}, e.g., Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (requiring that allegations contained in pro se complaint be held to “less stringent standards than formal pleadings drafted by lawyers”), \textit{reh'g denied}, 405 U.S. 948 (1972).} While being supportive of the pro se party, however, the judge also must keep the proceeding moving and avoid tipping the balance of a trial in either the direction of the plaintiff or the defendant. Judges have to remind practitioners that winning is not everything, something many litigators lose sight of in the heat of battle. How one wins also matters. Cases should be decided for the right reasons, not, for example, because one attorney is more able or a better actor than the other.

A controversial aspect of ensuring a fair trial is whether a trial judge should intercede during testimony to create balance, for example by assisting a counsel who is foundering as a result of his or her own ineptitude, and missing the critical points with a witness. Much discussion has been generated on this subject among members of the bar. Most litigators fervently argue that in an adversary system a judge has absolutely no business intervening, and that plaintiffs and defendants have chosen their own lawyers. Unfortunately, not all litigants can choose their own counsel. The economics of litigation are such that not everyone can afford equally competent counsel of their choice. Assigned counsel, of course, can be the most fervent counsel. Public defenders, legal aid society attorneys, and even students in clinics, while often quite young and less experienced, often do a better job than some members of the private bar. Unfortunately, as a trial judge, I see vastly mixed levels of competence.

As I said earlier, I happen to believe that my job as a trial judge is to make sure that we decide cases for the right reasons. My law clerks hear me repeat this phrase over and over. You have to remember that behind the attorneys — good, bad, or indifferent — there are real plaintiffs and defendants who deserve, and should get, the best the court system has to offer. Morally, I have trouble sitting back and watching a trial conclude with what I feel is the
wrong result. I am not suggesting that my judgment is perfect, but, I do have an obligation to do the best job I can. Generally, therefore, in egregious situations, I gently try to help the process. One of the harshest forms of intervention is for the judge to ask additional questions of a witness when, as a judge, you think the important issues have not been reached or a witness is lying. Lawyers often object. One solution is to offer the attorneys an opportunity to ask additional questions after the judge has asked his or her questions. On occasion, the insertion into the process is to inquire of an attorney whether he or she objects to the admission of a document. The reactions to bad lawyering can be instinctive and inadvertent. As a judge, you also try to control your body language, but sometimes it is so painful to watch, that complete composure is hard to accomplish. As a trial judge, you have to make hard, on the spot decisions regarding both what to do and what not to do. The general presumption is certainly not to interfere, but, sometimes I feel I have to or an injustice will be done.

Sixth, a good trial judge must be creative. Every day in a trial court should be undertaken with an eagerness to approach new challenges. Although there are helpful instruction books, there are no form books for a good trial. The unexpected happens all the time. Few requests for evidentiary rulings are the same. I have been doing this job for a long time now, and virtually no two cases present the same problems. That is probably why I enjoy my job so much. I am on a train that goes a mile a minute, but it never goes in a straight line. Using available tools such as docket management techniques, pretrial motion practice, stipulations, test cases, and both traditional and non-traditional alternative dispute resolution (“ADR”), judges can speed up the resolution of cases. At the same time, while eagerly searching for new conflict resolution techniques, one also must be careful to use ADR and other techniques wisely and only when appropriate. It is up to the judge to provide the leadership so that naturally cautious litigators are willing to investigate and try new methods.

Seventh, while creativity to solve procedural problems is a vital skill, an able trial judge must apply the law with intelligence and consistency. One of the rules we operate under in the court system is the law of precedential decisions. Blind adherence to precedent is not what I am advocating. It is not the role of a trial judge, however, to disregard existing case precedents. In our system, appellate courts, and most especially the Supreme Court, are dele-
gated the primary responsibility to effect dramatic changes in the law not based on statutory change.

As a lawyer, you study the judge assigned to your case. You try to discern a pattern in his or her legal leanings and temperament. You try to figure out in advance how the judge conducts proceedings. If, after studying your assigned trial judge, you conclude he or she takes each case on a fact-by-fact basis, does a good job of applying the existing law and rules of procedure, and also runs a tight courtroom, with high performance expectations, I personally would consider that profile a compliment. I also would consider it a compliment if the bar which appears before me cannot predict the outcome of cases assigned to me because I am not labeled as a plaintiff’s or defendant’s judge on any particular type of case or issue. I want a reputation as a fair judge.

Eighth, the trial judge also has a duty to ensure that attorneys who appear in his or her courtroom comply with their own ethical obligations, such as the duties of diligence, confidentiality, conflict of interest, knowing when to decline or to terminate representation, and knowing when a motion or claim is meritorious and, thus, worth pursuing. As members of the bar and officers of the court, it should go without saying that attorneys will act ethically. For example, in a perfect world, judges could trust attorneys not to exercise inappropriate privileges. Unfortunately, although most lawyers do behave at the highest levels, some do not. For example, as a judge, I should be able to expect candor toward the tribunal. During discovery I will say to an attorney, “Mr. [Jones], if you tell me as an officer of the court that the documents which have been subpoenaed do not exist, I will have to take your word for it.” Sometimes I say it with a sinking feeling. As a judge, you hope to trust attorneys to abide by the proper ethical boundaries. Judges look to lawyers in their courtrooms to be truthful with the court, to not merely be an advocate for his or her client, but also to do so honestly and forthrightly.

When I attended law school at Fordham, we did not have required ethics and professional responsibility courses, nor was there a related exam as a part of the bar examination in most states. We did have a jurisprudence course, which was more of a history course about some of the great religious and moral leaders. As a former history major, I loved the class, but it did not focus on professional responsibility, except by analogy. The students were expected to make the intellectual leap and apply the teachings to their own lives. Nonetheless, once we graduated, I honestly be-
lieve we would never have dared to do some of the things I now see in the courtroom, and not infrequently.

Each judge has a scrapbook of horror stories. Among my examples, one attorney became more suspect than the clients he represented, some of whom it turned out did not even know the attorney had filed a case on their behalf. Moreover, the attorney was consistently late with required filings and failed to communicate with his clients with respect to the pleadings filed and the status of the cases. Another attorney directly contacted the court reporting service and attempted to have the transcript altered by instructing the reporter to change a negative statement to a positive one after she received a copy of the daily transcript. The reporting service contacted the court. Shortly thereafter, when we held a status conference, everyone in the room but the offending attorney remembered the witness as having made a negative statement on the stand. Her attempted fix required a great deal of audacity and certainly lacked professional responsibility. The court has some options to try to ensure propriety, including putting the attorney and/or the client under oath through affidavit or live testimony. And there is also the possibility of imposing sanctions. Judges, of course, are reluctant to impose sanctions, but they should not be afraid to do so.

Unfortunately, also, too many attorneys come to court unprepared without having reviewed the file or the relevant case precedent. In my days as a litigator, I would have been too scared to do that. Inadequate preparation happens more often for status conferences or pretrial discovery motions than at trial; regardless, it is unacceptable. Similarly, the quality of some of the briefs filed with the court is embarrassing, with little evidence of intelligence or effort. The majority of attorneys do an adequate, and many do an excellent job for their client. But those who do not give a bad name to the practice of law and the system which responsible attorneys try to maintain.

In sum, it is critical for the courts to ensure that litigation continues to be a search for the truth and a promotion of the highest ethical and moral values. One of the most basic tools on which we rely is to put witnesses under oath. Every witness is asked to take an oath that they will “tell the truth, the whole truth, and nothing but the truth.” Sitting here tonight, none of us question the definition of perjury. We all readily understand the concept. We also all agree that perjury is wrong, and agree on the critical importance of the oath each witness takes at the start of testimony. No one has
the privilege to lie. The expectation, at a minimum; should be that in a courtroom — in fact, in all our relations with people — we should be entitled to expect honesty. Anything less should cause shock and chagrin. Although the role of the judge is often to decide between two asserted truths offered by two opposing witnesses, the expectation and the standard should be that both witnesses are trying to testify in accordance with the oaths they have taken, but have differences of opinion or different recollections of the events.

I am not so naive as to assume that everyone who comes to court will tell the truth. However, I do not want to become as cynical about our system as many lawyers and many members of the public seem to have become. One attorney friend, who represents many criminal defendants, recently told me “all my witnesses try to lie, even to me, to help themselves.” I never want to believe that every witness potentially is violating the oath to tell the truth in his or her own self-interest. Fortunately, on the whole, judges and juries are surprisingly good at recognizing the lies and understanding the truth. Let me give you one example from my private practice days. I was part of a litigation team on a major construction accident case. We prepared the night before trial. On the stand, one of our principal witnesses, a senior corporate officer in the construction company, did a complete reversal of the testimony he had described the night before. When we asked him why, he responded, “I was watching the jury and I thought it would help my case.” We lost. The jury saw through it. Juries are generally comprised of good, honest and perceptive people.

The oath to tell the truth, and, if necessary, the threat of perjury, have been and should be promoted as the watchdogs of truthfulness in the courtroom. We cannot allow the expectation of truthfulness during discovery and trial to diminish. New York Senator Daniel Patrick Moynihan coined a useful phrase, “defining deviancy down,” which describes a process by which society tolerates and comes to accept formerly unacceptable conduct. Conduct that was previously considered negative, immoral or even criminal is now considered normal, thus reducing the level of expectation for appropriate, ethical and moral behavior. Gradually we make fewer and fewer demands on members of the community. In other words, we begin on a path of normalizing deviancy.

As attorneys, we must refuse to allow erosion of our system by ignoring the ramifications of perjury. Every bad image of the legal profession and system becomes true if we allow perjury to go unpunished and to become an acceptable norm dependant upon the circumstances. The prohibition against perjury is not negotiable. The expectation must remain that once a witness takes an oath of truthfulness during any part of a judicial proceeding, that witness must meet the obligations of that oath. The procedures we use in the courtroom must have meaning, and violation of those procedures must have consequences. To excuse perjury under any circumstances is to promote the image of attorneys as slick, greasy operatives who have been taught to manipulate the truth and who can talk others into, or out of, anything. It is also to destroy the very core of our judicial system.

Practicing law should be fun. It should be an honor to be admitted to the bar and to continue as part of a noble profession which defines and promotes ethics and morality. You should be in this profession not just to support yourselves and your families, but to reward yourselves in other ways. You also should be in it for the intellectual satisfaction the law can provide. I certainly have that privilege. You also should be in it to make your community a better place, whether on the job or through extra-curricular activities in which you share your unique skills with others.

Every day, each of us must commit to further enhance a system of laws that promotes an ultimate forum in which conflict resolution and a search for truth is the goal we uniformly applaud and actively support. The accomplished lawyer must combine legal proficiency and technical skill with humanity and morality. Our commitment as lawyers and judges alike should be to accept responsibility for the proper and effective functioning of our legal system and to defend its basic principles. We should never allow the pressures of our profession to compromise our commitment to a fair and ethical search for the truth.

I thank you all for allowing me to be with you tonight.