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Cover Page Footnote

Gerald L. Shargel is a criminal defense attorney in private practice and the Practitioner-in-Residence at Brooklyn Law School where he teaches evidence and criminal procedure. The author would like to thank Kathy Chen, Esq., for her invaluable assistance in the preparation of this essay.

FEDERAL EVIDENCE RULE 608(b): GATEWAY TO THE MINEFIELD OF WITNESS PREPARATION

Gerald L. Shargel*

Opportunity may knock only once, but temptation leans on the doorbell.

—Unknown

INTRODUCTION

Samuel Johnson wrote, “[I]n so far as you approach temptation to a man, you do him an injury; and, if he is overcome, you share his guilt.”¹ By this logic, a criminal defense attorney injures his client by telling him anything that might tempt him to commit perjury, and the attorney shares his client’s guilt if the client succumbs to this temptation.

Federal Rule of Evidence 608(b) contains the exact sort of information that could tempt a client to commit perjury. The Rule states that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness . . . may not be proved by extrinsic evidence.”² Rule 608(b)’s “absolute prohibition on extrinsic evidence” enables a witness to “successfully defend his credibility by lying.”³

Of course, Rule 608(b) was not intended to invite perjury, but merely to make trials more efficient. The “notion underlying the rule is that while certain prior good or bad acts of a witness may constitute *character* evidence bearing on veracity, they are not evidence of enough force to justify the detour of extrinsic proof.”⁴ Rule 608(b) thus avoids “mini-trials on peripherally related or irrelevant matters.”⁵

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1. James Boswell, *The Life of Samuel Johnson*, LL.D. 262 (Percy Fitzgerald ed., Swan Sonnenschein & Co., Ltd. 1900) (1792).

2. Fed. R. Evid. 608(b).

3. Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 355 (1997).

4. *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995).

5. *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); see also Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 Fordham L. Rev. 1229, 1242 (2007) (suggesting that limiting cross-examination in this way may also prevent the jury from drawing unfair and prejudicial inferences).

It is unlikely that a determined criminal defendant would care about the intent behind Rule 608(b). Instead, he might focus on the fact that the Rule leaves the perjury henhouse unguarded. Should a defense attorney expose such a person to temptation by telling him about Rule 608(b)? If the attorney knows that the defendant intends to use that information to lie, can the attorney still put him on the stand? Should the attorney withdraw? Should he reveal his client's plan to the court? Alternatively, what if the client's perjury surprises the attorney? Does the attorney have to rectify his client's misdeed?

These questions are a subset of the larger questions that Professor Monroe Freedman posed four decades ago. Freedman brought up what I call the "temptation problem" by asking whether it is "proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury."⁶ Freedman raised what I call the "planned perjury" issue by asking, "Is it proper to put a witness on the stand when you know he will commit perjury?"⁷

According to Freedman, these questions present an attorney with a "trilemma."⁸ The situation pits the attorney's duties to find out all he can about his client's case and to maintain client confidentiality against his duty of candor to the court.⁹ In the narrower context of Rule 608(b), this trilemma means that—to prepare his case—the attorney has to ask his client about collateral bad acts and keep them secret unless doing so would perpetrate a fraud on the court. Freedman resolved this trilemma by arguing that an attorney's duties to inquire and to maintain client confidences trump his duty of candor.¹⁰ I would further tip the scale—creating a "quadrilemma"—by adding an attorney's obligation to prepare his client to testify.¹¹

Commentators have spent decades lambasting Freedman's arguments.¹² The late Judge Marvin Frankel claimed that the "temptation problem" merited no discussion whatsoever because the legal profession had rejected "[that] particular brand of sleaze."¹³ Frankel responded to the "planned

6. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1469 (1966).

7. *Id.*

8. Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics* 159–95 (3d ed. 2004).

9. *Id.* at 161.

10. *Id.*

11. See Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 Geo. J. Legal Ethics 389, 392 (1987) (explaining that although the Model Rules do not demand that an attorney prepare his client to testify, this obligation is strongly implied by the attorney's more general duty of zealous advocacy).

12. See, e.g., Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*, 34 Hofstra L. Rev. 821 (2006).

13. Marvin E. Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. Inst. for Study Legal Ethics 25, 27 (1996). Frankel claims that Freedman "withdrew long ago his blessing" for

perjury” problem by writing that defense attorneys should embrace a duty not to “thwart[] the search for the truth in the courtroom.”¹⁴ According to Frankel, if a defendant is hell-bent on committing perjury, his attorney should withdraw from the case.¹⁵

Professor William Simon goes even further. He does not just oppose tolerating perjury; he opposes all “aggressive defense” tactics.¹⁶ Such tactics include, Simon argues, impeaching witnesses whom the attorney knows to be truthful, requesting delays so as to inconvenience prosecution witnesses, and arguing that evidence supports a proposition which the attorney knows to be false.¹⁷ Simon believes that a defense attorney should not focus myopically on advancing any particular client’s interests; instead, Simon urges defense attorneys to “focus resources and effort on cases that present the greatest threats of injustice.”¹⁸ Accordingly, a defense attorney should only resort to “aggressive defense” in “cases that present a threat of excessive or arbitrary punishment and only . . . to the extent it is likely to counter that threat.”¹⁹

In contrast, Professor Geoffrey Hazard bolsters Freedman’s partisan approach by pointing out the limits on a defense attorney’s duty of candor.²⁰ Hazard asserts that the defense attorney’s main function is to control “what the court will learn about what the client knows.”²¹ Thus, invocations of the attorney’s duty of “complete candor” should be “regarded as hortatory, hypocrisy, or simply nonsense.”²²

Hazard further argues that the legal system would derive little benefit from forcing defense attorneys to blow the whistle on client perjury.²³ Outside of the rare case in which a client explicitly tells his attorney that he

giving a client information that might tempt him to commit perjury, and Frankel cited to Freedman’s treatise entitled *Lawyers’ Ethics in an Adversary System*. *Id.* (citing Monroe H. Freedman, *Lawyers’ Ethics in an Adversary System* 59, 61, 69–70, 71–76 (1975)). Judge Frankel overstates Freedman’s capitulation. In his treatise, Freedman still condones giving a client information that might tempt him to commit perjury but “on a different, and more limiting, rationale.” Freedman, *supra*, at 75. Freedman writes,

I adhere to my earlier position that there are situations in which it may be proper for the attorney to give the client legal advice even though the attorney has reason to believe that the advice may induce the client to commit perjury. There does come a point, however, where nothing less than “brute rationalization” can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participat[e] in the creation of perjury.

Id.

14. Frankel, *supra* note 13, at 26.

15. *See id.* at 40–41.

16. William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703, 1704–05 (1993).

17. *See id.* at 1704.

18. *Id.* at 1725.

19. *Id.*

20. *See* Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 Hofstra L. Rev. 1041, 1048 (1997).

21. *Id.* at 1049.

22. *Id.*

23. *See id.* at 1051–52.

is lying, a defense attorney would only know that his client's testimony is false if that testimony is "inherently incredible."²⁴ However, "when a client's fabrication is so obvious that counsel must be held to know that it is such, then the fabrication probably will also be obvious to the trier of fact."²⁵

Personally, I find Freedman and Hazard's arguments compelling. Freedman, Hazard, and many others—myself included—belong to what I call the "zealous advocate school." The zealous advocate school unabashedly embraces role morality, the notion that one's role dictates one's moral obligations in a given context. In contrast, Frankel and Simon belong to what I call the "truth trumps" camp. To them, the legal system's highest goal is to uncover truth and anything that conflicts with that goal is suspect.

The ethical dilemmas raised by Rule 608(b) provide an excellent opportunity to contrast the different views of the zealous advocate and truth trumps schools. In this essay, I explore how these two groups approach the question of whether a defense attorney should risk tempting his client to commit perjury by telling him about Rule 608(b)'s extrinsic evidence ban. I also discuss what an attorney should do if his client exploits Rule 608(b) to lie on the witness stand. Finally, I suggest amending Rule 608(b) to lessen its obfuscating effects without sacrificing judicial efficiency.

I. THE TEMPTATION PROBLEM: SHOULD AN ATTORNEY RISK TEMPTING HIS CLIENT TO COMMIT PERJURY BY TELLING HIM ABOUT RULE 608(b)?

I believe an attorney should tell his client that Rule 608(b) bars extrinsic evidence of collateral bad acts even though this might tempt him to commit perjury. Before I explain my logic, allow me to clarify that I do *not* endorse *explicitly* urging a criminal defendant, or any other witness, to lie. If, for example, a testifying client tells me that he lied on a mortgage application—an act irrelevant to the issues at trial except insofar as it bears upon the client's credibility—I cannot tell the client, "Don't worry about it. Rule 608(b) says the prosecutor will be stuck with your answer."²⁶ Professor Richard Wydick calls this "overt[] induce[ment]," and it is forbidden by the Model Rules of Professional Conduct and punishable by penal law.²⁷ Rule 1.2(d) states, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or

24. *Id.* at 1052.

25. *Id.*

26. An attorney engaged in this sort of misconduct in *In re Storment*, 873 S.W.2d 227, 228–31 (Mo. 1994). The attorney in *Storment* was disbarred because—during a recess in a custody battle—he told his client that she "better deny" a true allegation that she had had adulterous sex in the same motel bed in which her baby was sleeping. *Id.* at 228. A stenographer's tape recorder caught the attorney's transgression. *Id.* at 228–29.

27. See Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 3 (1995); see also Model Rules of Prof'l Conduct R. 1.2(d), 3.3(a)(3), 3.4(b) (2006).

fraudulent . . .”²⁸ Likewise, Rule 3.3(a)(3) states, “A lawyer shall not knowingly offer evidence that the lawyer knows to be false.”²⁹ Finally, Rule 3.4(b) bars a lawyer from “counsel[ing] or assist[ing] a witness to testify falsely.”³⁰

Even Freedman, academia’s staunchest defender of partisanship, agrees that a defense attorney should never explicitly urge his client to commit perjury. To the contrary, Freedman maintains that, whenever a lawyer discovers that his client plans to lie on the stand, “the lawyer has a duty to attempt to dissuade him on grounds of both law and morality.”³¹

To me, the hard question—where morality and the Model Rules both leave confusing wiggle room—is whether an attorney can *implicitly* encourage his client to commit perjury by explaining Rule 608(b) to him. Those who would insist on informing the client about Rule 608(b) fall within the zealous advocate school. For zealous advocates, an attorney’s conduct flows from his role as his client’s guide and defender. A zealous advocate tells his client about Rule 608(b) to fully prepare the client for trial and enable him to participate in his own defense.

The zealous advocate school endorses role morality. As Freedman notes, our system is “based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views.”³² As one of those proponents, the zealous advocate focuses on defeating the government’s case, not upon finding truth. As I like to put it, a trial may be a search for truth, but I—as a defense attorney—am not part of the search party. This is morally acceptable because other actors, the judge and jury, are tasked with finding the truth and are more adept at that task; they are more objective.³³

Role morality applies with particular force to criminal defense attorneys. Because the defendant’s liberty and sometimes life are at stake and the government is such a formidable opponent, the criminal defense attorney has exceptionally strong duties of loyalty and zeal. Freedman writes that a defense attorney’s “every word, action, and attitude [must] be consistent with the conclusion that his client is innocent.”³⁴ Similarly, Hazard maintains that a criminal defendant’s “special need of counsel” implies that “the balance between [an attorney’s duties of] candor to the court and loyalty to the client should be struck differently for a criminal defense attorney than for other advocates.”³⁵

28. Model Rules of Prof’l Conduct R. 1.2(d).

29. *Id.* R. 3.3(a)(3).

30. *Id.* R. 3.4(b).

31. Freedman, *supra* note 6, at 1478.

32. *Id.* at 1470.

33. See Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339, 405–07 (1994).

34. Freedman, *supra* note 6, at 1471.

35. Hazard, *supra* note 20, at 1052.

As a zealous criminal defense attorney, I tell the client about Rule 608(b) because doing so prepares him to testify. To zealous advocates, witness preparation is a sacrament. Despite the spate of courtroom dramas on television, testifying remains an alien, frightening process to most nonlawyers. Sending a client off to testify “raw” would be like tossing a child into a raging river to teach him to swim. The child might not drown, but will suffer harm nonetheless.

Full preparation not only makes a client more comfortable on the witness stand, it also helps him to testify more effectively on his own behalf.³⁶ Accordingly, Professor John Applegate writes that witness preparation is “a fundamental duty of representation and a basic element of effective advocacy.”³⁷ Professor W. William Hodes goes even further; he claims that failure to engage in witness preparation, or “horseshedding,” would be “unethical and unprofessional, bordering on legal malpractice to boot.”³⁸

I also tell the client about Rule 608(b) to enhance his ability to participate in his own defense and to maximize his personal autonomy. By enabling the client to participate more fully in his defense, an attorney advances the practical goal of winning that client’s case. Enhancing client autonomy serves more abstract, but still crucial, purposes. Some zealous advocates argue for client autonomy on the grounds that it affirms the client’s “dignity and personhood, and the right of self-determination.”³⁹ Others believe that autonomy increases the client’s “happiness and well being.”⁴⁰ Personally, as a criminal lawyer, I try to maximize my clients’ autonomy out of simple fairness. I believe the client, not the attorney, should be the decider because he is the one who has to live with the consequences of those decisions, and those consequences are especially serious in a criminal trial.

For a client to make wise, autonomous decisions, he needs to know about the facts and rules pertaining to his case, including evidentiary rules like 608(b). Along these lines, the Utah State Bar stated, “A lawyer is under a duty to inform clients of the relevant facts, law and issues necessary for the client to make intelligent decisions regarding the objectives of the representation.”⁴¹ Indeed, the U.S. Supreme Court repeatedly has cited

36. Witness preparation also helps the system. It “promotes a more efficient administration of justice and saves court time” by concentrating the witness’s attention on what is relevant. Brian N. Smiley, *The Law and Ethics of Witness Preparation* (PLI Corp. Law and Practice Course Handbook Series No. B0-001K, 1998), WL 1061 PLI/Corp 659.

37. John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 279 (1989).

38. W. William Hodes, *The Professional Duty to Horseshed Witnesses Zealously—Within the Bounds of the Law*, 30 Tex. Tech. L. Rev. 1343, 1350 (1999).

39. Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. Rev. 315, 336 (1987) (urging lawyers to move toward the “informed consent” model used by doctors so as to maximize client autonomy).

40. *Id.*

41. Utah State Bar Ethics Advisory Op. Comm., Op. 02-10 (2002), http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_10.html; cf. Utah State Bar Ethics Advisory Op. Comm., Op. 06-04 (2006), http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_06_04.html (stating that a

criminal defendants' unfamiliarity with the rules of evidence as one of the main reasons for the Sixth Amendment right to counsel.⁴²

A. *The Case Against Telling Criminal Defendants About Rule 608(b): The "Truth Trumps" Camp's Aversion to Robust Criminal Defense Work*

Critics of the zealous advocate school—those who would probably oppose telling a client about Rule 608(b)—fall into the truth trumps camp. As its label suggests, the truth trumps camp believes that the legal system's primary purpose is to find the truth. They look with suspicion upon anything that undermines this goal. For them, it would be unethical to tell a criminal defendant about Rule 608(b) because doing so would tempt him to lie on the witness stand. One's role as a criminal defense attorney would be no excuse.

The truth trumps camp criticizes criminal defense attorneys for relying on role morality to justify their actions.⁴³ Simon argues that there is no "feature distinctive to the criminal sphere" that pardons immoral tactics.⁴⁴ Similarly, Judge Frankel writes that a defense attorney should have the same duty to "seek the truth" that a prosecutor has.⁴⁵ Simon adds that a criminal defense attorney cannot rely on other actors—judges, juries, prosecutors—to ferret out the truth because defense attorneys often possess information that these other actors lack (for example, confidential information from the defendant or other witnesses).⁴⁶ How can a defense attorney have faith that "all will turn out for the best" if he knows that he is sitting on key, inculpatory evidence that others lack? Such faith is irrational, truth trumppers say.

The corollary of this view is that there is nothing unique about a criminal defendant's plight. Professor Stephen Gillers points out that other kinds of litigants face different, but just as important, potential losses. A client "fighting to maintain parental rights" has "an interest that is surely more profound" than a criminal defendant trying to avoid a fine or a few years in prison.⁴⁷ Simon adds that criminal defendants do not face a particularly formidable opponent.⁴⁸ He writes that the "Bogey of the State" as an adversary with boundless power and resources is "misleading."⁴⁹ Instead,

criminal defense attorney can—in limited circumstances—delay giving his client certain information).

42. See *Geders v. United States*, 425 U.S. 80, 88–89 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

43. See, e.g., Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 *Geo. J. Legal Ethics* 125 (1987) (attacking role morality and arguing that a criminal defense attorney does not have a moral right to present a false defense).

44. Simon, *supra* note 16, at 1705.

45. Frankel, *supra* note 13, at 37.

46. See Simon, *supra* note 16, at 1706.

47. Gillers, *supra* note 12, at 825.

48. See Simon, *supra* note 16, at 1707.

49. *Id.*

the defendant usually faces a “small number of harassed, overworked bureaucrats.”⁵⁰

In my opinion, the truth trumps approach is fraught with weaknesses. Truth trumppers purportedly condemn role morality; yet they engage in it constantly. They focus myopically on the attorney’s role as an officer of the court and treat zealous advocacy like a hobby that should never interfere with more serious pursuits. Rather than respond to zealous advocates’ concerns, they simply restate those concerns in the most damaging manner possible. Thus, for example, Judge Frankel dismisses Freedman’s “hard question”—should a defense attorney impeach a truthful witness—by rephrasing it. Frankel writes that the real question is whether defense attorneys should “thwart[] the search for the truth in the courtroom.”⁵¹

Moreover, although truth trumppers denigrate defense attorneys’ irrational faith that other actors in the criminal justice system can ascertain truth without their help, truth trumppers maintain their own irrational tenet of faith. The truth trumps camp assumes that if the criminal justice system finds the truth, the system will *always do the right thing* with that truth. That assumption ignores prejudiced judges, unjust laws (e.g., the Fugitive Slave Act, laws criminalizing sodomy, excessive sentencing laws for drug offenders, etc.), and bigoted juries.

B. Rule 608(b) as a Legitimate Form of Witness Preparation

The truth trumps camp does not fault defense attorneys for preparing criminal defendants to testify. They would argue, however, that telling a client about Rule 608(b) is not part of legitimate witness preparation; instead, it is a form of sinister “coaching.” This concern has some merit. Admittedly, witness preparation sometimes does degenerate into illicit “coaching.”⁵²

It is often difficult to distinguish legitimate “preparation” from improper “coaching.”⁵³ For some, preparation means helping to elicit or clarify truth

50. *Id.*

51. Frankel, *supra* note 13, at 26.

52. Courts roundly condemn coaching. *See, e.g.,* Webb v. State, 663 A.2d 452, 459 (Del. 1995) (“It is antithetical to the process of truth-seeking that any witness be permitted to consult with counsel during cross-examination to be ‘coached’ on what to say, or not say, or how-to-say-it, or how to control or ‘put a better face on’ testimonial damage already done.”); *see also* State v. Earp, 571 A.2d 1227, 1235 (Md. 1990) (stating that attorneys should “exercise great care to avoid suggesting to the witness what his or her testimony should be”); D.C. Bar Legal Ethics Comm., Op. 79 (1979) (stating that lawyers should not “engage in suppressing, distorting or falsifying the testimony that the witness will give”).

53. Courts and commentators do not use the same terminology to describe this dichotomy. Many, probably most, refer to it as I do: proper “witness preparation” versus illicit “coaching.” However, some allude to legitimate and illegitimate “coaching.” *See, e.g.,* United States v. Poppers, 635 F. Supp. 1034, 1037 (N.D. Ill. 1986). Meanwhile, Richard Wydick writes of “witness preparation” versus different “grades” of witness coaching (i.e., overt, covert, and inadvertent “inducement”). *See* Wydick, *supra* note 27, at 1–4.

while coaching means prompting lies.⁵⁴ Others focus on how dictatorial the attorney is being with his witness. Thus, John Allen defines preparation as “making suggestions” and coaching as “commanding testimony.”⁵⁵ Richard Wydick also focuses on suggestiveness, but he draws a more detailed picture with unsuggestive “preparation” at one end of the moral spectrum, “overt inducement” at the other end, and other “degrees” of coaching in between.⁵⁶

I think that it is almost impossible to identify exactly when preparation degenerates into coaching. For me, the basic distinction is that I do not provide content. I merely shape and polish delivery. Still, the rules are murky. Can I remind the witness or client that she previously had included fact X in her account of what occurred? Should I call her attention to a document or recorded statement that contradicts what she is now saying? As long as I am doing this to refresh recollection with a view toward getting the witness’s answer, I am not, in my view, crossing any line. But some would argue that, by interjecting, I am not “getting” the witness’s answer; instead, I am “suggesting” what her answer should be. I do not agonize excessively over gray areas like this one because black and white ones abound. Witnesses sometimes say to me, at some sticky point, “Tell me what to say” and are uniformly disappointed when I reply that my role does not include making up answers.

Gillers would probably fault me, as he already has faulted Freedman, for drawing an arbitrary line: why is it acceptable to tempt your client to commit perjury so long as you do not script it?⁵⁷ However, courts have had no trouble drawing this line. It rests on the notion that an attorney’s culpability increases with his active involvement in propagating lies. For example, in *In re Foley*, the Massachusetts Supreme Judicial Court suspended an attorney’s license to practice for three years because the attorney concocted a false story, advised his client to make up details to

54. See, e.g., Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 Tex. Tech. L. Rev. 1383, 1383 (1999); see also *Poppers*, 635 F. Supp. at 1037.

55. John W. Allen, *Emerging from the Horse Shed and Still Passing the Smell Test—Ethics of Witness Preparation and Testimony*, 32 Brief 56, 58 (2003).

56. Wydick, *supra* note 27, at 1–4. To Wydick, an attorney’s culpability for inducing a client to lie hinges on intent. If an attorney knows he is inducing his client to lie, then he is culpable. Wydick urges attorneys to parse their words carefully so as to avoid even inadvertent inducement. He writes that in conversations with clients “a lawyer should continuously think about whether there is a legitimate purpose for the next question or the next statement.” *Id.* at 52. Wydick’s analysis, while helpful, is problematic because statements and questions often have multiple purposes. If an attorney can see both legitimate and illegitimate uses for the information he conveys, does that mean he should withhold the information on the assumption that his client will misuse it? If the attorney withholds the information, does he not violate his duty to fully advise his client? Conversely, if the attorney provides the information, is he automatically guilty of covert inducement? Moreover, if culpability hinges on intent, then are less sophisticated attorneys who fail to perceive multiple uses somehow less culpable? Do we condemn Prince Hamlet and pardon Homer Simpson?

57. See Gillers, *supra* note 12, at 822–25.

ensure his false testimony would appear credible, and “passed the fabricated story along to a prosecutor in an effort to influence the outcome of the case.”⁵⁸ The court found the attorney’s conduct egregious because it entailed “planning, . . . premeditation, and [a] level of manipulation.”⁵⁹ The attorney escaped disbarment only because the case never made it to court.⁶⁰

C. *Rejecting Truth Trumpers’ Paternalism in Favor of Partisanship*

Truth trumppers maintain that an attorney must do more than just refrain from actively suborning perjury. They believe that an attorney has an affirmative duty to elicit truth. Fidelity to truth overrides all other values, including the right to a robust defense.

While zealous advocates stress autonomy, the truth trumps camp embraces paternalism. Truth trumppers do not agonize over depriving a defendant of choices because they believe that there is only one legitimate choice to be made.⁶¹ As paternalists, the truth trumps school reasons that, by leaving the defendant ignorant of Rule 608(b), you are helping him by limiting his choices. Such moral baby proofing has its allure. Hoarding information gives the attorney a rewarding sense of superiority and averts potentially messy conversations with clients.

Ultimately, even for a zealous advocate, deciding to tell a client about Rule 608(b) requires a close call, and the truth trumps camp would probably condemn such action on that basis alone. The truth trumps camp is very squeamish about impropriety. They favor reading the Model Rules broadly, without unseemly partisanship. For example, Professor J. Alexander Tanford writes, “Ethics are not simply rules to be interpreted in the light most favorable to clients, but moral principles that are supposed to guide our behavior as members of an honorable profession.”⁶² Similarly, Professors Fred Zacharias and Shaun Martin claim that an attorney should not use the “literal content of the ethics rules” as the sole break on partisan conduct,⁶³ instead, an attorney should “maintain[] objectivity” and act consistently with the “spirit” of the rules.⁶⁴ The general message seems to be: if you think that you are coming close to the line, then you have probably crossed it.

58. *In re Foley*, 787 N.E.2d 561, 569 (Mass. 2003).

59. *Id.* at 571.

60. *Id.* at 570.

61. The U.S. Supreme Court used this rationale in *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). In that case, a defendant argued that his attorney violated his right to testify by threatening to withdraw if the defendant testified falsely. The Court rejected this argument, finding that the lawyer’s “admonitions to his client can in no sense be said to have forced respondent into an *impermissible* choice between his right to counsel and his right to testify as . . . there was no *permissible* choice to testify falsely.” *Id.*

62. J. Alexander Tanford, *The Ethics of Evidence*, 25 Am. J. Trial Advoc. 487, 554–55 (2002).

63. Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 Ky. L.J. 1001, 1016 (1999).

64. *Id.* at 1011.

This moral posturing stems from the truth trumps camp's fixation on the appearance and reputation of attorneys generally and of criminal defense attorneys in particular.⁶⁵ But should an advocate focus on what some amorphous society thinks of him or the bar? Or should he focus on fighting for his client's rights? I suspect that most commentators, indeed, most citizens, would strike this balance one way as members of society and another as parties to serious litigation. To the individual, especially the criminal defendant, his lawyer is his champion.

A person in distress does not need a disinterested professional; he needs what, more than thirty years ago, Professor Charles Fried called a "lawyer as friend."⁶⁶ More recently, novelist Stephen King aptly described the relief an individual experiences upon hiring a thoroughly partisan attorney. He writes,

There's something oddly comforting about talking to a legal guy once the billable-hours clock has started running; you have passed the magical point at which *a* lawyer becomes *your* lawyer. Your lawyer is warm, your lawyer is sympathetic, your lawyer makes notes on a yellow pad and nods in all the right places. Most of the questions your lawyer asks are questions you can answer. And if you can't, your lawyer will help you find a way to do so, by God. Your lawyer is always on your side. Your enemies are his enemies. To him you are never shit but always Shinola.⁶⁷

As a partisan, I do not favor excessive moral caution. I believe that advocates should not be afraid to take on ethical risks. A whiff of impropriety should not cause an advocate to faint. I agree with W. William Hodes when he writes, "Legal ethics is hard. You must *try* to find the line between what is permitted and what is not, and then get as *close* to that line as you can without crossing over to the bad side. Anything less is less than zealous representation"⁶⁸

I believe that the excessive moral caution of the truth trumps camp with respect to criminal law stems, in part, from a profound disgust for criminal defendants. Along these lines, Tanford asserts that "student authors" only make pro defense arguments because they "have not yet discovered that criminal clients are not often noble and innocent creatures."⁶⁹ This sort of remark makes it clear that the truth trumps camp pays only lip service to the presumption of innocence.

65. See, e.g., Frankel, *supra* note 13, at 38 (bemoaning the "low esteem in which we are held" after "extravaganzas like the O.J. Simpson trial"); see also Subin, *supra* note 43, at 153 (noting that the "public at large" sees the "defense attorney as a person unconcerned with the truth and therefore not to be trusted, little more than the alter ego, if not alter id, of his or her client").

66. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

67. Stephen King, *Bag of Bones* 167-68 (1998).

68. Hodes, *supra* note 38, at 1366.

69. Tanford, *supra* note 62, at 496.

According to the truth trumps camp, a criminal defense attorney should not tell his client about Rule 608(b) because the client just would use that information to commit perjury, and no one has a right to commit perjury. The truth trumps camp often resorts to this argumentative ploy. When a defendant complains that his lawyer's action violated his right to X (e.g., confidentiality, testify on his own behalf, privacy, etc.), the truth trumps camp will say that the defendant never had a right to use X to do illegal Y.

For example, in *Nix v. Whiteside*, when an attorney threatened to withdraw if his client testified in a particular manner, the client protested that this threat violated his right to testify, but the Supreme Court retorted that the defendant did not have a right to "testify falsely."⁷⁰ Similarly, Judge Frankel refers to a criminal defendant's right to a vigorous defense as a "right to beat the rap."⁷¹ This ploy ignores that fact that no one knows what the client would have done with his right to X if that right had been respected. Besides, whenever the legal system gives someone a right, it also gives him the opportunity to misuse that right and risk attendant consequences.

Personally, I do not believe in prejudging my clients so I feel free to tell them about Rule 608(b). Like any piece of information, Rule 608(b) has functional autonomy. We may suspect that knowing the Rule will tempt a defendant to lie, but, instead, that knowledge may help a defendant to legitimately protect himself during cross-examination.

I easily can envision such a scenario. For example, a prosecutor, like any other litigator, might engage in what some attorneys call "paper training." This entails the prosecutor ruffling ominously through papers while he cross-examines the defendant. Each time the defendant prevaricates or hesitates, the prosecutor uses a document to legitimately hold the defendant to task. After being "paper trained" on his prior inconsistent statements, the defendant will admit to almost anything because he knows a denial will prompt the prosecutor to whip out another scary document. When the prosecutor moves on to collateral bad acts—for which his scary papers are inadmissible—the prosecutor might ask, "Didn't you lie on a bank application three years ago?" Even if the defendant did not lie, he might testify that he did because he fears whatever documents the prosecutor might introduce. The defendant may have forgotten whatever he wrote on the bank application or he may assume that the prosecutor has bogus, but convincing, documentation. If the defendant has not been warned about Rule 608(b), he will be unprepared to deal with this line of questioning, and his lawyer will have done him a disservice.

This scenario may seem far-fetched. However, "paper training" is not rare; prosecutors and defense attorneys both engage in it. Sometimes, the questioner has legitimate, but inadmissible, documents to ruffle through ominously; at other times, the questioner bluffs and makes a great show of

70. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986).

71. Frankel, *supra* note 13, at 36.

paging through what turns out to be that day's racing form. Given that prosecutors sometimes bluff, it is easy to imagine a prosecutor engaging in the conduct I have described. Rule 608(b) only asks that a prosecutor have a "good faith" basis before asking about collateral bad acts. It does not demand that he substantiate his good faith in any way, and courts rarely challenge prosecutors on this. Indeed, several commentators have noted that Rule 608(b)'s good faith standard "invites abuse."⁷² Rule 608(b)'s lax standard allows a prosecutor to ask damning questions with little factual support. If questioned, a prosecutor can always avow that he meant well.

Even if I believed that a prosecutor never would bluff and that my clients never would be intimidated by courtroom theatrics, I still would tell my client about Rule 608(b) because—as a zealous advocate—it is my job to enhance my client's knowledge of the rules and let *him* choose what to do with that information. Along these lines, Professor Stephen Ellmann points out that people make decisions most competently when,

first, they are aware that a decision is to be made and that they are entitled to make it; second, they know the choices open to them and comprehend the extent and likelihood of the costs and benefits of the various alternatives; and, third, they are acting with as full an understanding of their own values and emotional needs as possible.⁷³

Thus, an attorney should not shield his client from information on the presumption that the client cannot handle moral choices.

D. *The Timing Issue: When to Tell a Client About Rule 608(b)*

I believe an attorney should tell the client about Rule 608(b) before asking the client about his past. Some would object that, by doing this, I would be signaling to the client that he should lie to me about his history. Along these lines, Liisa Renée Salmi writes,

The pivotal issue on the propriety of an attorney lecture to a witness on the law of the case is the timing of the lecture. If the attorney lectures on the law before knowing the witness's version of the facts, she runs the risk of "suggesting" to the witness what the testimony should be.⁷⁴

72. Donald H. Zeigler, *The Confusing Relationship Between Rules 608(b) and 609 of the Federal Rules of Evidence*, 19 N.Y.L. Sch. J. Hum. Rts. 157, 164 (2003) (noting that a lawyer should not be allowed to ask about prior bad acts unless he has evidence "sufficient to make a prima facie case that the bad act actually happened"); see also Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135, 145 (1989) (finding that Rule 608(b)'s good faith standard "lacks uniform application and can have a threshold so low as to be nonexistent"); Rice, *supra* note 3, at 548–49, 551–52 (arguing that a lawyer should not be able to even ask about bad acts unless he has admissible evidence of the witness's commission of those bad acts).

73. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. Rev. 717, 727–28 (1987).

74. Liisa Renée Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 Rev. Litig. 135, 154–55 (1999). *But see* Nassau County (N.Y.) Bar Ass'n, Op. 94-6 (1994) (holding that an attorney may advise the client of applicable laws before hearing the client's version of the facts; to mandate otherwise would "in effect be to legislate mistrust of the client's honesty").

Likewise, Tanford asserts that when an attorney lectures a client about the law before interviewing him, the client's subsequent testimony will be unreliable.⁷⁵

Tanford and other truth trumpers wish to avoid the sort of covert inducement to lie that occurs in the much debated "lecture" scene from *Anatomy of a Murder* by Robert Traver.⁷⁶ In that novel, Lieutenant Manion shoots Barney Quill in front of a roomful of witnesses.⁷⁷ Manion then meets his new defense attorney, and Manion blurts out a story making it plain that he committed first-degree murder.⁷⁸ The attorney quickly stops Manion, and gives him a highly suggestive "lecture" on the defenses for murder, strongly implying that Manion's only option is an insanity defense.⁷⁹ When the lecture ends, Manion says, "Maybe . . . maybe I was insane."⁸⁰ He manufactures a story about blackouts and irresistible impulses, and his attorney replies, "Maybe you've got something there."⁸¹

I do not applaud the ham-fisted lecture from *Anatomy of a Murder*. The lecture is almost comically suggestive. The attorney does everything but blink "insanity defense" in Morse code. That said, I see nothing wrong with educating a client on the law before the client commits himself to any particular version of the facts. What is the alternative? Should a defense attorney soften a client up with promises of confidentiality, quiz the client about his past, uncover his secrets, and only then tell the client about the attorney's duty of candor to the court?

Stephen Ellmann points out the unfairness of such an approach. Ellmann writes, "[A]ny statement by the lawyer that offers the client 'extrinsic reward' for speaking frankly but leaves out this possibility of 'extrinsic loss' [e.g., if you tell me X, then I will not be able to argue Y for you] is plainly, and manipulatively, incomplete."⁸²

Assurances of this nature are particularly problematic in a criminal case. Freedman claims that it violates a criminal defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel for a lawyer to "establish a relationship of trust and confidence, [and] then disclose to the court the incriminating communications that result."⁸³ Freedman argues that a defense attorney acts as an "agent of the state" when he induces a defendant to confide without first warning that defendant about the attorney's duty of candor to the court.⁸⁴

75. Tanford, *supra* note 62, at 536.

76. *Id.* at 534-37; *see also* Robert Traver, *Anatomy of a Murder* 44-49 (1958).

77. Traver, *supra* note 76, at 30.

78. *Id.* at 30-33.

79. *Id.* at 35, 44-49.

80. *Id.* at 46.

81. *Id.* at 47.

82. Ellmann, *supra* note 73, at 741.

83. Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939, 1948 (1988).

84. *Id.* at 1947-48 (internal quotation marks omitted).

E. *An Advocate's Duty and Power to Dissuade*

Regardless of whether I tell my client about Rule 608(b) before or after asking about his personal background, I do not believe this information will open the floodgates to a wave of lies. I think I can deter my client from lying by warning him about the risks that lying entails. I am a strong believer in the power of negative persuasion. Along these lines, Roseanne Barr once suggested the following diet: "Eat anything you want, but do it naked in front of a mirror." My warning speech is like that mirror; it shows an unpalatable version of reality.

I begin by emphasizing that perjury is illegal, immoral, and—worst of all to a defendant facing possible jail time—counterproductive.⁸⁵ I would stress that prosecutors are adept at uncovering lies on cross-examination, and, if the prosecutor catches a defendant in a lie, no matter how small, the jury and the judge will have trouble believing the defendant about anything else. I would caution my client that, as Hazard points out, juries and judges are "notoriously unsympathetic to witnesses who lie on the stand" and that this "lack of sympathy readily translates into a harsh verdict."⁸⁶

Focusing on Rule 608(b), I would warn my client that he would be gambling if he relies on that Rule to conceal lies about collateral bad acts. Although 608(b) bars extrinsic evidence of bad acts insofar as those acts demonstrate "character for truthfulness," the same evidence often comes in for other purposes. Courts can admit collateral bad acts to establish motive, modus operandi, intent, etc.⁸⁷ Also, if my client makes a sweeping denial of illicit activity during his direct testimony, the court can admit extrinsic evidence of collateral bad acts to impeach him "by contradiction" under Rule 607.⁸⁸

In sum, I believe that I have the ability, as most criminal defense attorneys do, to deter my client from relying on Rule 608(b) to lie. Although it is always possible that my client would disregard my advice

85. See *State v. McDowell*, 681 N.W.2d 500, 513 (Wis. 2004) (stating that where a defendant intends to commit perjury, his attorney can often dissuade him "on pragmatic grounds" by explaining the "evidentiary weakness of the false account" and the "likely consequences that, obviously, the defendant does not desire" (quoting *State v. McDowell*, 669 N.W.2d 204, 224 (Wis. Ct. App. 2003))).

86. Hazard, *supra* note 20, at 1050.

87. Fed. R. Evid. 404(b); see also *People v. Molineux*, 61 N.E. 286, 294–304 (N.Y. 1901).

88. For example, in *United States v. Castillo*, after a drug defendant testified on direct examination that he "would not have smuggled drugs 'for a million dollars'" and that he "never used drugs and would not touch them," the court allowed prosecutors to impeach the defendant "by contradiction" with extrinsic evidence of a prior arrest for cocaine possession. 181 F.3d 1129, 1132–33 (9th Cir. 1999); see also *United States v. Paulsen*, 645 F.2d 13, 14–15 (8th Cir. 1981) (ruling that after the defendant stated on direct examination that he had never been involved with drugs except for personal use, the prosecutor was entitled to impeach him via contradiction with previous drug transactions); *United States v. Benedetto*, 571 F.2d 1246, 1249–50 (2d Cir. 1978) (ruling that after the defendant testified on direct examination that he had never accepted bribes from anyone, Rule 607 allowed a prosecution witness to testify about how he had repeatedly bribed the defendant in the past).

and lie anyway, I do not believe that this remote possibility makes it wrong to tell a client about Rule 608(b). As a zealous advocate, I have a duty to prepare my client for trial and to enhance his decision-making power. Again, my role as a criminal defense attorney is to protect my client, not to ferret out the truth.

Simon claims that my brand of role morality, the notion of the criminal defense attorney as a champion of the individual against a powerful government, is based upon unpopular and "paranoid antistatism."⁸⁹ Simon argues that a defense attorney should not use "aggressive defense" tactics (i.e., impeaching truthful government witnesses, etc.) if he knows his client is guilty and faces just punishment.⁹⁰ Professor Harry Subin echoes this sentiment.⁹¹ Subin contends that when a defense attorney knows his client is guilty, the attorney should limit himself to a "monitoring" role, just screening the government's case to ensure that the government meets its burden of proof.⁹² Simon and Subin seem to be arguing that if a defense attorney "knows" his client is guilty, the attorney should not defend that client too zealously or too well. This stance accords with the U.S. Court of Appeals for the Seventh Circuit's holding that a defendant's right to counsel just requires a "minimum standard of professional representation."⁹³

To me, zealous advocacy *is* the "minimum standard." I believe that truth is just one of the values of the criminal justice system; safeguarding my client's rights, dignity, and well-being are just as compelling. Moreover, I find nothing dated or paranoid about "antistatism." Over the past few years, we have witnessed mistreatment of inmates at Guantanamo, Attorney General Alberto Gonzales's memorandum advocating torture, and the intense politicization of the Department of Justice as revealed by U.S. attorney firings. With such an impressive trifecta of governmental abuses, it would be breathtakingly stupid for defense attorneys to ratchet down their zeal in protecting their clients against the government. As the saying goes, "Never drop your gun to hug a bear."⁹⁴ Accordingly, I intend to make sure my clients can use Rule 608(b) as ammunition.

II. THE PLANNED PERJURY PROBLEM: WHAT SHOULD AN ATTORNEY DO IF HIS CLIENT PLANS TO USE RULE 608(b) TO COMMIT PERJURY?

The Supreme Court has not ruled on what an attorney must do when he knows that his client is about to commit perjury.⁹⁵ The Court in *Nix v. Whiteside* only addressed what an attorney *can* do in such a situation; it stands for the narrow proposition that if an attorney believes his client

89. Simon, *supra* note 16, at 1727-28.

90. *Id.* at 1725.

91. See Subin, *supra* note 43, at 149.

92. *Id.* at 149-50.

93. United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975).

94. This maxim is sometimes attributed to H.E. Palmer.

95. See Shockley v. State, 565 A.2d 1373, 1378 (Del. 1989) (discussing *Nix v. Whiteside*, 475 U.S. 157 (1986)).

intends to lie, the attorney *may* threaten to withdraw without violating his client's Sixth Amendment right to counsel.⁹⁶

In his concurrence in *Whiteside*, Justice Harry Blackmun stated that it would be "inappropriate" to establish a "blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court."⁹⁷ Justice Blackmun elaborated,

Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three.⁹⁸

Unlike Justice Blackmun, the framers of the Model Rules do not flinch from inflicting blanket rules. Under Model Rule 3.3(b), if a lawyer learns that his client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct [e.g., perjury] related to the proceeding," the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."⁹⁹ Comment [10] to this Rule elaborates,

In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.¹⁰⁰

As comment [10] makes clear, there are multiple steps to the "planned perjury" problem: dissuasion, withdrawal, disclosure, and/or having the defendant testify in narrative form. All but one of those steps—dissuasion—has provoked fierce debate.

A. *Dissuasion*

According to the Supreme Court, "It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for

96. *Whiteside*, 475 U.S. at 174–76.

97. *Id.* at 188–89 (Blackmun, J., concurring).

98. *Id.* (citations omitted).

99. Model Rules of Prof'l Conduct R. 3.3(b) (2006).

100. *Id.* cmt. 10.

perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."¹⁰¹

As I discussed earlier, I believe defense attorneys can usually deter their clients from committing perjury. Gillers, Hazard, and others share this view.¹⁰² Indeed, the American Bar Association is so confident of attorneys' persuasive powers that it allows an attorney—after he remonstrates with his client—to assume that he has persuaded his client and eliminated the threat of perjury altogether.¹⁰³ But what if the client rebuts that presumption by telling the lawyer that he still intends to lie? What should the lawyer do next?

B. *Withdrawal*

The lawyer always can move to withdraw, but doing so often involves breaching the attorney-client privilege. The case law runs the gamut on how much or how little one should tell the court when withdrawing. Some lawyers demurely cite "professional responsibility" while others explicitly tell the court that their clients plan to lie.¹⁰⁴

My personal view is that if an attorney tries to withdraw just before his client takes the stand he does not have to tell the judge that his client plans to lie. The attorney's actions speak for him. "Indeed, an attorney's motion to withdraw at such a tell-tale juncture has been found [by several courts] to be alone enough to inform the finder of fact that the defendant intends perjury."¹⁰⁵ It is less clear what an attorney should say if his client's trial is weeks or months away. The Model Rules state that if withdrawal will not "undo the effect of the false evidence," the withdrawing attorney "must make such disclosure to the tribunal as is reasonably necessary to remedy the situation."¹⁰⁶ But if the trial is far off, then how can an attorney know that his client will even have an opportunity to testify? Only a fraction of criminal cases go to trial. If an attorney withdraws because of planned

101. *Whiteside*, 475 U.S. at 169.

102. See Gillers, *supra* note 12, at 830–31 ("If the lawyer does know of intended perjury, the lawyer will often be able to discourage the client from asking to testify."); Hazard, *supra* note 20, at 1049–50.

103. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353 (1987) ("Ordinarily, the lawyer can reasonably believe that such advice [against committing perjury] will dissuade the client from giving false testimony and, therefore, may examine the client in the normal manner." (emphasis omitted)).

104. See *Thornton v. United States*, 357 A.2d 429, 432 (D.C. 1976) (involving an attorney who attempted a noisy withdrawal by telling the court that he believed his client planned to lie because his client dramatically altered his story on the eve of trial); *cf.* *United States v. Henkel*, 799 F.2d 369, 370 (7th Cir. 1986) (involving an attorney who tried to withdraw by stating that he could not "professionally . . . proceed"); *People v. Ramos*, 708 P.2d 1347, 1349 (Colo. 1985) (involving an attorney who sought to withdraw by telling the judge that his relationship with the defendant had "deteriorated" without disclosing his suspicion that the defendant would commit perjury).

105. *Henkel*, 799 F.2d at 370 (citing *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978)).

106. Model Rules of Prof'l Conduct R. 3.3(b) cmt. 10 (2006).

perjury, does he then have a duty to monitor the case and step forward if the case makes it to trial?

Leaving confidentiality concerns aside, commentators and courts alike have criticized withdrawal. Robert Horgan writes, “[J]ust a request for withdrawal may raise suspicions of client fraud in the judge’s mind and perhaps unknowingly cause the judge to no longer be an unbiased participant.”¹⁰⁷ This prejudice is especially serious in a criminal case because the judge does not just preside over the trial; he sentences the defendant. Under the Federal Sentencing Guidelines, if a judge believes that the defendant lied on the stand, the judge must factor that into the guidelines calculation.¹⁰⁸

Commentators and courts alike have tried to find ways to prevent a defense attorney’s withdrawal from prejudicing the judge. Judge Frankel proposed that, when an attorney seeks to withdraw because of anticipated client perjury, the attorney should make a motion to withdraw before an independent magistrate, not the trial judge.¹⁰⁹ The independent magistrate would hear the basis for the attorney’s belief that the client intends to lie, and, if the attorney cannot persuade the magistrate, the attorney can proceed with the representation. The trial judge would never be the wiser. The Colorado Supreme Court proposed a simpler solution. In *People v. Schultheis*, the court ruled that when a defense attorney withdraws because of anticipated perjury he can just cite to an “irreconcilable conflict.”¹¹⁰ The attorney “should never be required to cite the specific provisions of the Code of Professional Responsibility which prohibit the use of perjured testimony or false evidence.”¹¹¹

These purported solutions achieve nothing. Neither of them prevents a withdrawing attorney from revealing his suspicion of client perjury to the judge. They just alter the manner in which that suspicion is communicated. With Frankel’s proposed change, whenever a defense attorney suspends proceedings to go before an independent magistrate without explanation, the trial judge is on notice that defense counsel expects his client to lie. Similarly, after *Schultheis*, when attorneys in Colorado seek to withdraw because of anticipated perjury, they file a motion to withdraw citing *Schultheis*, and the judge assumes, without any specific citations to the Model Rules, that perjury is afoot.¹¹²

107. Robert C. Horgan, Note, *Making Black and White out of Gray: An Attorney’s Duty to Investigate Suspected Client Fraud*, 29 New Eng. L. Rev. 795, 849–50 (1995).

108. U.S. Sentencing Guidelines Manual § 3C1.1 (2006); see also *United States v. Grayson*, 438 U.S. 41, 55 (1978) (Stewart, J., dissenting).

109. Frankel, *supra* note 13, at 40–41 (citing Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121, 149 (1985)).

110. *People v. Schultheis*, 638 P.2d 8, 14 (Colo. 1981).

111. *Id.* at 13.

112. See *People v. Ramos*, 708 P.2d 1347, 1352 (Colo. 1985). In *Ramos*, a defendant complained that the trial judge should have recused himself because the defendant’s attorney had telegraphed the defendant’s anticipated perjury via a “*Schultheis* motion.” *Id.* at 1349.

In addition to breaching confidentiality and prejudicing the judge against the defendant, withdrawal has drawn fire because it does not ultimately solve anything. Indeed, withdrawal may facilitate the client's fraud by transferring the case to another attorney who is ignorant of the client's plans.¹¹³ Donald Liskov writes, "Assuming the defendant still intends to offer the same testimony, he or she will probably be less candid with his new lawyer [A]ll that is achieved is that the second attorney will unknowingly assist in presenting perjury."¹¹⁴ Conversely, if the new attorney discovers the client's plan, that new attorney will likewise seek to withdraw, resulting in more delays. Even worse, the client could encounter an unethical attorney who will present and even argue perjury.¹¹⁵

C. Narrative Testimony

If the attorney does not try to withdraw, or if his motion to withdraw is denied, he will have to determine how to present his client's perjurious testimony. In this situation, lawyers often have their clients testify in narrative form, meaning that the lawyer does not examine the defendant directly. Instead, the lawyer simply asks the defendant his name, directs his attention to a particular time and place, and invites him to tell his story to the jury.

Professor Norman Lefstein advocates the narrative approach because it enables the defendant to testify without involving his lawyer in perjury.¹¹⁶ Lefstein also claims that the narrative approach deters perjury because if a defendant learns that he will have to testify in narrative form, he might decide not to testify at all.¹¹⁷

The Model Rules condemn the narrative approach, stating that a lawyer "may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false."¹¹⁸ A number of courts, however, have embraced the narrative approach as a compromise between the defendant's

The court rejected this argument, holding that the trial judge had assumed that the defendant would offer "fabricated testimony" solely for the purpose of deciding the motion to withdraw. *Id.* at 1352. I find it hard to believe that anyone can compartmentalize his thinking in this manner.

113. See *People v. DePallo*, 754 N.E.2d 751, 754 (N.Y. 2001).

114. Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth*, 28 New Eng. L. Rev. 881, 888 (1994). George Rutherglen has proposed that when an attorney withdraws because of anticipated perjury, he should tell his successor about the defendant's plans. See George Rutherglen, *Dilemmas and Disclosures: A Comment on Client Perjury*, 19 Am. J. Crim. L. 267, 269-78 (1992). This frustrates the client's plan, but it still does not solve the problem. It just transfers it.

115. See, e.g., *People v. Gadson*, 24 Cal. Rptr. 2d 219, 224 n.5 (Ct. App. 1993) (noting that withdrawal does "not necessarily resolve the problem").

116. Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 Geo. J. Legal Ethics 521, 550-51 (1988).

117. *Id.* at 546.

118. Model Rules of Prof'l Conduct R. 3.3 cmt. 6 (2006).

right to testify and the attorney's ethical obligations.¹¹⁹ Usually, when an attorney has his client testify in narrative form, the attorney refrains from affirmatively arguing his client's false claims during summation.¹²⁰

Some commentators have criticized the narrative approach. According to Gillers, this approach gives us the worst of both worlds. He writes, "The compromise of narrative slights both . . . the value of avoiding perjury and the value inherent in the constitutional right to testify with the aid of counsel."¹²¹ Horgan claims that the narrative approach enables the attorney to let the judge and jury know his client is lying.¹²² Likewise, Professor Jeremy Miller asserts that by having a client testify in narrative form, the "defense attorney is sending a 'subliminal' or 'direct' message that his or her client is lying, or at the least, that the attorney places little merit in such testimony."¹²³

In *Commonwealth v. Mitchell*, a Massachusetts superior court tried to block this subliminal message by giving stage directions to the defense attorney.¹²⁴ The court instructed the defense attorney to "remain standing during the defendant's narrative testimony."¹²⁵ Afterward, when the defendant requested a new trial on the ground that the narrative approach "signaled to the jury that his own counsel disbelieved his testimony," the court rejected his argument, noting,

[A]t a sidebar immediately following closing argument, this court noted that the narrative testimony went smoothly and that the jury did not display any alarm or surprise at the defendant's method of testifying. Indeed, the jury may well have been of a mind that it was ordinary for a defendant, as opposed to other witnesses, to testify in that manner.¹²⁶

In a country addicted to *Law & Order* reruns and Court TV, I find it hard to believe that a jury would be so poorly informed.

119. See, e.g., *Gadson*, 24 Cal. Rptr. 2d at 224 (approving the narrative approach as a way to reconcile a defendant's right to testify and a lawyer's ethical obligations); see also *United States v. Henkel*, 799 F.2d 369, 370 (7th Cir. 1986) (denying withdrawal when an attorney moved to withdraw right before the defendant was set to testify, but offering the defendant "an opportunity to testify without an attorney to guide him"); *Commonwealth v. Mitchell*, No. Crim. A. 9673CR0312, 2000 WL 33119695, at *18 (Mass. Super. Ct. Dec. 18, 2000) (rejecting defense counsel's motion to withdraw and permitting the defendant to testify in narrative form).

120. See, e.g., *Gadson*, 24 Cal. Rptr. 2d at 223 (involving an attorney who did not argue the defendant's bogus alibi defense during summation; instead, defense counsel just attacked the state's case); see also *Thornton v. United States*, 357 A.2d 429, 437 (D.C. 1976) (involving an attorney who "avoid[ed]" talking about the defendant's perjured testimony during summation); *Mitchell*, 2000 WL 33119695, at *18 ("[T]he lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.").

121. Gillers, *supra* note 12, at 830.

122. See Horgan, *supra* note 107, at 846-47.

123. Jeremy M. Miller, *Client Perjury: An Ever Present, Multidimensional Problem*, 106 Com. L.J. 349, 371 (2001).

124. *Mitchell*, 2000 WL 33119695, at *18.

125. *Id.*

126. *Id.* at *26.

D. *Surprise Perjury*

The narrative approach may solve the planned perjury problem; however, what if a client surprises his lawyer by lying during his direct testimony or cross-examination? As with planned perjury, consensus dictates that the attorney's first step is to privately remonstrate with his client and try to get him to recant.¹²⁷ If the client will not recant, then most jurisdictions require the attorney to "take the dramatic step of affirmatively revealing his client's perjury to the tribunal."¹²⁸ According to the American Bar Association, the attorney must do this "notwithstanding the fact that the information to be disclosed is information relating to the representation."¹²⁹

In theory, an attorney does not have to worry about violating the attorney-client privilege in such a situation because, as the Iowa Supreme Court put it, "no duty [of confidentiality] exists to the client when the client perjures himself to the knowledge of the attorney."¹³⁰ According to the majority view, a client cannot reasonably expect his attorney to "tolerate lying or any other species of fraud in the [judicial] process."¹³¹

Characteristically dissenting from majority opinion, Freedman argues that a criminal defense attorney should *not* reveal his client's perjury. He claims that doing so violates a criminal defendant's Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel.¹³² Analogizing to cases involving psychiatrists and other confidantes, Freedman claims it is unconstitutional for a lawyer to "establish a relationship of trust and confidence [and] then disclose to the court the incriminating communications that result."¹³³

As previously noted, Freedman has argued that, by doing this, the lawyer acts as an "agent of the state."¹³⁴ He is an agent of the state because the state requires him to find out as much as he can about his client's case by imposing duties to prepare and investigate;¹³⁵ however, the state does not allow the attorney to forewarn the client that his words may be used against him at trial. The American Bar Association's Standards for Criminal Justice explicitly forbid lawyer-client *Miranda* warnings.¹³⁶

127. See Model Rules of Prof'l Conduct R. 3.3 cmt. 10 (2006).

128. See Smiley, *supra* note 36, at 675 (emphasis omitted).

129. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353 (1987); see, e.g., *In re Ellis*, 130 P.2d 564, 565 (Kan. 1942) (holding that the failure to reveal a client's perjury merited reprimand).

130. Comm. on Prof'l Ethics v. Crary, 245 N.W.2d 298, 306 (Iowa 1976) (faulting attorney for allowing client to commit perjury during deposition).

131. *Id.*

132. Monroe H. Freedman, *Disclosing the Truth About Client Perjury* (Hofstra Univ. Sch. of Law, Legal Studies Research Paper Series, Research Paper No. 07-10, 2007), available at <http://ssrn.com/abstract=979654>.

133. Freedman, *supra* note 83, at 1948.

134. *Id.* at 1947.

135. *Id.* at 1947-48.

136. See Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-3.2 cmt. (3d ed. 1993).

Gillers disagrees with Freedman. Gillers argues that an attorney's duty to reveal concluded perjury is even stronger than his duty to avert anticipated perjury. Gillers reasons that the "two values Freedman wishes to protect—encouraging clients to be candid with counsel and discouraging a lawyer's intentional ignorance—are less threatened in the case of completed perjury."¹³⁷ Gillers is correct with respect to that particular case. However, Gillers ignores the fact that by revealing perjury in one case, an attorney warns future defendants not to trust their attorneys and discourages defense attorneys from inviting such trust.

Fortunately for me, New York does not follow the majority rule with respect to perjury. Like a handful of other jurisdictions, New York law dictates that if a criminal defendant commits perjury, his attorney must reveal the perjury to the "affected person or tribunal, except when the information is protected as a confidence or secret."¹³⁸ This exception swallows the rule because attorneys usually only know their clients are lying because of what their clients have told them in confidence.¹³⁹

Under the New York rule, I never would have to reveal my clients' confidences to a court. If confronted with a client intending perjury, I believe I could probably dissuade him. If that did not work and if I was *absolutely positive* that my client intended to lie, I would have my client testify in narrative form. I agree with critics that the narrative form is not an ideal solution because, like withdrawal, it signals my doubts about my client to the judge; however, it allows my client to testify without embroiling me in perjury. And unlike withdrawal, having my client testify in narrative form preserves the attorney-client relationship.

E. Knowledge

I doubt that I will ever have to resort to the narrative approach because I cannot be entirely certain that my client intends to lie on the stand unless he explicitly tells me so. And, even then, I would have reservations about using the narrative approach because my client might change his mind and opt to tell the truth at the last moment.

Neither the Supreme Court nor the Model Rules provides a clear standard for determining whether an attorney knows his client has committed or will

137. Gillers, *supra* note 12, at 832.

138. N.Y. Code of Prof'l Resp. DR 7-102(B)(1) (2007).

139. See Nassau County (N.Y.) Bar Ass'n Comm. on Prof'l Ethics, Op. No. 98-1 (1998) (holding that an attorney must disclose client information to the court only if it would be material to the resolution of a disputed issue in the litigation, and then only if the information is not a confidence or secret). In *People v. DePallo*, 754 N.E.2d 751, 753 (N.Y. 2001), the New York Court of Appeals narrowed—but did not invalidate—the "confidences" exception to an attorney's duty to reveal client perjury under Disciplinary Rule 7-102(B)(1). The court ruled that the "confidences" exception does not encompass a client's stated intention to commit perjury or any other future crime; nor does it extend to matters that the client has already revealed to the court. *Id.* at 753–54. *DePallo* demands disclosure of planned perjury about a *central* issue; it does not apply to accomplished perjury concerning collateral matters.

commit perjury. The Supreme Court did not tackle this issue in *Whiteside*.¹⁴⁰ The Model Rules are similarly useless on this point. Under the Model Rules, a lawyer “knows” something when he has “actual knowledge of the fact in question.”¹⁴¹ The Rules add that “[a] person’s knowledge may be inferred from circumstances.”¹⁴²

To fill the gap, state and federal courts have concocted their own standards for assessing whether an attorney knows his client is lying. At least one court has ruled that an attorney must know beyond a reasonable doubt that the defendant has lied or intends to do so.¹⁴³ Other courts have adopted the “lesser but still demanding requirement that counsel have a ‘firm factual basis.’”¹⁴⁴ Iowa courts just demand “good cause to believe the defendant’s proposed testimony would be deliberately untruthful.”¹⁴⁵ Meanwhile, Illinois courts have required a “good-faith determination that [the] defendant was going to commit perjury.”¹⁴⁶ Colorado courts do not even have a standard; they just insist that the attorney’s knowledge stem from his “independent investigation of the evidence or upon distinct statements by his client or the witness which support that belief.”¹⁴⁷

These standards are meaningless. Differentiating between them is like trying to distinguish “knowing” from “really, really knowing.” As the Wisconsin Supreme Court noted in *State v. McDowell*, even the supposedly demanding “‘firm factual basis’ standard is really no standard at all.”¹⁴⁸ The court elaborated,

[L]eaving it up to individual lawyers to take into account all relevant facts and circumstances and decide whether a firm factual basis exists to believe the client will commit perjury tells lawyers virtually nothing about when they should compromise their role as advocate. Such an approach, in our estimation, breeds needless uncertainty.¹⁴⁹

The same can be said of the other standards. Indeed, where the courts apply the same standard to similar circumstances, they often come up with very different results.

For example, the courts in *People v. Bartee* and *People v. Calhoun* applied the same “good faith” standard in radically different ways. In *Bartee*, the court was “not told how [defense] counsel” knew his client

140. See Freedman, *supra* note 83, at 1940–46.

141. Model Rules of Prof'l Conduct R. 1.0(f) (2006).

142. *Id.*

143. See *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989).

144. *Commonwealth v. Mitchell*, No. Crim. A. 9673CR0312, 2000 WL 33119695, at *20 (Mass. Super. Ct. Dec. 18, 2000); see also *United States v. Long*, 857 F.2d 436, 444 (8th Cir. 1988); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

145. *State v. Hischke*, 639 N.W.2d 6, 10 (Iowa 2002).

146. *People v. Calhoun*, 815 N.E.2d 492, 499–500 (Ill. App. Ct. 2004); see also *People v. Bartee*, 566 N.E.2d 855, 857 (Ill. App. Ct. 1991).

147. *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981); see also *State v. DeGuzman*, 701 P.2d 1287, 1291 (Haw. 1985).

148. *State v. McDowell*, 681 N.W.2d 500, 512 (Wis. 2004).

149. *Id.* (internal quotation marks omitted).

intended to commit perjury; however, “[a]bsent some showing that counsel’s decision was unreasonable under the circumstances,” the court presumed the attorney had a good faith basis.¹⁵⁰ Yet, in *Calhoun*, where an attorney stated that he knew his client would lie because his client’s statements conflicted with those of other witnesses, the court found that the attorney lacked a good faith basis for believing his client would lie.¹⁵¹ The court ruled that a good faith determination “cannot be based merely on defense counsel’s assessment of the evidence”; it must rest on some other “articulable basis.”¹⁵² Thus, while the *Bartee* court assumed good faith based on an apparent absence of “unreasonableness,” the *Calhoun* court demanded much more.

J. Vincent Aprile argues that defense attorneys should not delve into this mess of standards.¹⁵³ Aprile claims that, by directing a lawyer to determine whether he has a firm factual basis, no reasonable doubt, good cause, or a good faith basis to disbelieve his client, these standards require defense counsel to “be proactive and constantly evaluate any and all objective circumstances that could undermine the truthfulness of the client’s intended testimony.”¹⁵⁴ Aprile asserts that attorneys should not serve as “first-line, proactive censors” of client testimony; they should only act as “reactive censor[s].”¹⁵⁵

Aprile argues that courts should adopt the holding in *State v. McDowell*, which provides that “absent the most extraordinary circumstances,” a defense attorney only can know his client will lie if the client explicitly tells him that he intends to do so.¹⁵⁶ The *McDowell* court adds that while the “defendant’s admission need not be phrased in ‘magic words,’ it must be unambiguous and directly made to the attorney.”¹⁵⁷ When the client does this, the attorney should react by trying to dissuade him and, if that fails, either withdrawing or having his client testify in narrative form.¹⁵⁸

I agree with Aprile and the *McDowell* court’s approach. As a defense attorney, I resolve every conceivable doubt in favor of my client. As Justice Blackmun noted in his concurrence in *Whiteside*, “Except in the rarest of cases, attorneys who adopt ‘the role of the judge or jury to determine the facts,’ pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.”¹⁵⁹

150. *Bartee*, 566 N.E.2d at 857.

151. *Calhoun*, 815 N.E.2d at 500.

152. *Id.*

153. J. Vincent Aprile II, *Client Perjury: When Do You Know the Client Is Lying?*, 19 *Crim. Just.* 14, 18 (2004).

154. *Id.*

155. *Id.*

156. *Id.* (citing *State v. McDowell*, 681 N.W.2d 500, 511 (Wis. 2004)).

157. *McDowell*, 681 N.W.2d at 513.

158. Aprile, *supra* note 153, at 18; see also *McDowell*, 681 N.W.2d at 513.

159. *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) (citation omitted).

From previous experience, I know that it is rare for a client to tell his attorney that he intends to lie. If that situation were to arise, I would fulfill my duty as an officer of the court and have my client testify in narrative form. However, I would do so with misgivings. As the U.S. Court of Appeals for the Eighth Circuit noted in *United States v. Long*, even if a client gives me “a statement of an intention to lie on the stand,”¹⁶⁰ I cannot be entirely certain that he will carry out his plan. The Eighth Circuit elaborated, “Once a client hears the testimony of other witnesses, takes an oath, faces a judge and jury, and contemplates the prospect of cross-examination by opposing counsel, she may well change her mind and decide to testify truthfully.”¹⁶¹ By using the narrative approach to alert the court—albeit implicitly—that my client intends to lie, I rob the client of his last-minute opportunity to change his mind and tell the truth to an unbiased audience.

Ultimately, however, I support Aprile’s approach because it allows me to be loyal to my client virtually all of the time. Also, I believe that this bright-line approach discourages defense attorneys from engaging in selective ignorance.

F. *Selective Ignorance*

Attorneys sometimes engage in selective ignorance to reconcile their duty of candor to the court with their duties to maintain client confidences and to prepare and investigate their clients’ cases. When a client intends to commit perjury, an attorney can only satisfy all three duties if he avoids learning that his client is lying. Under the standards now in vogue for assessing whether an attorney knows his client will lie, any inculpatory bit of evidence can be relevant. Thus, lawyers have a strong incentive to play a game of Marco Polo, where they keep their eyes closed so that they cannot see the incriminating, possibly damning, shards of evidence that their clients, witnesses, or other sources might reveal to them. When playing this game, attorneys fumble around in the dark asking questions that hopefully will uncover only helpful facts.¹⁶²

Courts and commentators alike have condemned attorneys who engage in selective ignorance because it harms clients and the legal system itself. For example, in *State v. Hensley*, the Supreme Court of Oklahoma disbarred an attorney, Lois Hensley, for telling a probate court that she did not know the

160. *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988).

161. *Id.*

162. Tanford aptly describes selective ignorance. He writes, “Some commentators have actually come to the conclusion that, if an attorney believes an investigation would show that a client’s proposed testimony was perjurious, the attorney should *not conduct the investigation*. In that way the attorney will be able later to deny actual knowledge of the falsity of the evidence and may ethically present it, all of which is justified as zealous loyalty to the client.”

Tanford, *supra* note 62, at 504.

address of a minor heir.¹⁶³ The Supreme Court of Oklahoma stated that, even if one credited Hensley's "contrived unawareness,"¹⁶⁴

her failure to learn the address . . . when the means of said knowledge was immediately at hand and available upon mere inquiry, coupled with her knowledge that as an attorney she had a duty to make inquiry and her affirmative representation to the probate judge . . . [was] a clear and unequivocal act of dishonesty, fraud, deceit, and misrepresentation, and conduct that is prejudicial to the administration of justice. That she might have misp[er]ceived said conduct as being beneficial to her client does not mitigate against the gravity of the offense . . .¹⁶⁵

Similarly, the American Bar Association deplors "intentional ignorance" because a lawyer who engages in it "runs the risk of being the victim of surprise at trial."¹⁶⁶ Judge Frankel also criticized lawyers who cling to self-protective ignorance, calling "the device of deliberate ignorance" a "fraud."¹⁶⁷ Tanford adds, "It is improper to present false evidence to a court when its falsity would have become certain from minimal investigation regardless of the reason the lawyer failed to investigate."¹⁶⁸

To me, the idea that a lawyer can navigate ethical shoals by staying ignorant of a client's account of what occurred is preposterous. I want to know everything I can about the case, learning facts from the client and from third-party sources. There is no ethical discomfort here because a defense lawyer can put on a "false defense," putting on witnesses and introducing documents to create a reasonable doubt and, as Justice Byron White said in *United States v. Wade*, put the government's case in the worst possible light.¹⁶⁹ I am permitted to do this as long as I am not knowingly introducing false testimony.

If, however, a defense attorney can be charged with knowingly presenting perjury under an infinite number of scenarios thanks to amorphously defined standards, then she will have an incentive to engage in selective ignorance. Conversely, if, as Aprile urges, the attorney can only truly know that her client intends to lie if the client actually tells her so, then the attorney can freely investigate the client's case. In the process, to truth trumbers' delight, the attorney may uncover facts that will persuade the client to plead guilty, thus eliminating the threat of perjury altogether.

163. *State v. Hensley*, 661 P.2d 527, 530 (Okla. 1983); *see also* *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) (faulting prosecutors for "consciously avoid[ing] recognizing the obvious" fact that their witness committed perjury).

164. *Hensley*, 661 P.2d at 530.

165. *Id.*

166. *Standards for Criminal Justice: Prosecution Function and Defense Function* Standard 4-3.2 cmt. (1993).

167. Frankel, *supra* note 13, at 32.

168. Tanford, *supra* note 62, at 504-05.

169. *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part).

III. RULE 608(b) SHOULD BE AMENDED TO ALLOW JUDGES TO ADMIT
EXTRINSIC EVIDENCE OF COLLATERAL BAD ACTS WHENEVER
THE WITNESS WHO COMMITTED THOSE ACTS AUTHENTICATES
THAT EVIDENCE

I have come across several schools of thought regarding whether and how Rule 608(b) should be amended. Those who support the status quo do so because it promotes efficiency. Rule 608(b)'s ban on extrinsic evidence averts confusing and time-consuming "minitrials" on witnesses' collateral bad acts. It prevents a trial from devolving into "a parade of witnesses disputing trivialities [that] would reduce the trial to a diversionary swearing match, a series of convoluted detours."¹⁷⁰ As one commentator put it, Rule 608(b) stops the "sideshow" from "tak[ing] over the circus."¹⁷¹

These "efficiency fans" argue that Rule 608(b)'s extrinsic evidence ban makes sense because collateral bad acts, and lies about those acts, are not all that probative. Indeed, psychologist Richard Redding argues that prior acts of untruthfulness in other settings are not predictive of a person's truthfulness on the stand.¹⁷² Relying on psychoanalytic studies, Redding writes, "One's propensity for truthfulness may be consistent in a particular situation (for example, in court) and within a limited time frame, but variable across different situations, time-periods, and ages."¹⁷³ Thus, the fact that a witness lied on a mortgage application several years ago does not mean he will lie in court today.

Besides, even if a witness lies about collateral bad acts on the stand, he arguably does not get away with much. According to one commentator, "[C]onventional wisdom" has it that "just asking the prior bad act question does some damage to the credibility of the witness, regardless of the response."¹⁷⁴ The jury will often believe that the witness committed the bad act because where there's smoke, there's fire.¹⁷⁵

Others favor eliminating Rule 608(b) and leaving this matter entirely to judges. Professors Kevin McMunigal and Calvin Sharpe have argued that 608(b)'s bright-line rule gives a witness a "license to lie" about his past without fear of being exposed.¹⁷⁶ They claim a "weighing rule"—allowing a judge to weigh all relevant factors on a case-by-case basis—will produce

170. Gerald L. Shargel & Marc Fernich, *Federal Rules of Evidence 608(b): A Modest Amendment Proposal*, N.Y. L.J., Mar. 21, 2006, at 4.

171. *Id.* (internal quotation marks omitted).

172. Richard E. Redding, *Socialization by the Legal System: The Scientific Validity of a Lacanian Socio-legal Psychoanalysis*, 75 *Or. L. Rev.* 781, 800–01 (1996).

173. *Id.*

174. Rafael Guzman, *Impeaching the Credibility of a Witness: Issues, Rules and Suggestions*, 1994 *Ark. L. Notes* 29, 32 (1994); see also James Ethan McDaniel, *Alabama Rule of Evidence 608(b): The Call for an Amendment to Prevent Abuse of the Protections Within the Rule*, 57 *Ala. L. Rev.* 1105, 1121 (2006) (stating that asking about prior bad acts can be "especially damaging" (internal quotation marks omitted)).

175. See McDaniel, *supra* note 174, at 1121; Guzman, *supra* note 174, at 32.

176. Kevin C. McMunigal & Calvin William Sharpe, *Reforming Extrinsic Impeachment*, 33 *Conn. L. Rev.* 363, 379 (2001).

“fairer result[s].”¹⁷⁷ Professor Edward Imwinkelried also favors replacing Rule 608(b) with a weighing rule because doing so would shift decision-making power from appellate judges to trial judges.¹⁷⁸ Imwinkelried favors this result because trial courts have a better understanding of the facts; as one court noted, the trial judge is “Johnny-on-the-spot; he has savored the full taste of the fray.”¹⁷⁹

A third group favors altering Rule 608(b) so that extrinsic evidence of a collateral bad act comes in, at the judge’s discretion, only if the witness denies the act. This change would reverse the incentives now in place. It would reward truthful witnesses by ensuring that their collateral bad acts receive only brief mention, and it would penalize liars by allowing courts to delve more extensively into their collateral bad acts and reveal their lies about those acts. “Incentives fans” claim that this change also will promote truth seeking. Professor Paul Rice argues that if “witnesses are confronted with their prior conduct and deny it, the potential value of that evidence may increase significantly.”¹⁸⁰ Collateral bad acts just show that the witness has lied in the past; however, by denying these acts in court, the witness shows his willingness to lie *right now on the witness stand*. Thus, the logic goes, the court should permit litigants to delve into lying witnesses’ collateral acts in detail.

Hawaii has endorsed this rationale. Hawaii’s Rule 608(b) allows judges to admit extrinsic evidence of collateral bad acts at the judge’s discretion.¹⁸¹ The Rule itself does not state that judges should only admit such evidence when the witness lies about collateral bad acts, but the Rule’s commentary does. The commentary states that the intent behind the Rule is to “invest the trial judge with discretion to admit the extrinsic evidence . . . assuming the witness is confronted on cross-examination and denies” it.¹⁸² The commentary adds that, if the witness admits the act on cross-examination, “then there is no need for the extrinsic evidence.”¹⁸³

A last group of commentators, I among them, favors changing Federal Rule of Evidence 608(b) so that a judge may admit extrinsic evidence of collateral bad acts whenever the witness who committed those acts lays

177. *Id.* at 405–06.

178. Edward J. Imwinkelried, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether It Is Necessary or Even Desirable to Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness’s Credibility*, 1998 U. Ill. L. Rev. 1013, 1033–34.

179. *Id.* at 1033 (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)). Unlike Edward J. Imwinkelried, Abraham Ordover opposes unfettered discretion for trial judges. Ordover claims that even with the limited discretion that trial judges enjoy under Rule 608(b), they “have not been evenhanded in their treatment of prosecutors and defense counsel as cross-examiners.” Ordover, *supra* note 72, at 189.

180. Rice, *supra* note 3, at 354.

181. Haw. R. Evid. 608(b).

182. *Id.* cmt.

183. *Id.*

sufficient foundation.¹⁸⁴ Of course, incentives fans would condemn this change because, even more than the old Rule 608(b), the new rule would punish truthful witnesses and reward liars; however, this would not always be the case. It is true that—under my proposed rule—a truthful witness will have to suffer through a longer discussion of his bad act than he would have had to under the old rule. It is also true that a witness who responds falsely to questions about the underlying act and refuses to lay a foundation for extrinsic evidence will not have his sins rehashed. However, many witnesses will not fall into either category. A witness may deny the bad act but authenticate the impeaching tape or document by acknowledging his own voice, writing, or signature. This witness will be exposed as a perjurer in real time, whereas the old rule lets him off “scot-free.”

Incentives fans would counter, “Yes, but what about the liar who refuses to acknowledge his voice, signature, *and* his prior bad act? What about him?”

My response is that Rule 608(b) was never intended to entrap such witnesses. The Rule’s primary purpose was not to create a Pinocchio test for the jury to enjoy (i.e., watch the lying witness’s list of sins grow longer right before your eyes). No, the point of Rule 608(b) was to promote efficiency. Changing Rule 608(b) to accommodate a Pinocchio test sends us back to minitrials. It necessitates a parade of witnesses and accords an excessive amount of time to collateral issues.

In contrast, the change I propose would allow courts to delve into collateral bad acts without triggering a proverbial trial within a trial.¹⁸⁵ Moreover, this proposal should please judicial discretion fans because it establishes a permissive, not mandatory, rule.

My proposal finds ample support in federal case law. Take, for example, the U.S. Court of Appeals for the Third Circuit’s opinion in *Carter v. Hewitt*, a civil rights suit under 42 U.S.C. § 1983.¹⁸⁶ Reginald Carter, a prison inmate, alleged that three guards assaulted him during a routine cell search.¹⁸⁷ On cross-examination, the defense confronted Carter with a letter describing how to file a false prison brutality complaint.¹⁸⁸ Carter conceded writing the letter, but he claimed that he only meant to encourage legitimate complaints.¹⁸⁹ The trial court directed Carter to read the letter aloud and later admitted it into evidence to impugn his credibility.¹⁹⁰

Carter appealed the ensuing judgment against him, arguing that the letter’s admission violated Rule 608(b)’s extrinsic evidence ban.¹⁹¹ The

184. See, e.g., Edward J. Imwinkelried, *A Radical Approach to the Law of Impeachment: The Statutory Outer Limits*, 22 Am. J. Trial Advoc. 1, 27 (1998).

185. See McCormick on Evidence § 41, at 89 (Edward W. Cleary ed., 3d ed. 1984).

186. *Carter v. Hewitt*, 617 F.2d 961, 969–70 (3d Cir. 1980).

187. *Id.* at 963.

188. *Id.* at 964.

189. *Id.* at 965.

190. *Id.* at 964–65.

191. *Id.* at 966.

Third Circuit disagreed and affirmed, stressing Carter's "admission that he wrote the letter."¹⁹² The court explained,

[T]he great majority of . . . decisions finding violations of Rule 608(b) do so when the extrinsic evidence . . . is obtained from a witness *other* than the one whose credibility is under attack. When, however, the extrinsic evidence is obtained from and through . . . th[at] very witness . . . the rule's core concerns are not implicated.¹⁹³

The court further stated that "[n]o issues are confused or time wasted through a *trial* of a collateral matter: no trial is needed since the matter is conceded,"¹⁹⁴ and that "the extrinsic evidence ban should be relaxed when the witness sought to be impeached *admits* the impeaching act."¹⁹⁵

The U.S. Court of Appeals for the Fourth Circuit applied the same rule in *United States v. Zandi*, a drug case in which one defendant testified.¹⁹⁶ Attacking this defendant's veracity, the prosecutor introduced several documents rife with falsehoods—credit, employment and loan applications, tax returns, and a lease—that the defendant conceded completing. On appeal, the Fourth Circuit sustained the documents' admission over a Rule 608(b) challenge. Invoking *Carter*, the court observed that, "when a witness *admits* to having performed certain acts," courts "generally hold that . . . the prohibition against using extrinsic evidence" does not apply.¹⁹⁷

Similarly, the U.S. Court of Appeals for the Fifth Circuit relied on the *Carter* rule in *United States v. Simpson*, another drug case.¹⁹⁸ William Simpson took the stand in his own defense, painting himself as a legitimate businessman who was "merely role playing" in various drug-related conversations.¹⁹⁹ To refute this claim, the government presented a Securities and Exchange Commission civil injunction that described Simpson's securities violations involving a Louisiana oil company.²⁰⁰ Simpson appealed, citing Rule 608(b). The Fifth Circuit affirmed, relying on *Carter*.²⁰¹ The court emphasized that Simpson had admitted the underlying conduct "simultaneously" with the document's "introduction," effectively identifying and authenticating it.²⁰²

Critics of my proposal will retort that admitting extrinsic evidence of collateral bad acts, acts which a witness has already acknowledged, is needlessly cumulative. However, documentary evidence or other tangible proof often is "much more convincing" than a witness's dry concession or

192. *Id.* at 970.

193. *Id.* at 969–70.

194. *Id.* at 971.

195. *Id.* at 972 n.11.

196. *United States v. Zandi*, 769 F.2d 229 (4th Cir. 1985).

197. *Id.* at 236.

198. *United States v. Simpson*, 709 F.2d 903, 907–08 (5th Cir. 1983).

199. *Id.* at 907.

200. *Id.*

201. *Id.* at 910.

202. *Id.* at 908.

counsel's bare questions and arguments.²⁰³ For this reason, the Supreme Court ordinarily forbids witnesses from escaping a case's "full evidentiary force" by "naked admission," sapping it of weight, color, depth, and richness.²⁰⁴ Moreover, admitting such documentation prolongs nothing, and it may even cause counsel to ask fewer questions about the underlying misconduct on the theory that the jury can review the evidence itself and reach its own conclusion.

CONCLUSION

The legal profession does not attract droves of risk takers. Many people enter law school because they hope to pursue prestigious, relatively stable work for decent, sometimes fabulous, compensation. To become lawyers, these people must be smart and studious enough to figure out what answers their professors and bar examiners desire, and they must be willing to recite those answers on cue. Because becoming a lawyer demands so much diligence and conformity, it is no surprise that lawyers are eager to protect their personal reputations and the reputation of the legal profession itself.

I believe that the extreme moral caution of truth trumpets stems from this obsession with reputation. To them, zealous criminal defense attorneys are the black sheep of the legal family. Faced with close ethical questions, a zealous attorney will always err on the side of his client. Such loyalty invites popular derision when the client is an accused criminal. The more wicked the criminal, the greater the scorn. Nevertheless, a truly effective criminal defense attorney must be willing to endure that derision. It is appalling to render anything less than zealous advocacy to a client, particularly a client facing potential loss of liberty or life. In order to mount that level of advocacy, the lawyer's heart must be in it.²⁰⁵

Zealous advocacy means arming the client with every legitimate means of defense. This includes telling the client about Rule 608(b). To the extent that Rule 608(b) invites perjury, I believe the answer is to modify the Rule—not hobble the client with ignorance.

203. *Rosario v. Kuhlman*, 839 F.2d 918, 927 (2d Cir. 1988).

204. *Old Chief v. United States*, 519 U.S. 172, 186–87 (1997).

205. Twenty-five years ago, Harvard Law Professor Alan M. Dershowitz described former prosecutors who are defense lawyers in name only as "The Prosecutor in Defense Attorney's clothing." Alan M. Dershowitz, *The Best Defense* 400 (1982). As Professor Dershowitz wrote, "[T]heir hearts are not in defending guilty criminals. Nor is it their ambition to spend their lives on what they regard as the 'wrong side' of the law." *Id.*