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Dishonest Ethical Advocacy?: False Defenses in Criminal Court

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DISHONEST ETHICAL ADVOCACY?: FALSE DEFENSES IN CRIMINAL COURT

*Joshua A. Liebman**

Up to this morning I believed most firmly in his innocence; and so did many others as well as myself.

“I have sent for you, gentlemen,” said he, “to tell you I committed the murder!”

When I could speak, which was not immediately, I said “Of course, then, you are going to plead guilty?”

“No, sir,” was the reply, “I expect you to defend me to the utmost.”

We returned to our seats.¹

Whatever the torments of his private morality, the lawyer has got to know what the law of the land requires.²

Our criminal justice system aims to acquit the innocent and convict the guilty. To facilitate these just outcomes, attorney ethics rules require criminal defense attorneys to defend clients with the utmost loyalty and zeal while taking care never to engage in dishonesty, fraud, or misrepresentation. When a defense attorney knows a client is guilty, these competing ethical duties present a dilemma: How and when, if at all, do the rules of professional conduct permit or even require an attorney knowingly to defend a guilty client?

This Note examines this dilemma and recent judicial approaches to it. Judges disagree about how guilty criminal defendants should be permitted to mount defenses at trial. Some have forbidden defense counsel from knowingly advancing any false exculpatory proposition. Others have permitted guilty defense attorneys to present sincere or truthful testimony in order to bolster a falsehood. And still others have signaled more general

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1. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 133 (1973) (quoting SAMUEL WARREN & CHARLES PHILLIPS, *CORRESPONDENCE BETWEEN SAMUEL WARREN, ESQ., BARRISTER-AT-LAW, AND CHARLES PHILLIPS, ESQ., RELATIVE TO THE TRIAL OF COURVOISIER* 11 (1849)).

2. *Id.* at 158.

comfort with the idea that an attorney aggressively can pursue an acquittal on behalf of a guilty client.

This Note seeks to resolve this issue by parsing the range of false defense tactics available to attorneys and evaluating the propriety of each under the Model Rules of Professional Conduct. This Note reads the Model Rules in the context of the adversary system's twin aims to seek truth and safeguard individual rights; it defines and categorizes specific false defense tactics; and it offers practical, context-specific recommendations to courts and attorneys evaluating knowingly false defenses as they occur in the real world.

Rather than accepting or rejecting false defenses wholesale, this Note argues that the best reading of the Model Rules permits some false defense tactics and prohibits others. Specifically, this Note distinguishes false defenses that adduce or rely on evidence known to be false from others that do not: the former violate the Model Rules, while the latter comport with them and facilitate the adversary system's proper function. This distinction accounts for important ethical differences between false defense tactics and provides a workable, practical framework through which courts can determine precisely how and when defense counsel should be allowed to advocate on behalf of a guilty client.

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INTRODUCTION

Imagine you are a criminal defense attorney representing a client facing the death penalty for murder.³ During the course of representation, you have come to know that your client is guilty of shooting and killing the victim in broad daylight at point-blank range: he credibly admitted guilt to you during a privileged and confidential conversation. Your duties competently and diligently to represent your client and to keep your client’s confidences⁴ require that you pursue the best possible outcome on his behalf—if possible, an acquittal. Yet you also seek to honor your duties of candor to the court and fairness to the prosecution, which forbid you from making or introducing false statements or evidence in court.⁵

You contemplate your options on the eve of trial. Can you ethically and permissibly stand before the judge and jury and argue that your guilty client did not, in fact, commit the crime? Can you call to the witness stand an expert to sincerely but incorrectly testify that your client was not the person seen on video committing capital murder, even though you know your client is guilty? Can you argue or present evidence suggesting that an innocent third party pulled the trigger? Or are you ethically constrained merely to cross-examine the prosecution’s witnesses or, after hearing the government’s case, only to argue to the jury that the prosecution has failed to prove your client’s guilt beyond a reasonable doubt? At what point, and under what circumstances, do these forms of zealous advocacy transform into instances of professional misconduct?

Professor Harry I. Subin defined a false defense as a “means attempting to convince the judge or jury that facts established by the state and known to the attorney to be true are not true, or that facts known to the attorney to

3. The following hypothetical is adapted from the facts of *United States v. Jiménez-Bencevi*, 788 F.3d 7, 9–14 (1st Cir. 2015). For discussion and analysis of that case, see *infra* Part III.C.

4. See MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2016) (“A lawyer shall provide competent representation to a client.”); *id.* r. 1.3 cmt. 1 (“A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”); *id.* r. 1.6 (discussing attorney-client confidentiality).

5. See *id.* r. 3.3 (discussing attorneys’ duty of candor to the courts); *id.* r. 3.4 (discussing attorneys’ duty of fairness to opposing parties and opposing counsel).

be false are true.”⁶ The dilemma presented by such defenses, especially when made by a lawyer who knows a client is guilty, predates the American legal system and has plagued attorneys, ethicists, and legal scholars alike throughout Anglo-American legal history.⁷ Writing in 1892, George D. Watrous lamented that “[n]o problem in professional ethics has more thoroughly distracted the conscientious student, and none is more responsible for the ignorant and contemptuous opinion which really prevails among many laymen, that no lawyer can be an honest man or that no honest man can become a lawyer.”⁸ At the turn of the twentieth century, Louis J. Rosenberg noted that “the status of the attorney to his guilty client[] is not infrequently a matter causing him much perplexity.”⁹ Indeed, the earliest American legal ethics treatises dedicated whole sections to defense ethics, attorney candor, and related topics.¹⁰ These treatises aired both sides of the debate: opinions ran the gamut from advocating for unbridled zealous advocacy¹¹ to arguing that guilty defendants deserved either the barest defense or no defense at all.¹² While recent decades have seen increasing

6. Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 126 (1987). *But see* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339 (1987) (critiquing Subin's definition of false defenses and his proposed answers to whether and when false defenses should be allowed).

7. *See, e.g.*, MELLINKOFF, *supra* note 1, at 141–45 (citing English letters and newspaper articles dating to 1840 debating this topic).

8. George D. Watrous, *The Moral Right to Defend the Guilty*, 2 YALE L.J. 41, 44 (1892).

9. Louis J. Rosenberg, *The Status of an Attorney Defending a Guilty Client*, 10 YALE L.J. 24, 24 (1900).

10. *See, e.g.*, HERSCHEL WHITFIELD ARANT, *CASES AND OTHER MATERIALS ON THE AMERICAN BAR AND ITS ETHICS* 234–58, 422–500 (1933); ELLIOTT E. CHEATHAM, *CASES AND OTHER MATERIALS ON THE LEGAL PROFESSION* 215–66 (1st ed. 1938); GEORGE P. COSTIGAN, JR., *CASES AND OTHER AUTHORITIES ON LEGAL ETHICS* 181–203 (1st ed. 1917); GEORGE W. WARVELLE, *ESSAYS IN LEGAL ETHICS* 128–44 (1st ed. 1902).

11. *See, e.g.*, CHEATHAM, *supra* note 10, at 194 (“A lawyer has no business with the justice or injustice of the cause which he undertakes The justice or injustice of the cause is to be decided by the judge.” (quoting Note, *Dr. Johnson and the Law*, 29 CAN. L. TIMES 1021, 1021 (1909))); COSTIGAN, JR., *supra* note 10, at 320 (quoting a nineteenth-century defense attorney who argued that if defense attorneys violated clients' confidences by revealing knowledge of clients' guilt, “the relation of client and counsel will be deranged, and their mutual confidence interrupted; the independence of the bar will be violated, and the principle of advocacy will be abolished altogether”); WARVELLE, *supra* note 10, at 136 (“Before the law all men are equal, and guilty men have the same right to be defended and to be represented by counsel as have the innocent.”); *see also id.*, at 137 (derisively labeling as “pseudo-moralists” those who criticized zealous defenders of the guilty).

12. *See, e.g.*, CHEATHAM, *supra* note 10, at 197 (“No lawyer can work for the acquittal of a client who has confessed to him his guilt . . . without ceasing to be professional and ethical; nor can he, if such be his practice, assert himself to be an apostle of ‘law and order.’” (quoting CARL F. TAEUSCH, *PROFESSIONAL AND BUSINESS ETHICS* 64–66 (1926))); COSTIGAN, JR., *supra* note 10, at 318–19 (“[I]f an accused person be really guilty, he has no moral right to any defense. In him, any attempt to avoid punishment by a deception . . . is an additional crime, instead of a justifiable act; and how can it be a virtue in his counsel to do that for him which is a crime if done by himself?” (quoting Editorial, 4 JURIST 593, 594 (1840))); WARVELLE, *supra* note 10, at 134–35 (“[I]n the minds of many, [knowingly defending a guilty client] is the depth of professional infamy, and a lawyer who will so far lower himself

acceptance of the idea that false defenses can be ethical or even desirable,¹³ theorists continue in search of a final resolution to the false-defense dilemma.¹⁴

While this intellectual debate has continued to simmer, some courts have faced circumstances requiring concrete, real-world determinations of what attorneys confronting the false-defense dilemma should be permitted to do in court.¹⁵ In this context, judges have interpreted and applied rules governing attorney conduct to fact-specific circumstances in which a defendant's liberty often hangs in the balance.¹⁶ Perhaps unsurprisingly given the tenor of the scholarly discourse surrounding this topic, judicial decisions addressing knowingly false defenses conflict and often beg the question. Some courts have interpreted rules of professional conduct to forbid all false defenses by which an attorney affirmatively advances any proposition contrary to her client's guilt.¹⁷ Yet the First Circuit recently suggested that false defenses based on properly admitted evidence may be permissible,¹⁸ and the Second Circuit sharply divided on the question of whether, how, and when to allow a guilty criminal defendant to try to convince a jury of his innocence.¹⁹

This Note argues that most of these courts' analyses are misguided, overly simplistic, or both, and it advocates for more nuanced judicial analysis of false defenses' ethical propriety. In short, it concludes that the Model Rules of Professional Conduct ("the Model Rules") are best read to permit some false defense tactics and to prohibit others. Courts should distinguish tactics that deliberately yield or rely on false evidence from tactics that do not. The former—i.e., knowingly proffering or making use of false evidence—violate the Model Rules and undermine the adversary criminal process, while the latter—advancing false conclusions drawn from evidence properly before the finder of fact—both comport with the Model Rules and work to ensure our criminal process's proper function. This Note applies this distinction to the variety of trial circumstances in which defense counsel might employ a false defense; it presents arguments for and against judges permitting false defenses in each of these circumstances; and it recommends a specific approach to each of these scenarios.

as to . . . continue in a case after such knowledge has been brought home to him, is regarded as utterly depraved and destitute of moral feeling.”).

13. For a seminal work advancing this position, see generally Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (arguing that a defense attorney should not hesitate to zealously cross-examine truthful witnesses, should be permitted to call to the stand a client who intends to testify falsely, and ethically may give legal advice to a client even when doing so will tempt the client to commit perjury).

14. Ellen Yankiver Suni, *Who Stole the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1652 (2000).

15. *See infra* Part III.

16. *See infra* Part III.

17. *See infra* Part III.A–B.

18. *See infra* Part III.C.

19. *See infra* Part III.D.

Part I introduces the underlying ethical responsibilities, rules, and concepts relevant to this discussion. It discusses defense attorneys' competing roles as zealous advocates and officers of the court. It then introduces competing understandings of the adversary criminal process as motivated by truth seeking on one hand and safeguarding individual rights on the other. These dueling motivations mirror the defense attorney's dual ethical roles and should inform analyses of false defenses in the criminal context.

Part II sets forth five varieties of false defense tactics that defense counsel might seek to employ: putting the government to its proof, drawing false inferences or advancing alternate theories, arguing actual innocence, blame shifting, and eliciting perjury or knowingly submitting false evidence. Part II defines each of these tactics and sets forth the specific ethical questions and challenges each presents.

Part III describes four recent cases in which federal courts have grappled with the ethics of knowingly false defenses. These cases tend to reveal judicial hesitancy to permit false defenses. Several suffer from unsophisticated analyses of both the variety of false defense tactics and the varied circumstances in which they may be employed.

Finally, Part IV distinguishes false defenses that adduce or rely on evidence known to be false from those that are advanced through legal arguments. Contextualizing and examining specific false defense tactics in turn, Part IV sets forth and weighs the ethical considerations relevant to them and recommends a judicial approach to each. It begins with the easy boundary cases: putting the government to its proof always is allowed, and eliciting perjury or knowingly submitting false evidence never is allowed. Part IV then delves into the more challenging instances in which the false-defense dilemma may arise in practice.

By parsing false defenses in this way, this Note strives to offer useful practical guidance to attorneys and judges faced with the prospect of employing or ruling on false defenses. Further, by considering these defenses as they occur in the real world, this inquiry sheds new light on the normative debate over the criminal advocate's ideal balance between loyalty to clients and loyalty to truth.

I. CRIMINAL DEFENSE ETHICS AND ADVERSARY THEORY

Criminal defense attorneys necessarily occupy a unique—and uniquely challenging—ethical position.²⁰ They principally serve as advocates by pursuing the most favorable outcomes possible for their clients.²¹ Yet they also function as “officers of the court” charged with upholding the integrity of the courts and the criminal process.²² This part introduces these often

20. See, e.g., Samuel J. Levine, *Judicial Rhetoric and Lawyers' Roles*, 90 NOTRE DAME L. REV. 1989, 1997–98 (2015) (explaining that criminal defense attorneys' duties to clients often take precedence over their other ethical responsibilities).

21. See MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016); see also *infra* Part I.B.

22. See MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 2; see also *infra* Part I.A.2.

competing responsibilities²³ in the context of criminal advocacy, as well as the Model Rules²⁴ that govern defense counsel's approaches to them. This part then links these dual ethical responsibilities with two underlying and often conflicting animating purposes of the adversary criminal process: arriving at the truth²⁵ and safeguarding individual rights.²⁶ The Model Rules' requirements, restrictions, and guidance regarding false defenses are best understood when read in the context of these twin systemic aims, which find themselves directly and unavoidably at odds in the false defense context.²⁷

A. *The Defense Attorney as Zealous Advocate*

This section sets forth defense attorneys' ethical duties as zealous advocates for their clients.

1. Diligence and Zeal

Like all attorneys, criminal defense counsel must "act with reasonable diligence and promptness in representing a client."²⁸ This mandate contemplates "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."²⁹ In addition to diligence in tactics, the Model Rules instruct defense attorneys to bear an attitude of commitment, dedication, and zeal toward both their clients' interests and their own efforts to realize them.³⁰ One apt and well-known gloss on this duty of zealous advocacy comes from the distinguished nineteenth-century English attorney Lord Henry Brougham, who described it during the notorious 1820 English trial known as *Queen Caroline's Case*:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he

23. See, e.g., A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 922–25 (describing the persistent problem of locating a proper balance between these two responsibilities).

24. The Model Rules of Professional Conduct are promulgated by the American Bar Association and inform the standards of professional conduct enacted by the vast majority of U.S. jurisdictions. See *States Making Amendments to the Model Rules of Professional Conduct: Dates of Adoption*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last visited Nov. 19, 2016) [<https://perma.cc/K8QA-W2B3>].

25. See *infra* Part I.C.1.

26. See *infra* Part I.C.2.

27. Cf. Pye, *supra* note 23, at 924–25 (arguing that defense attorneys' dual roles are best balanced "by examining the purposes of the criminal process and the degree to which different defense tactics contribute to or impede the achievement of those purposes").

28. MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2016); accord STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-1.3(a) (AM. BAR ASS'N 1993) ("Defense counsel should act with reasonable diligence and promptness in representing a client.").

29. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1.

30. *Id.*

must not regard the alarm, the torments, the destruction which he may bring upon others.³¹

In short, the ethical defense attorney demonstrates undivided loyalty to her client and strives to achieve her client's goals to the fullest possible extent.

2. Confidentiality

In addition to zeal, confidentiality and full disclosure also are central to the attorney-client relationship. An attorney must keep clients' confidences by not revealing any "information relating to the representation of a client" without first obtaining the client's informed consent.³² Confidentiality long has been recognized as a fundamental legal ethical duty.³³ Indeed, the current iteration of the Model Rules marks confidentiality as a "fundamental principle . . . [that] contributes to the trust that is the hallmark of the client-lawyer relationship."³⁴ Without the protection offered by attorney-client confidentiality, a client might withhold relevant information from his attorney for fear of saying something that later could be used against him, hampering his attorney from mounting the best possible defense—and potentially depriving the client of sound legal advice that only a well-informed attorney could provide.³⁵

B. The Defense Attorney as Officer of the Court

In addition to serving as zealous advocates, defense attorneys bear the responsibility of acting as "officers of the court."³⁶ As such, the Model

31. TRIAL OF QUEEN CAROLINE: PART II, at 3 (N.Y., James Cockcroft & Co. 1874); *see also id.* at 1649 n.18 (collecting references in the criminal ethics literature to this famous quotation).

32. MODEL RULES OF PROF'L CONDUCT r. 1.6(a); *accord* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-3.1 (describing defense attorneys' duty of confidentiality to their clients). Attorneys also must make reasonable efforts to avoid unintentional or unauthorized disclosure of confidential information. MODEL RULES OF PROF'L CONDUCT r. 1.6(c). *But see id.* r. 1.6(b) (establishing seven exceptions to the duty of confidentiality).

33. *See, e.g.*, Julia Thomas-Fishburn, *Attorney-Client Confidences: Punishing the Innocent*, 61 U. COLO. L. REV. 185, 186–87, 189–90 (1990) (tracing the origins of American attorney-client confidentiality to eighteenth-century English law and noting that the American Bar Association's original ethics canons forbade attorneys from disclosing client confidences); Brandon P. Ruben, Note, *Should the Medium Affect the Message?: Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 FORDHAM L. REV. 2131, 2140 (2015).

34. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2.

35. *E.g.*, Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1061 (1978); *see also, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-3.1(a) ("Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures."); *id.* standard 4-3.2(a)–(b) (instructing defense counsel to interview clients to "determine all relevant facts known to the accused" and that, in so doing, defense counsel should not suggest that the client not be candid).

36. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 2.

Rules require that they “avoid conduct that undermines the integrity of the adjudicative process,”³⁷ a category that includes knowingly making a false statement of fact or law in court³⁸ or knowingly offering false evidence.³⁹ A defense attorney also may not act unfairly toward an adversary by, among other things, falsifying evidence or counseling or assisting a witness to offer false testimony.⁴⁰ These proscriptions accord with the Model Rules’ general admonition that an attorney must not “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”⁴¹ or, more generally still, to refrain from “conduct that is prejudicial to the administration of justice.”⁴²

Defense attorneys therefore must maintain a delicate balance. The Model Rules require that they advocate fiercely on each client’s behalf, but they must never advocate *too* fiercely by engaging in behavior or tactics that impede, discredit, or derail the criminal process.

*C. Truth Versus Rights?:
Two Goals of the Adversary System*

The adversary criminal process itself synthesizes competing goals that parallel the criminal defense advocate’s twin responsibilities to the client and to truth. Scholars who seek to account for the aims of the American criminal justice system emphasize a wide range of animating purposes, including truth seeking, affording procedural fairness, minimizing the incidence of factually inaccurate verdicts, safeguarding individual rights, enforcing and reasserting societal values and norms, advancing defendants’ dignity and autonomy, and incentivizing parties to negotiate settlements or

37. *Id.*

38. *Id.* r. 3.3(a); accord STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-1.2(f) (“Defense counsel should not intentionally misrepresent matters of fact or law to the court.”).

39. MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(3); accord STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-7.5(a) (“Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.”). Because the Model Rules define knowledge as actual knowledge, an attorney can violate these prohibitions only if she subjectively knows that a statement or piece of evidence is false. See MODEL RULES OF PROF’L CONDUCT r. 1.0(f) (also noting that actual knowledge “may be inferred from circumstances” and so need not be proven by direct evidence).

40. MODEL RULES OF PROF’L CONDUCT r. 3.4(b); accord STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-7.5(a) (“Defense counsel should not knowingly offer false . . . testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.”); see also MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 4-3.7(b) (“Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.”).

41. MODEL RULES OF PROF’L CONDUCT r. 8.4(b).

42. *Id.* r. 8.4(d).

pleas.⁴³ This section highlights two of these systemic aims that are of especial relevance to the false-defense dilemma: arriving at the truth and safeguarding individual rights. This section discusses competing understandings of the adversary process that focus on one of these goals and then sets forth the implications of these views in the context of the false-defense dilemma.

1. Arriving at the Truth

One principal goal of the criminal process is, of course, to arrive at the truth—in other words, to determine whether the defendant actually committed the crime or crimes charged.⁴⁴ From this perspective, then, the criminal justice system's adversarial structure should be understood as a means to uncovering what actually happened.⁴⁵ Assigning zealous advocates to the prosecution and defense ensures that both sides' strongest arguments will be made at trial, best positioning the fact-finder to assess a defendant's guilt.⁴⁶ By its terms, this normative framework values rules, standards, and procedures governing criminal procedure that facilitate truth seeking; and its enthusiasts view rules, standards, and procedures that serve to obfuscate the truth as antithetical to the criminal justice system's principal goal.⁴⁷

Focusing now on criminal defense counsel, those who prioritize the criminal process's truth-seeking function would favor constraints on defense attorneys that (they believe) aid the criminal process in its mission

43. See, e.g., Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987); see also Suni, *supra* note 14, at 1650–51, 1651 n.23. For an introduction to the adversary theory literature, see Goodpaster, *supra*, at 118 n.1 (collecting seminal works in the field and notable scholarly responses to them).

44. E.g., Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1138 (1988) (“[T]hat the objective of a trial under the adversary system is the determination of truth would on its face seem unexceptionable if not self-evident.”).

45. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975) (“It is said, commonly by judges, that ‘[t]he basic purpose of a trial is the determination of truth.’” (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (alteration in original))); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1486–87 (1966) (“[T]he advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case.” (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–61 (1958))); Pye, *supra* note 23, at 926 (arguing that “[c]onduct that is intended to, or is likely to, result in the suppression of truth, or which is designed to mislead a court or jury or to facilitate a falsehood, should be presumptively improper” because “objectives of the system [other than truth seeking] must themselves be re-examined if in concert they preclude the ascertainment of truth”).

46. See, e.g., Goodpaster, *supra* note 43, at 121 (describing the view that “[t]ruth is best discovered by powerful statements on both sides of a question” (quoting *United States v. Cronin*, 466 U.S. 648, 655 (1984) (alteration in original))). But see, e.g., MELLINKOFF, *supra* note 1, at 4 (asserting that “[w]e assume or pretend that a system of justice is nothing more than a search for the truth despite abundant evidence around us and inside us that points in another direction”); Frankel, *supra* note 45, at 1036 (questioning whether the adversary system is as effective at truth seeking as commonly believed).

47. See, e.g., Noonan, Jr., *supra* note 45, at 1486–87 (“[T]he advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case.” (quoting *Professional Responsibility: Report of the Joint Conference*, *supra* note 45, at 1160–61)).

to uncover the truth. If truth seeking were the criminal justice system's sole mission, a defense attorney who knew her client was guilty would not be permitted to employ any defense tactic intended to conceal this truth from the jury in hopes of winning an undeserved acquittal. From the perspective of the Model Rules, these constraints would arise from defense counsel's role as an officer of the court,⁴⁸ which, on this thinking, trump the attorney's responsibility diligently to serve as a guilty client's zealous advocate⁴⁹: an attorney who knowingly propounds a false proposition impedes truth seeking, and the rules of professional conduct should proscribe attorney conduct that undermines this systemic goal.⁵⁰

2. Safeguarding Individual Rights

A second animating purpose of the criminal justice system is the protection of defendants' individual rights, including the rights of defendants who are known by their attorneys to be guilty.⁵¹ Legal scholars who prioritize this goal commonly emphasize the importance of the adversary process in shielding individual rights from government overreach.⁵² By imposing what Professor John B. Mitchell has described as a series of "screens" on the government's prosecutorial power, the criminal process ensures that the government imposes punishment only when it can prove a defendant's guilt beyond a reasonable doubt.⁵³ This positivist, normative standard is best understood, according to Mitchell, as "the symbol we have chosen to represent th[e] line between societally acceptable and unacceptable levels of certainty and doubt in the mind of the fact finder

48. *See supra* Part I.A.2.

49. *See supra* Part I.A.1.

50. *See, e.g.*, Subin, *supra* note 6, at 125 (arguing for a rule of professional conduct banning defense counsel from attempting to refute a fact established by the prosecution when defense counsel knows the fact to be true beyond a reasonable doubt); *see also* Randolph Braccialarghe, *Why Were Perry Mason's Clients Always Innocent?: The Criminal Lawyer's Moral Dilemma—The Criminal Defendant Who Tells His Lawyer He Is Guilty*, 39 VAL. U. L. REV. 65, 77 (2004) (arguing that the Model Rules should be amended to forbid false defenses on behalf of clients known to be guilty because "[e]fforts by lawyers to secure the acquittal of the guilty do not benefit the law abiding members of society, victims, or even the falsely or mistakenly accused; the main beneficiaries are guilty defendants and, to some extent, the pocket books of criminal defense lawyers themselves"). *But see, e.g.*, Mitchell, *supra* note 6 (critiquing Subin's conclusions and arguing that defense attorneys should be permitted to advance false interpretations of the prosecution's evidence); Harry I. Subin, *Is This Lie Necessary?: Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689, 690 (1988) [hereinafter Subin, *Is This Lie Necessary?*] (responding to Mitchell's critique).

51. For an informative introduction to this school of thought, see Suni, *supra* note 14, at 1649–51 & nn.17–29.

52. *See* Mitchell, *supra* note 6, at 342; *cf.* Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1064–65 & nn.18–22 (1975) (quoting several U.S. Supreme Court decisions recognizing that, as zealous advocates, defense attorneys often must engage in conduct that does not promote the truth).

53. Mitchell, *supra* note 6, at 347; *see also* John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223, 229–34 (1986) (describing this "checking function" by which "the criminal process . . . check[s] and regulate[s] its own institutions").

when deciding a criminal case.”⁵⁴ Unlike a system dedicated to uncovering the truth, an adversarial system engineered to protect individual rights more readily would permit defense attorneys to challenge the prosecution’s evidence by knowingly advancing false propositions. That rare case in which a defense attorney knowingly convinces the fact-finder that the government has not proven a guilty defendant’s guilt beyond a reasonable doubt serves the invaluable societal function of reinforcing systemic constraints on prosecutorial power.⁵⁵

To be sure, many legal ethicists and adversarial theorists cannot neatly be separated into one or the other of these two categories. Rather than presenting a detailed taxonomy of competing views on the nature of the American adversary system, however, this part focuses on truth seeking and protecting individual rights because these goals so closely mirror defense counsel’s ethical duties as officers of the court and advocates for their clients, respectively. The zealous advocate strives to safeguard her client’s individual rights, checking prosecutorial power by fighting for her client to the fullest permissible extent.⁵⁶ The officer of the court maintains the integrity of the courts and criminal process by refraining from unfair or dishonest practices or knowingly relying on dishonest testimony or false evidence, even—and especially—when doing so would benefit her client at the expense of the adversary process’s truth-seeking function.⁵⁷ Correspondingly, while an ardent truth seeker deplors successful false defenses for deliberately transgressing the criminal process’s truth-seeking function, a theorist or practitioner prioritizing defendants’ individual rights not only finds false defenses desirable but also believes they reify a core systemic value.

II. FALSE DEFENSES INTRODUCED

False defenses encompass a wide range of tactics, from affirmatively stating that a guilty client is innocent to seeking to undermine truthful adverse evidence by more subtle means.⁵⁸ Bearing in mind the ethical roles and systemic aims introduced above,⁵⁹ this part introduces the range of false defense tactics that defense counsel may employ. This part does so in the following order: first, passively putting the government to its proof; second, expounding false inferences drawn from admitted evidence; third, falsely asserting a guilty client’s actual innocence of a crime; fourth,

54. Mitchell, *supra* note 6, at 343.

55. See, e.g., Robert P. George, *Reflections on the Ethics of Representing Clients Whose Aims Are Unjust*, 40 S. TEX. L. REV. 55, 57 (1999) (“It is true that acquittal enables the criminal to escape just punishment; but his client’s acquittal can be sought by the lawyer for other reasons, namely, the preservation of his client’s legal rights and the protection of the integrity of the legal process.”).

56. See *supra* Part I.A.1.

57. See *supra* Part I.A.2.

58. For an illustration of a less direct false defense, see Subin, *Is This Lie Necessary?*, *supra* note 50, at 691 (juxtaposing and analyzing two hypothetical defense closing arguments knowingly made on behalf of a guilty client).

59. See *supra* Part I.

shifting blame by falsely suggesting the guilt of a third party; and fifth, knowingly introducing false evidence or eliciting false testimony favorable to a guilty client's case. It is important to note that these five categories bleed into one another in practice.⁶⁰ Nonetheless, this part aims to account for all common varieties of false defenses and, by juxtaposing them, to convey important differences between these strategies that courts and attorneys should consider when evaluating these tactics' ethical propriety.⁶¹

A. *Putting the Government to Its Proof*

First, a defense attorney puts the government to its proof simply by arguing that the prosecution has failed to prove its case beyond a reasonable doubt. In so doing, defense counsel need neither suggest that the defendant is innocent nor advance any other false proposition—or, really, set forth any affirmative proposition whatsoever. Indeed, the most passive way to put the government to its proof is simply to argue to the jury that the prosecution's case is insufficient to support a conviction. Defense counsel naturally might choose to highlight specific reasons why this is so—for example, by highlighting gaps, inconsistencies, or other problems with the prosecution's evidence or theory of the case. This Note categorizes an approach that limits itself merely to observing such deficiencies as putting the government to its proof; but it labels the tactic of illustrating such deficiencies by arguing specific counterfactuals as drawing false inferences.⁶²

Putting the government to its proof does not require defense counsel to convince the fact-finder of a falsehood or to undermine a truthful proposition. Indeed, perhaps for this reason, putting the government to its proof always is permitted even on behalf of a client known to be guilty, for the prosecution's duty to prove the defendant's guilt beyond a reasonable doubt is meaningless unless defense counsel can argue that this burden has not been satisfied.⁶³ For this reason, failing to put the government to its proof constitutes a dereliction of zealous advocacy amounting to a violation of Model Rule 1.3.⁶⁴

60. See, e.g., David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1759–62 (1993).

61. See *infra* Part IV.

62. See *infra* Part II.B (discussing false inferences).

63. E.g., Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 271 (2006) (explaining that “[i]t is universally accepted that the defense lawyer can put the government to its proof—a process that could well result in a not-guilty verdict if,” for example, “a crucial witness fails to appear or testifies poorly or if important physical evidence is unavailable”).

64. Suni, *supra* note 14, at 1653 (“[T]here is no serious dispute that when a defendant chooses to go to trial, the criminal defense lawyer has an obligation to represent the defendant, whether guilty or not, so as to require the government to meet its constitutionally mandated burden of proof.” (footnotes omitted)); see also *supra* Part I.A.1 (describing the duty of zealous advocacy imposed by Model Rule 1.3).

B. Drawing False Inferences

Second, a defense attorney draws a false inference (or advances an alternate theory) when she submits to the fact-finder a false conclusion that is drawn or arises from truthful evidence (or, more accurately, evidence or testimony not known by defense counsel to be false). While an attorney advancing an alternate theory need not directly make a false statement, the goal is to convince the fact-finder of a conclusion that defense counsel knows to be false; in other words, “weakening the persuasiveness” of the prosecution’s case by raising possibilities favorable to the client.⁶⁵ Professor David Luban characterizes this tactic as “[s]uggesting reasonable doubts,” which he points out often elides in practice into knowingly advancing a false conclusion, impeaching a witness known to be testifying truthfully, or “[s]aying things that are literally true but drastically misleading.”⁶⁶ The goal here is to convince the fact-finder that a false narrative favorable to the defendant cannot be disproven beyond a reasonable doubt by affirmatively pointing out specific ways in which the government has failed to prove its case.⁶⁷

Some commentators separate false inferences into two categories: inferences intended to show how the prosecution has failed to carry its burden of proof and inferences “used for their probative value.”⁶⁸ The difference between these two forms of false inference often is subtle.⁶⁹ As an example of the former, consider a defense attorney who argues to the jury that, based on the prosecution’s evidence, it cannot be known beyond a reasonable doubt whether the (guilty) defendant actually committed the crime.⁷⁰ This form of false inference is widely accepted as an appropriate means by which to put the government to its proof because defense counsel simply is illustrating with particularity ways in which the prosecution has failed to make its case.⁷¹

65. Mitchell, *supra* note 6, at 346 (emphasis omitted).

66. Luban, *supra* note 60, at 1759–62. Luban expressed ambivalence as to the propriety of these tactics. *See id.*

67. Mitchell, *supra* note 6, at 346.

68. Suni, *supra* note 14, at 1656 & n.54. *But see id.* at 1656 n.55 (noting Luban’s argument that this distinction “is so artificial that it can never form the basis for drawing the magic moral line” (quoting Luban, *supra* note 60, at 1760–61)).

69. *See, e.g.,* Luban, *supra* note 60, at 1760; *see also supra* note 68. However, it should be noted that if defense counsel offensively advances a falsehood not supportable by any admitted evidence, she may approach advancing the type of false statement banned by Model Rule 3.3. *See supra* Part I.B (introducing and discussing Model Rule 3.3).

70. For a more specific counterfactual, see Mitchell, *supra* note 6, at 345 (offering a hypothetical defense closing on behalf of a guilty client that concludes, “So, maybe she did [commit the crime]. On the other hand, . . . maybe she didn’t. . . . The prosecution has the burden, and he simply can’t carry any burden let alone ‘beyond a reasonable doubt’ with a maybe she did, maybe she didn’t case”). *But see* Subin, *Is This Lie Necessary?*, *supra* note 50, at 691–92 (critiquing Mitchell’s argument and asserting that, while this closing’s message is not a lie, “it certainly creates a false impression, which amounts to the same thing”).

71. Suni, *supra* note 14, at 1656 & n.55; *cf. id.* at 1654 n.45 (explaining that juries commonly are thought to construct and evaluate the prosecution’s and defense’s competing stories of the case and noting that “to a large extent[,] the benefits to a defendant of the

The latter form of false inference—one relied upon by defense counsel for its purported truth—by its terms seeks to deceptively convince the factfinder of its truthfulness. This tactic is more controversial in the legal ethics literature.⁷² As an example, consider an attorney who exploits a deficiency in the prosecution's evidence by arguing that a truthful eyewitness did not actually observe the defendant committing the crime. Indeed, in practice this tactic often occurs when a defense attorney subjects a truthful witness to dogged cross-examination intended to impugn the witness's credibility.⁷³ Though scholarly minds may differ as to these inferences' ethical propriety, in practice, attorneys are not disciplined for propounding them, indicating that doing so most likely does not run afoul of the Model Rules.⁷⁴

C. Arguing Actual Innocence

Third, a defense attorney argues actual innocence by affirmatively submitting that a guilty defendant did not actually commit the crime with which he has been charged.⁷⁵ This tactic is best understood as a specific variant of false inferences advanced for their purported truthfulness.⁷⁶ When a defendant's guilt is clear, defense counsel can argue actual innocence only by introducing or relying upon false evidence, which is an approach as plainly impermissible as it is ethically uninteresting.⁷⁷ Of particular relevance to this Note, however, are cases in which a defense attorney argues actual innocence by relying on evidence that she does *not* know to be false.

One oft-cited example of such a defense is found in a Michigan ethics opinion offering guidance to a defense attorney preparing to defend at trial a client who credibly, privately, and confidentially had admitted guilt.⁷⁸ This devious defendant divulged to his attorney that he had knocked his victim unconscious and stolen the victim's watch so that the victim would have an incorrect sense of when the crime occurred.⁷⁹ Defense counsel wondered if he ethically could call as alibi witnesses friends of the defendant who truthfully would place the defendant away from the crime scene during the time when the victim mistakenly believed the crime took place.⁸⁰ Noting that these alibi witnesses would testify truthfully and that "[o]ne cannot suborn the truth," the ethics committee concluded that the defense attorney

government being required to carry a high burden of proof may be negated unless the defense can present its own version of the case").

72. *See id.* at 1656 & n.54, 1658–59, 1658 nn.62–64.

73. *Cf. id.* at 1657–58 & nn.59–61 (comparing such hostile cross-examination to the tactic of shifting blame).

74. *Id.* at 1663 n.91.

75. This Note classifies arguments of actual innocence in which defense counsel knowingly shifts blame onto an innocent third party as falling within the "blame shifting" category of false defenses. *See infra* Part II.D for a discussion of that tactic.

76. *See supra* notes 72–74 and accompanying text.

77. *See infra* Part II.E (discussing perjury and knowingly submitting false evidence).

78. Mich. State Bar Comm. on Prof'l & Judicial Ethics, Op. CI-1164 (1987).

79. *Id.*

80. *Id.*

ethically could present the false defense.⁸¹ Unlike a defense attorney who draws a false inference, an attorney arguing actual innocence attempts directly and deceptively to convince the jury of her client's innocence. Such an assertion aims squarely to undercut the truth-seeking purpose of a criminal trial⁸² by challenging offensively and falsely the crux of the prosecution's case.

D. Shifting Blame

Fourth, a defense attorney shifts blame by presenting what many refer to as the "SODDI" defense: "Some Other Dude Did It."⁸³ This tactic can include introducing evidence tending to falsely demonstrate another's involvement in or commission of the crime, or, on rare occasion, evidence that another party has committed similar crimes in the past.⁸⁴ One variation of this tactic, which Professor Edward J. Imwinkelried refers to as the "SODDI defense 2.0," is to submit evidence showing that the police failed diligently to investigate another party who might have committed the crime.⁸⁵ Many commentators view blame shifting on behalf of a client whom defense counsel knows to be guilty as especially undesirable because of this tactic's potential to inflict harm on the innocent third party who the defense attorney argues is guilty.⁸⁶ However, Professor Ellen Yankiver Suni concludes in her persuasive treatment of the blame-shifting tactic that the rules and standards of professional conduct do not prohibit it and in fact may even require it when defense counsel is not certain of a client's guilt.⁸⁷

E. Perjury and Knowingly Submitting False Evidence

Finally, a defense attorney might knowingly elicit false testimony or submit false evidence. Such tactics are outlawed both by criminal statutes and by ethics rules, as they universally are recognized as detrimental to the

81. *Id.*; see also Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 367 n.176 (1998) (assessing favorably the ethics committee's reasoning).

82. See *supra* Part I.C.1.

83. E.g., Edward J. Imwinkelried, *Evidence of a Third Party's Guilt of the Crime That the Accused Is Charged With: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 LOY. U. CHI. L.J. 91, 92 (2015). See generally Suni, *supra* note 14 (compiling, analyzing, and critiquing the evidentiary rules and rules of professional conduct that restrict the use of the SODDI defense and arguing that courts should more readily permit defense counsel to engage in blame shifting).

84. Imwinkelried, *supra* note 83, at 99–102 (explaining that evidence of another party's similar prior criminal acts rarely, though occasionally, is admissible).

85. *Id.* at 105.

86. See Suni, *supra* note 14, at 1658–59, 1658 nn.62–64. To the extent that false defenses are rationalized by their role in protecting a defendant's individual rights, this justification cannot account for the potential damage that blame shifting inflicts on the innocent third party, including potentially exposing that party to future criminal investigation or prosecution. *Id.* at 1658 & n.64; see also *supra* Part I.C.2 (discussing the aim of protecting individual rights).

87. See Suni, *supra* note 14, at 1659.

proper functioning of the criminal justice system.⁸⁸ Thus, for the purposes of this Note, perjury and the like are of minimal ethical interest.

III. MALUM IN SE?: RECENT RULINGS ON FALSE DEFENSES

Bearing these tactics in mind, this part describes several recent federal cases that address whether defense attorneys knowingly may advance a false defense on behalf of a guilty client. In two of these cases, *United States v. Lauersen*⁸⁹ and *United States v. Burnett*,⁹⁰ the courts held that false defenses are proscribed outright by state-law equivalents of the relevant ABA Model and Disciplinary Rules.⁹¹ In the third case, *United States v. Jiménez-Bencevi*,⁹² the First Circuit avoided grappling directly with the ethics of false defenses by circumventing for defense attorneys working on capital cases the knowledge requirement otherwise imposed by Massachusetts's Rules of Professional Conduct.⁹³ Finally, in *Poventud v. City of New York*,⁹⁴ the U.S. Court of Appeals for the Second Circuit, sitting en banc, split 9–6 regarding the propriety of false defenses in criminal trials.⁹⁵

A. *United States v. Lauersen*

In *Lauersen*, two codefendants were charged with committing health insurance fraud.⁹⁶ At least one defendant, Magda Binion, elected to attend a pretrial proffer session with prosecutors during which she confessed her guilt in a sworn, written statement.⁹⁷ Before offering her proffer statement,

88. Subin, *supra* note 6, at 126 & n.12, 145 n.91. A particularly challenging case arises when a criminal defendant seeks to exercise his right to testify in his own defense and his attorney knows he intends to do so falsely. This heavily debated scenario is beyond the scope of this Note; but for a useful introduction to the client perjury ethics literature, see generally Brian Slipakoff & Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935 (2002).

89. No. 98CR1134 (WHP), 2000 WL 1693538 (S.D.N.Y. Nov. 13, 2000); *see infra* Part III.A.

90. No. 08-201-03, 2009 WL 2180373 (E.D. Pa. July 17, 2009); *see infra* Part III.B.

91. *See Lauersen*, 2000 WL 1693538, at *8; *see also Burnett*, 2009 WL 2180373, at *4–5; *cf.* MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2016); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(a)(4) (AM. BAR ASS'N 1969).

92. 788 F.3d 7 (1st Cir. 2015).

93. *See infra* Part III.C.

94. 750 F.3d 121 (2d Cir. 2014).

95. *See infra* Part III.D.

96. *See generally* Indictment, *Lauersen*, 2000 WL 1693538 (No. 98 CR 1134 (WHP)), 2000 WL 35630186.

97. *See Lauersen*, 2000 WL 1693538, at *1. Proffer sessions are a means by which some criminal defendants try to convince prosecutors to offer a guilty plea in exchange for a more lenient sentence. A proffer is a written or oral statement made during a proffer session in which the defendant admits guilt, tells his side of the story, or provides other information that the prosecutor may find useful or compelling—for example, information that would make the defendant a valuable confidential informant. *See, e.g.,* Benjamin A. Naftalis, Note, “Queen for a Day” Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 6–8 (2003) (describing how, when, why, and under what legal conditions these proffers take place).

Binion signed a waiver permitting the government to use it “for the purpose of cross-examination should [the defendant] testify, or to rebut any evidence or arguments offered by or on behalf of [the defendant] . . . at any stage of the criminal prosecution.”⁹⁸

Binion and the prosecution presumably could not reach a plea agreement, and the case against her proceeded to trial. Before the trial began, defense counsel moved the court to preclude the government from introducing Binion’s inculpatory proffer statement into evidence.⁹⁹

The parties argued over the enforceability of the waiver.¹⁰⁰ In addition to arguing that the waiver enabled it to use Binion’s statement at trial, the government argued that the applicable rules of professional conduct prohibited Binion’s attorney from “adducing evidence of Binion’s ‘actual innocence’”¹⁰¹ because Binion’s statements during her proffer session left her attorney with no “good-faith basis”¹⁰² to argue she did not commit the crimes with which she had been charged.¹⁰³ The government contended that ethics rules required Binion’s attorney to passively put the government to its proof or elicit evidence and argue points that did not conflict with Binion’s inadmissible admission of guilt.¹⁰⁴

The trial court denied in part and granted in part Binion’s motion.¹⁰⁵ While the court first found that the waiver was unenforceable,¹⁰⁶ it nonetheless held that the New York Lawyer’s Code of Professional Responsibility¹⁰⁷ precluded defense counsel from advancing at trial any proposition that contradicted Binion’s proffer statement.¹⁰⁸ In so holding, the court summarily cited the rule of professional conduct that governed an attorney’s “[r]epresent[ation] [of] a [c]lient [w]ithin the [b]ounds of the

98. *Lauersen*, 2000 WL 1693538, at *2.

99. *Id.* at *1.

100. *Id.* at *1, *4.

101. *Id.* at *5.

102. *Id.*; *cf.* MODEL RULES OF PROF’L CONDUCT r. 3.3 cmt. 8 (AM. BAR ASS’N 2016) (“The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact.”); *supra* note 39 and accompanying text (citing the Model Rules’ definition of knowledge).

103. *Lauersen*, 2000 WL 1693538, at *5.

104. *Id.*

105. *Id.* at *1.

106. *See id.* at *7 (finding that “the facts strongly suggest that Binion did not fully understand the potential consequences of the extent to which the Government could use her statements to ‘rebut’ evidence or arguments presented on her behalf” when she signed the waiver).

107. The New York Lawyer’s Code of Professional Responsibility, first enacted in 1970, was based on the American Bar Association’s Code of Professional Responsibility, which also was adopted that year. Chris G. McDonough & Michael L. Epstein, *Regulating Attorney Conduct: Specific Statutory Schemes v. General Regulatory Guidelines*, 11 *TOURO L. REV.* 609, 611 & n.7 (1995). New York’s code was supplanted in 2009 by the current New York Rules of Professional Conduct. *See* N.Y. COMP CODES R. & REGS. tit. 22, § 1200 (2009).

108. *See Lauersen*, 2000 WL 1693538, at *8; *cf.* N.Y. RULES OF PROF’L CONDUCT r. 3.3 (2013).

[I]aw.”¹⁰⁹ Among other things, this rule forbade attorneys from knowingly using perjured testimony or false evidence,¹¹⁰ knowingly making a false statement of law or fact,¹¹¹ “[p]articipat[ing] in the creation . . . of evidence when the lawyer knows or it is obvious that the evidence is false,”¹¹² or “assist[ing] the client in conduct that the lawyer knows to be illegal or fraudulent.”¹¹³ The trial court reasoned that its “duty . . . to protect the integrity of the proceeding and to ensure that matters presented to the jury are grounded in good faith” compelled it to preclude Binion’s attorney from eliciting testimony from any witness or making any argument to the jury at any stage of Binion’s trial that “directly contradict[ed] specific factual statements made by Binion” in her proffer statement, unless Binion’s attorney had a “good-faith basis” for doing so.¹¹⁴ New York’s Disciplinary Rule 7-102, cited with a “*see, e.g.*,” signal, was the only authority offered in support of this holding.¹¹⁵

The *Lauersen* court stressed the “integrity” of the criminal process in summarily holding that a defense attorney may not argue a client’s innocence if she knows the client is guilty.¹¹⁶ Under this reasoning, any knowingly false defense necessarily undermines the criminal process; and under the court’s one-sentence analysis of the ethical issues at play, this effect is undesirable and impermissible across the board.¹¹⁷

B. United States v. Burnett

Nearly nine years after *Lauersen*, the Eastern District of Pennsylvania considered the same issue in *Burnett*.¹¹⁸ There, the defendant was charged with federal crimes arising from a series of robberies affecting interstate commerce.¹¹⁹ Like the defendant in *Lauersen*, the *Burnett* defendant made sworn, inculpatory proffer statements on two occasions, both of which were governed by a proffer agreement¹²⁰ that the court later deemed unenforceable.¹²¹

109. N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-102 (2007) (repealed 2009); *see Lauersen*, 2000 WL 1693538, at *8.

110. N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(4).

111. *Id.* DR 7-102(A)(5).

112. *Id.* DR 7-102(A)(6).

113. *Id.* DR 7-102(A)(7).

114. *Lauersen*, 2000 WL 1693538, at *8.

115. *See id.*

116. *See id.*

117. *See id.*

118. *United States v. Burnett*, No. 08-201-03, 2009 WL 2180373 (E.D. Pa. July 17, 2009).

119. *See id.* at *1 (referring to “a series of Hobbs Act robberies”); *see also, e.g.*, 5 DEP’T OF JUSTICE MANUAL tit. 9, no. 2402 (3d ed. 2015) (explaining that the Hobbs Act “prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce”).

120. The proffer agreement provided, in pertinent part,

if your client is a witness or party at any trial or other legal proceedings [sic] and testifies or makes representations through counsel materially different from statements made or information provided during the “off-the-record” proffer, the government may cross-examine your client, introduce rebuttal evidence and make

Like the court in *Lauersen*¹²²—which the *Burnett* Court cited repeatedly in its ruling¹²³—the *Burnett* Court then considered whether defense counsel ethically could advance at trial a proposition that contradicted the defendant’s sworn confession.¹²⁴ Citing Pennsylvania’s equivalents of Model Rules 3.1, 3.3(a), and 3.4,¹²⁵ the court held that “[a]bsent a good-faith basis, within the operation of the Pennsylvania Rules of Professional Conduct, Mr. Burnett’s counsel may not present evidence or arguments on Mr. Burnett’s behalf that directly contradict the admissions made by Mr. Burnett during his proffer sessions.”¹²⁶ As in *Lauersen*, the court offered no support or explanation for this holding beyond a quotation from and citation to the relevant ethics rules.¹²⁷ Without anything further, the court seems to have taken for granted that a knowingly false defense necessarily constitutes unethical attorney conduct.¹²⁸ Though the court expressed some sympathy as to the “frustration” its ruling might cause Burnett’s attorney as he attempted somehow to mount a zealous trial defense, the court nonetheless reasoned that lawyers often face difficult challenges and that “[s]killed lawyers . . . distinguish themselves—and will serve their clients—precisely because they see the dilemma ahead of time and can try to make the best of the circumstances as presented.”¹²⁹ The *Burnett* Court, then, read the Model Rules as proscribing false defenses of all kinds and warned defense counsel that the ethical attorney does not knowingly employ them.

C. United States v. Jiménez-Bencevi:
When Judges Close Their Eyes to the Truth

The First Circuit recently adopted a different approach to the false-defense dilemma in *Jiménez-Bencevi*.¹³⁰ The defendant in that case faced capital charges arising from a fatal shooting captured on surveillance

representations based on statements made or information provided during the “off-the-record” proffer.

Burnett, 2009 WL 2180373, at *1 (alteration in original).

121. *See id.* at *4.

122. *See supra* notes 105–14 and accompanying text.

123. *See Burnett*, 2009 WL 2180373, at *3–4.

124. *See id.* at *4–5.

125. 204 PA. CODE § 81.4, rr. 3.1, 3.3(a), 3.4 (2016); *cf.* MODEL RULES OF PROF’L CONDUCT rr. 3.1, 3.3(a), 3.4 (AM. BAR ASS’N 2016).

126. *Burnett*, 2009 WL 2180373, at *5.

127. *See id.*

128. The court further noted that, in light of this holding, “it may well be in this instance that the defendant’s waiver through the proffer agreement would not have restricted counsel any more than he was already bound by the rules of professional conduct.” *Id.* at *5 n.6; *see also supra* note 120 (reproducing the relevant terms of Burnett’s proffer agreement). The extent to which prosecutors should be able to use proffer agreements to limit a defendant’s trial defense is beyond the scope of this Note. For an incisive treatment of the topic, see generally Naftalis, *supra* note 97. Nonetheless, it is worth emphasizing the *Burnett* Court’s suggestion that Rule 3.3 may ban knowingly false defenses just as thoroughly as if the defendant knowingly and voluntarily had waived any right to present them.

129. *Burnett*, 2009 WL 2180373, at *5 n.6.

130. *United States v. Jiménez-Bencevi*, 788 F.3d 7 (1st Cir. 2015).

video.¹³¹ Jiménez-Bencevi offered to plead guilty in exchange for a life sentence rather than facing the death penalty at trial.¹³² As a precondition to agreeing to accept a guilty plea, the prosecution required Jiménez-Bencevi to make a sworn proffer statement admitting in detail his guilt of the crimes charged and also providing “any known information regarding other federal offenders.”¹³³ Though Jiménez-Bencevi initially assented and made a proffer statement that included admissions of guilt, plea negotiations broke down, and the case proceeded to trial.¹³⁴

At trial, defense counsel sought to introduce the testimony of a forensic expert who had reviewed the surveillance footage of the killing.¹³⁵ This expert—who did not know about Jiménez-Bencevi’s sworn confession—planned to testify that in his opinion, the man seen on the video could not actually have been Jiménez-Bencevi.¹³⁶ The prosecution objected and argued that the existence of Jiménez-Bencevi’s confession proved that his attorney knew that he was guilty and that defense counsel thus should not be permitted to call to the stand an expert whose opinion defense counsel knew was false.¹³⁷

The trial court responded by effectively precluding the defense from calling the expert witness. It advised the defense that if the expert witness offered his (presumably mistaken) opinion, the court would reveal to the witness and jury the contradictory substance of Jiménez-Bencevi’s confession.¹³⁸ The trial court explained that it “cannot in good conscience allow an expert who has not been made aware of the proffer to give an expert opinion on something where he’s missing evidence, he’s missing facts,” because it “would then be in a sense part and parcel to the giving of evidence that is not realistic or true.”¹³⁹ When defense counsel later revisited the issue, the trial court stated that even if the expert stood by his opinion after learning of Jiménez-Bencevi’s admission, the court still would not allow Jiménez-Bencevi to “use an expert to give an imprimatur of expertise on something that [Jiménez-Bencevi] know[s] is totally false.”¹⁴⁰

On appeal, the First Circuit rejected this reasoning and reversed Jiménez-Bencevi’s conviction.¹⁴¹ The appellate panel first examined the requirement, imposed by Model Rule 3.3(a), that attorneys not knowingly offer false evidence.¹⁴² The court noted that this rule applies only when an

131. *Id.* at 9–10.

132. *Id.* at 10.

133. *Id.*

134. *Id.* The proffer statement was governed by a waiver agreement substantively identical for the purposes of this Note to the waiver agreements in *Lauersen* and *Burnett*. See *supra* note 98 and accompanying text (excerpting the waiver agreement in *Lauersen*); *supra* note 120 (excerpting the waiver agreement in *Burnett*).

135. *Jiménez-Bencevi*, 788 F.3d at 13.

136. See *id.* at 13–14.

137. *Id.* at 17–19.

138. *Id.* at 13–14.

139. *Id.*

140. *Id.* at 14 (alterations in original).

141. *Id.* at 20.

142. See *supra* Part I.B.

attorney actually knows that evidence is false: mere belief, however strong, does not suffice.¹⁴³ The First Circuit then broke with *Lauersen* and *Burnett* by concluding that the existence of Jiménez-Bencevi's inculpatory proffer statement did not necessarily establish his guilt as an incontrovertible fact triggering Model Rule 3.3's restriction.¹⁴⁴ The panel found especially persuasive Jiménez-Bencevi's knowledge that he would face the death penalty unless he convinced the prosecution to offer a lesser sentence in exchange for a guilty plea.¹⁴⁵ Citing the U.S. Supreme Court's repeated admonishment that "death is different,"¹⁴⁶ the court suggested that the mere existence of capital charges may so forcefully pressure defendants to do whatever they can to avoid execution as to call into question the veracity of capital defendants' pretrial confessions.¹⁴⁷

The First Circuit went on to criticize and reject the trial court's reluctance to set aside its presumed knowledge of Jiménez-Bencevi's guilt when deciding whether to permit the defense's forensic expert to testify.¹⁴⁸ The district judge had reasoned, in a remark focused on the judge's duty to conduct a trial that would uncover the truth,¹⁴⁹ that he was bound by his "obligation to make certain that the facts that come out are as truthful as possible to the reality of the case. I cannot close my eyes to that reality. It would be improper, wrong for me to do that, and I will not allow that."¹⁵⁰ The First Circuit found this reasoning deeply misguided. It pointed out that evidentiary rules compel courts to "close their eyes' to pertinent evidence all the time"¹⁵¹: juries are not meant to learn or rely upon suppressed or unduly prejudicial evidence, for example, regardless of the evidence's relevance.¹⁵² The *Jiménez-Bencevi* Court held that, despite its relevance, the defendant's confession "for all intents and purposes[] did not exist"—and the trial court was indeed obliged to "close [its] eye[s]" to the confession's contents—unless the defendant contradicted his own confession on the witness stand.¹⁵³ The trial court's knowledge that the defendant had admitted guilt in a sworn statement thus did not alter its duty to conceal inadmissible evidence from the jury, and the statement ought not

143. *Jiménez-Bencevi*, 788 F.3d at 18; see also *supra* note 39 (describing the Model Rules of Professional Conduct's definition of knowledge as actual knowledge only).

144. See *Jiménez-Bencevi*, 788 F.3d at 18–19 (explaining that Jiménez-Bencevi initially denied involvement in the crime; the credibility of the prosecution's two eyewitnesses was questionable; the defense's (ostensibly mistaken) forensic expert was a former FBI agent with twenty-five years' experience; and that Jiménez-Bencevi was "desperate to avoid the death penalty and the government was adamant that it would not consider any plea agreement unless [he] admitted to all of the charges"). In addition, the court noted that the forensic expert's testimony would not have been dishonest, because his incorrect expert opinion was sincerely held. See *id.*

145. *Id.* at 17.

146. *Id.* at 17 n.5 (collecting Supreme Court cases invoking this aphorism).

147. See *id.* at 17–18, 17 n.5.

148. See *id.* at 19 n.7.

149. Cf. *supra* Part I.C.1.

150. *Jiménez-Bencevi*, 788 F.3d at 19 n.7.

151. *Id.*

152. *Id.* (discussing motions to suppress evidence and Federal Rule of Evidence 403).

153. *Id.* (second alteration in original).

have impacted the court's evaluation of the defense's attempt to elicit its forensic witness's sincerely held expert opinion.¹⁵⁴

In *Jiménez-Bencevi*, the First Circuit chose not to confront directly whether a defense attorney's ethical duties preclude her from knowingly advancing a false defense, instead limiting its holding to cases in which defense counsel has a good-faith basis to believe that her client may be innocent.¹⁵⁵ But by giving voice to the tension in the false-defense context between truth seeking and protecting defendants' rights, the *Jiménez-Bencevi* panel's admonition to the court below that defendants' rights can—and indeed, regularly do—outweigh the criminal process's truth-seeking function bears directly on the false-defense dilemma. At very least, the court's underlying reasoning makes clear that judicial treatments of knowingly false defenses must engage with both of these systemic aims rather than simply presuming that the criminal process cannot abide defense tactics that require a court to close its eyes to inadmissible knowledge of a defendant's guilt.

D. *Poventud v. City of New York*

In *Poventud*, the Second Circuit, sitting en banc, considered the viability of a constitutional tort action against the City of New York and four New York City police officers.¹⁵⁶ The procedural posture of this case is complex;¹⁵⁷ many of the parties' arguments and much of the en banc court's opinions addressed technical aspects of constitutional tort doctrine.¹⁵⁸ Underlying these arguments, however, was a disagreement as to the nature and propriety of false defenses. Nine judges on the Second Circuit endorsed the notion that *Brady* violations during *Poventud*'s first prosecution undermined *Poventud*'s right to zealously defend himself, even though he later pled guilty to the charges.¹⁵⁹ Six judges dissented, reasoning that *Poventud*'s guilty plea meant that he was actually guilty and asserting that a guilty defendant has no right to falsely defend himself at trial.¹⁶⁰

154. *See id.* at 18–19, 19 n.7.

155. *See supra* notes 144–47 and accompanying text.

156. *See Poventud v. City of New York*, 750 F.3d 121, 125–27 (2d Cir. 2014).

157. The case involved a vacated New York State criminal conviction; a plea deal whereby *Poventud* pled guilty to the original charges in exchange for a sentence of time served, enabling him to leave prison immediately; and a subsequent federal civil rights action alleging *Brady* violations during *Poventud*'s initial prosecution. *See id.* at 126–27 (setting forth the case's procedural history).

158. Specifically, the parties disagreed as to whether *Poventud*'s claims were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), a Supreme Court case holding that the federal civil rights statute 42 U.S.C. § 1983 does not permit actions at law that “necessarily have the effect of challenging [an] existing state or federal criminal conviction[,]” unless the conviction has been reversed, expunged, declared invalid, or “called into question by a federal court's issuance of a writ of habeas corpus.” *Poventud*, 750 F.3d at 124. The central issue addressed in *Poventud* was whether the defendant's guilty plea prevented him from satisfying this doctrinal requirement. *See id.*

159. *See infra* notes 161–63 and accompanying text.

160. *See infra* notes 164–68 and accompanying text.

Judge Richard C. Wesley authored the majority opinion.¹⁶¹ Of particular relevance, he noted, in dicta discussing the trial court's ruling, that the court below

incorrectly presume[d] that . . . the State could violate Poventud's *Brady* rights only if Poventud is an innocent man. . . . In this case, Poventud has the right to argue to the jury that with the main State witness impeached, he would have been acquitted based on reasonable doubt or convicted on a lesser charge.¹⁶²

Similarly, in a concurring opinion in which all nine judges in the majority joined, Judge Raymond J. Lohier contrasted the notion that Poventud did not actually commit the crime with his legal entitlement to be provided any evidence that "would have tended to lead to a verdict of not guilty" of the conduct to which Poventud later confessed.¹⁶³ In finding that Poventud had a right to contest facts the truth of which he later conceded by pleading guilty, the *Poventud* majority recognized a right to mount a false defense, at least under certain circumstances.

The panel's six dissenters adopted a contrary view, rejecting any right to mount a false defense and instead characterizing this purported right as a right to commit perjury. In an opinion joined by all but one dissenter, Judge Dennis Jacobs noted that "the undisclosed evidence here could only have been useful to Poventud in one very particular way—to support an inference that Poventud was elsewhere at the time of the crime. [However,] Poventud has now solemnly admitted that this inference is wholly false."¹⁶⁴ Judge Jacobs argued that the majority's holding wrongfully undermined truth seeking by allowing Poventud to seek damages for nondisclosure of "evidence [that] would have been helpful only to strengthen [a] perjurious alibi."¹⁶⁵ On this view,

[a criminal defendant] cannot have it both ways: he cannot state that he is guilty, that he was present on the day in question and participated in the crime, but that he was nonetheless prejudiced at his trial by the nondisclosure of evidence that could have helped him only by suggesting that the accurate testimony of the victim should not be believed.¹⁶⁶

In another opinion also joined by all but one dissenter, Judge Debra Ann Livingston adroitly summarized this rejection of false defenses, criticizing the majority's holding as recognizing a "right to recompense for a denial of the opportunity to commit perjury more successfully."¹⁶⁷ In Judge Livingston's estimation, Poventud's claim failed precisely because "the undisclosed evidence *could only have helped him falsely deny*" his guilt.¹⁶⁸

161. *Poventud*, 750 F.3d at 124–38.

162. *Id.* at 134–35.

163. *Id.* at 147 (Lohier, J., concurring).

164. *Id.* at 159 (Jacobs, J., dissenting).

165. *Id.* at 155.

166. *Id.* at 157.

167. *Id.* at 165 (Livingston, J., dissenting).

168. *Id.* at 168.

This pejorative language unmistakably conveys the dissenters' view that the courts should not permit such an outcome.

E. Lessons Learned

With the exception of the majority decision and concurrences in *Poventud*,¹⁶⁹ these four cases convey judicial discomfort with the notion that the trial process might have a legitimate purpose contrary to truth seeking. In effect, these opinions—excepting those authored by judges in the *Poventud* majority—hold that the Model Rules impose severe tactical restrictions on an attorney knowingly representing a guilty client and suggest that an attorney in this position can do little more than passively put the government to its proof. These cases' scarce analyses indicate a lack of recognition of the variety of false defense tactics, adopting instead an all-or-nothing approach to the false-defense dilemma and, in so doing, revealing superficial understandings of the professional conduct rules on which their conclusions are based.¹⁷⁰

IV. FALSE DEFENSES IN CONTEXT(S)

This part aims to build and improve upon the *Lauersen*, *Burnett*, *Jiménez-Bencevi*, and *Poventud* Courts' wanting analyses of false-defense tactics¹⁷¹ by evaluating the variety of procedural circumstances in which false defenses occur. It begins by considering the two ends of the ethical spectrum of false-defense tactics, namely, putting the government to its proof and knowingly eliciting or suborning false material testimony. This part then turns to more challenging scenarios in which the ethics of different types of false defenses are less clear. Rather than focusing strictly on philosophical or theoretical concerns, this part emphasizes practical ethical consequences of judges proscribing or permitting different false defenses. This part then offers context-specific recommendations to attorneys and judges about when and how to implement, allow, or forbid them.

This part concludes that defense counsel's dueling ethical roles and the adversary process's competing aims¹⁷² are best balanced by drawing a distinction between false defenses arising from evidence known by defense counsel to be false and false defenses involving false legal arguments. By differentiating false evidence from false arguments, this part offers a more nuanced approach to false defenses that comports with the ethical requirements imposed by the Model Rules¹⁷³ and affords workable, practical guidance to courts and practitioners alike.

169. See *supra* notes 161–63 and accompanying text.

170. See *supra* notes 108–15, 125–28 and accompanying text; *supra* Part III.D.

171. See *supra* Part III.

172. See *supra* Part I.

173. See *supra* Part I.A.

The Model Rules forbid knowingly introducing false lay or expert testimony.¹⁷⁴ However, false defense tactics that involve factually accurate testimony¹⁷⁵ or false legal arguments¹⁷⁶ do not violate the Model Rules, and they advance the adversary process's aim of safeguarding defendants' individual rights. This part, therefore, concludes that courts should permit the latter category of false defenses. Though parsing permissible from impermissible false defense tactics is challenging in certain scenarios, courts and practitioners should embrace these varieties of false defenses as ethical forms of zealous advocacy.

A. *The Easy Boundary Cases*

First, as set forth above,¹⁷⁷ judges and ethicists agree that defense attorneys always may submit to the fact-finder that the government has failed to prove its case beyond a reasonable doubt, even on behalf of an indisputably guilty client.¹⁷⁸ This must be so to safeguard defendants' individual rights by reifying the prosecution's burden to prove guilt beyond a reasonable doubt. It is not seriously disputed that courts should permit defense counsel to engage in this tactic, which commonly amounts to the minimum form of zealous representation required by Model Rule 1.3.¹⁷⁹

Second, knowingly eliciting or suborning false material testimony is forbidden by both criminal statutes¹⁸⁰ and the Model Rules: it is clear that a defense attorney never is permitted to resort to such tactics.¹⁸¹ It is important again to note that this prohibition serves to prevent the fact-finder from being influenced by false evidence, as opposed to false arguments drawn from evidence not known by defense counsel to be untrue.

174. *See infra* Part IV.B.1.

175. *See infra* notes 185–90 and accompanying text.

176. *See infra* Part IV.B.2.

177. *See supra* Part II.A.

178. *See, e.g.*, Freedman, *supra* note 52, at 1064 (“The defendant . . . is presumed innocent, the burden is on the prosecution to prove guilt beyond a reasonable doubt, and even the guilty accused has an ‘absolute constitutional right to remain silent’ and to put the government to its proof.” (quoting *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964))); Henning, *supra* note 63, at 271 (“It is universally accepted that the defense lawyer can put the government to its proof—a process that could well result in a not-guilty verdict if a crucial witness fails to appear or testifies poorly or if important physical evidence is unavailable.”); *see also supra* Part III.A.

179. *See supra* Part II.A (introducing the tactic of putting the government to its proof); *see also supra* Part I.A.1. (introducing Model Rule 1.3 and its requirements).

180. *See* 5 DEP’T OF JUSTICE MANUAL, *supra* note 119, tit. 9, no. 1752 (describing the elements of the crime of subornation of perjury and citing relevant case law and rules of professional conduct); *see also* MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 2016) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal.”); MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102 (AM. BAR ASS’N 1980); Subin, *supra* note 6, at 126 & n.12. *But see* MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 27–42 (1st ed. 1975) (arguing that defense attorneys should be permitted knowingly to call to testify on their own behalf defendants who intend to commit perjury).

181. *See supra* Part III.E.

B. Shades of Gray: False Defenses in Specific Contexts

Having established these clear cases, this section delves into false-defense tactics that require more nuanced legal, ethical, and policy analysis. In so doing, this section first considers false defenses bearing on the evidence presented at trial and then examines false defenses advanced through arguments made by defense counsel to the jury. It concludes that the Model Rules forbid tactics grounded in false evidence, which undermine the trial process's truth-seeking function without safeguarding defendants' individual rights. Tactics that rely on false arguments, however, fall within the Model Rules and advance defendants' individual rights without distorting the factual material parsed by the jury as it seeks to arrive at the truth. For this reason, courts should prohibit false-defense tactics that knowingly rely upon false evidence and permit tactics knowingly advanced through false arguments.

1. False Defenses Arising from False Evidence

This subsection considers false defenses that may result in false, inaccurate, irrelevant, or misleading facts being presented to the jury. It first discusses direct examination of lay witnesses¹⁸² and then discusses direct examination of expert witnesses. It concludes that the Model Rules prohibit defense counsel from knowingly eliciting factually inaccurate lay testimony; but they permit defense counsel to elicit lay testimony not known to be false, even if doing so undermines the adversary system's goal to arrive at the truth.

i. Lay Witnesses on Direct Examination

There are two types of lay witnesses whose testimony defense counsel may use to advance an evidentiary false defense: a witness whose testimony is sincere but incorrect, and a witness whose testimony is sincere and correct but may be used to support a falsehood.

First, the sincere but incorrect lay witness earnestly believes a falsehood to which he intends to testify in court. Such a witness may appear enticing to a guilty defendant eager to benefit from the witness's favorable, nonperjurious testimony. Unfortunately for the guilty defendant, however, his attorney cannot elicit this testimony without running afoul of a clear-cut ethical restriction. Model Rule 3.3(a)(3) forbids attorneys from offering

182. This subsection discusses direct examination. Regarding cross-examination, commentators and courts universally agree that defense attorneys may seek to impeach and undermine the credibility of witnesses who defense counsel know are testifying truthfully. *See* Suni, *supra* note 14, at 1657–58, 1658 n.61; *see also supra* note 69 and accompanying text (introducing the dogged cross-examination of a truthful witness as an instance of drawing false inferences). Indeed, defense counsel likely must subject truthful witnesses to dogged cross-examination to meet the duty of zealous advocacy. *See supra* Part I.A.1. While doing so obfuscates the truth, it commonly is considered a necessary part of zealously putting the government to its proof. *See supra* note 72 and accompanying text. Courts should continue to permit this widespread practice, which merits minimal discussion here.

any “evidence that the lawyer knows to be false.”¹⁸³ This rule does not distinguish sincere from insincere testimony.¹⁸⁴ An attorney who knows that a witness would testify to a falsehood therefore ethically may not elicit or rely upon that false testimony. A judge should not hesitate to read the plain language of Model Rule 3.3 as forbidding defense counsel from engaging in this tactic.

Eliciting a sincere but incorrect lay witness’s testimony clearly impedes the adversary process’s truth-seeking function, as defense counsel knowingly calls such a witness in an effort to convince the jury of a false proposition. Further, a defendant can point to no individual right advanced by engaging in this tactic: our system does not afford criminal defendants a legal or constitutional right to disprove the prosecution’s case by lying to the jury. Using sincere but incorrect lay testimony to defend against a criminal charge therefore serves no legitimate function relative to either of these systemic aims.

Second, defense counsel may seek to use sincere and correct lay witness testimony to knowingly support a false proposition. Such a witness appeals to the guilty defendant for the same reason as the sincere but incorrect one: the witness’s testimony again is earnest, nonperjurious, and bolsters the defense’s case. Such testimony does not run afoul of Model Rule 3.3, because no false evidence is submitted to the court. Perhaps for this reason, courts that have addressed this scenario widely have agreed with the conclusion reached in Michigan ethics opinion CI-1164¹⁸⁵ that the Model Rules permit attorneys to introduce truthful testimony even if that testimony may be used to support a false proposition.¹⁸⁶ So long as the witness’s testimony comports with evidentiary rules governing relevance, unfair prejudice, confusion, and the like,¹⁸⁷ judges should adhere to the Michigan ethics committee’s reminder that there is no ethical proscription against suborning truthful testimony.¹⁸⁸

The Model Rules thus impose no restriction on defense counsel calling a lay witness to offer testimony that is both sincere and factually accurate. Although this strategy, if successful, may impede truth seeking, it is a means by which a defendant may exercise his individual right to a zealous defense. Viewed through this lens, the Michigan ethics committee’s

183. MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(3).

184. *See id.*

185. *See supra* notes 78–81 and accompanying text.

186. *See, e.g.,* United States v. Jiménez-Bencevi, 788 F.3d 7, 18–19 (1st Cir. 2015) (applying with approval the holding of Michigan ethics opinion CI-1164).

187. *See* FED. R. EVID. 401 (relevance); *id.* 403 (unfair prejudice, confusion, and waste of time); *id.* 404(a)(1) (character evidence); *id.* 404(b)(1) (evidence of prior bad acts).

188. *See supra* notes 78–81 and accompanying text. It also is worth noting that a witness who intentionally offers literally true but misleading testimony may commit obstruction of justice. The Ninth Circuit famously addressed this dynamic in the U.S. government’s prosecution of baseball star Barry Bonds for allegedly evasive testimony about his alleged steroid use. *See* United States v. Bonds, 730 F.3d 890, 895–96 (9th Cir. 2013) (“[M]isleading or evasive testimony that is factually true can obstruct justice.”), *rev’d on other grounds*, 784 F.3d 582 (9th Cir. 2015) (en banc).

conclusion that “[o]ne cannot suborn the truth”¹⁸⁹ recognizes that the adversary system protects this individual right by widely permitting defenses based on truthful evidence rather than attempting to permit certain types of truthful evidence but forbid others. In short, defendants’ rights outweigh truth seeking in this context.¹⁹⁰

ii. Expert Witnesses on Direct Examination

This Note now turns to defense counsel’s treatment of expert witnesses on direct examination.

a. The Sincere but Incorrect Expert Witness

Unlike the straightforward ethical challenge inherent to lay witness testimony, expert witnesses can pose more challenging scenarios, because an expert’s testimony can be understood either as new evidence or as an opinion derived from the information provided to the expert. This characterization makes the application of Model Rule 3.3 to expert testimony less clear.

Consider an expert witness unaware of a defendant’s guilt. Should a trial court insist that this expert be made aware that the defendant is guilty?¹⁹¹ Expert witnesses testify merely to their opinion formed based on the evidence and information provided to them, and an expert does not necessarily testify directly to the truth or falsity of a disputed proposition.¹⁹² This unique evidentiary function¹⁹³ may justify defense counsel furnishing an expert only with information relevant to the expert’s inquiry.¹⁹⁴ Defense counsel then may allow the expert to draw his or her own independent conclusions from that information—as the First Circuit directed in *Jiménez-Bencevi*.

189. Mich. State Bar Comm. on Prof’l & Judicial Ethics, Op. CI-1164 (1987).

190. *See, e.g., id.*

191. *See, e.g., supra* Part III.C (describing the dilemma parsed by the courts in *Jiménez-Bencevi*).

192. *See, e.g.,* Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239, 251–56 (2015) (distinguishing between “participating expert,” “original knowledge expert,” and “assumption expert” witnesses and describing the nature of their testimony). *But see, e.g.,* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1140 (characterizing “[t]he major function of experts” as “to create new evidence in the form of expert opinions”).

193. Gross, *supra* note 192, at 1140 (“This is a unique feature of expert testimony—there is no other context in which a witness can create new evidence about past events—and it gives the expert witness a set of options that no other witness has.”).

194. Note that a defendant’s confession presumably is not relevant to an expert charged with drawing conclusions from objective evidence. For example, an expert comparing a defendant’s fingerprint to a fingerprint collected from a crime scene should reach the same conclusion whether or not that defendant has admitted guilt. Applying this principle to *Jiménez-Bencevi*, the forensic expert in that case simply investigated whether a surveillance video in fact depicted the defendant: that video’s contents did not change when *Jiménez-Bencevi* proffered his guilt to prosecutors before trial. *See supra* notes 131–36 and accompanying text.

Bencevi when it instructed the trial court to “close its eyes” to the defendant’s inadmissible confession of guilt.¹⁹⁵

Further, the unique role of the expert witness may mean that an attorney who knowingly elicits an expert’s false opinion does not violate Model Rule 3.3. Because an expert does not speak dishonestly by stating an earnestly held opinion, defense counsel arguably does not elicit false testimony by putting a sincere expert on the stand.¹⁹⁶ However, the unique authority vested in expert witnesses militates against permitting defense counsel to knowingly induce them to testify to false conclusions, because a witness vested with expert authority generally is more likely to convince a jury of his factually inaccurate opinion.¹⁹⁷

Whether a court should permit defense counsel knowingly to elicit the testimony of a sincere but incorrect expert witness ultimately turns on whether the court views expert opinions as more like a lay witness’s testimony—permitted if the testimony is sincere and accurate¹⁹⁸—or more like other evidence—impermissible if the attorney knows it to be false.¹⁹⁹

In practice, this distinction might turn in part on the precise way in which an expert witness presents his or her conclusions to the jury. For example, if an attorney knows her client is guilty, Model Rule 3.3 prohibits her from inducing a witness to attest inaccurately to the client’s innocence *per se*, even if the witness’s testimony is sincere.²⁰⁰ This proscription applies to expert and lay witnesses in equal measure.²⁰¹ Thus, defense counsel ethically cannot induce an expert witness to, for example, state that “the defendant is not the man in the video” if the attorney knows to the contrary. Alternatively, an expert might state, “*in my opinion*, the defendant is not the man in the video”; but if defense counsel knows the expert’s opinion is incorrect, a truth-seeking judge²⁰² may be disinclined to permit even this qualified testimony. In these scenarios, Model Rule 3.3’s proscription against submitting false evidence controls.²⁰³

But what if an expert witnesses opines, for example, that “*based on the information provided to me*, the man in the video is approximately six inches taller than the defendant”? By adding this clause, the expert now has testified sincerely and accurately without making any statement that the

195. *United States v. Jiménez-Bencevi*, 788 F.3d 7, 19 n.7 (1st Cir. 2015); *see also supra* Part III.C.

196. *See, e.g., Jiménez-Bencevi*, 788 F.3d at 19 (concluding that because the defense expert’s opinion was sincerely held, defense counsel should be permitted to present and cast as reliable to the jury the expert’s (presumably) factually incorrect testimony).

197. *See, e.g., L. Timothy Perrin, Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1395 (1995) (“[Their role and authority] make experts important witnesses in every case. The extensive testifying experience of many experts makes them not only powerful, but also persuasive witnesses, capable of making or destroying a case.”).

198. *See supra* Part IV.B.1.i (discussing false defense tactics arising from lay witness testimony).

199. *See* MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(3) (AM. BAR ASS’N 2016).

200. *See supra* note 183 and accompanying text.

201. *See supra* note 183 and accompanying text.

202. *See supra* Part II.A.

203. *See supra* Part I.A.1.

attorney knows to be false (provided that defense counsel furnished the expert with all relevant information at her disposal).²⁰⁴ Yet the practical impact of the expert's testimony on the fact-finder may be the same no matter which clause precedes the witness's conclusion. From one perspective, defense counsel has violated the spirit of Model Rule 3.3 through an artful turn of phrase unlikely to lessen the force of her expert's testimony. From a different view, courts may hesitate to prevent defense counsel from introducing testimony that, like the alibi witness discussed in Michigan ethics opinion CI-1164,²⁰⁵ is neither false nor misleading on its own terms, even if that testimony impedes the jury from arriving at the truth.²⁰⁶

On balance, the approach charted by the First Circuit in *Jiménez-Bencevi* is persuasive.²⁰⁷ So long as an expert is aware of all relevant information, a court that "closes its eyes" to inadmissible evidence best ensures that the criminal process functions fairly and properly.²⁰⁸ If nothing else, regardless of its conclusion, a court faced with this dilemma should carefully and thoughtfully consider the issues brought to the fore by the *Jiménez-Bencevi* Panel and seek to avoid the pitfalls encountered by the lower court in that case when it simply rejected the expert's testimony out of hand.²⁰⁹

b. The Sincere and Correct Expert Witness
Whose Testimony Supports a Falsehood

Another related and thorny issue arises when an attorney knowingly introduces an expert witness's sincere and accurate opinion, supporting a truthful proposition, to bolster a falsehood through subsequent legal argument.²¹⁰ A skillful advocate able to extract a carefully circumscribed expert opinion could generate expert testimony that is neither untruthful nor factually inaccurate and then, for example, knowingly draw a false inference from that testimony in hopes of securing an acquittal. In *Jiménez-Bencevi*, for instance, defense counsel could have induced a forensic expert to testify that, based on the information at the expert's disposal, the man on the surveillance video was taller than the defendant. Rather than simply using this testimony to point out weaknesses in the prosecution's case, the attorney then could have relied on this testimony to affirmatively and falsely argue actual innocence or shift blame onto an innocent third party.

Such tactics again present a close question. Standing alone, each of these steps could be deemed ethically permissible; but in combination they may mislead the fact-finder in the very ways that the Model Rules strive to prevent. When false-defense tactics compound to create new, misleading evidence, courts should prohibit the practice. By way of illustration,

204. See *supra* note 194 (discussing what constitutes relevant information in this context).

205. See *supra* notes 78–81 and accompanying text.

206. See *supra* text accompanying notes 189–90.

207. See *supra* note 204.

208. See *supra* notes 141–54 and accompanying text.

209. See *supra* notes 141–54 and accompanying text.

210. For analysis of false defenses made through legal arguments, see *infra* Part IV.B.2.

defense counsel in *Jiménez-Bencevi* would not be permitted to call an expert to testify—sincerely but inaccurately—that, in the expert’s opinion based on the information provided to him, the man on the surveillance video was the defendant’s brother—and then affirmatively argue that the brother committed the crime.²¹¹ Here, the defense attorney does not merely use the expert’s testimony to emphasize ways in which the jury may have reasonable doubt. Instead, she advances the expert’s opinion as though it were true despite knowing of its falsity, violating Model Rule 3.3 by knowingly submitting false evidence to the court.²¹² This tactic clearly undermines truth seeking, and because a defendant has no right to defend himself by lying to the jury, it does not implicate the adversary system’s function to safeguard individual rights.

Courts thus should permit defense counsel to put the government to its proof by highlighting deficiencies in the prosecution’s case;²¹³ but they should seek to draw the line where attorneys knowingly generate favorable false testimony to employ that testimony as a sword against the prosecution, rather than a shield.

2. False Defenses Arising from Legal Arguments

Having evaluated tactics trafficking in evidence, this subsection turns to false defenses that involve legal arguments knowingly advancing or suggesting false propositions.²¹⁴ Consider first the tactic of drawing false inferences.²¹⁵ Scholars have parsed false inferences into two types: those advanced to make plain the prosecution’s failure to prove its case and those advanced for their purported factual accuracy.²¹⁶ False inferences of the former kind properly are understood as a necessary extension of every defendant’s right to put the government to its proof.²¹⁷ From this perspective, if defense counsel always may argue the government has not proved its case beyond a reasonable doubt, then she always should be permitted to point to the specific reasons why this is so, even when she knows her client is guilty. This conclusion follows both logically and also in light of the narrative approach that juries commonly follow during deliberations.²¹⁸ Because the side presenting the more compelling story is more likely to prevail,²¹⁹ prohibiting defense counsel from drawing false

211. Such an argument would constitute what Professor Imwinkelried labels the “SODDI Defense 2.0.” See generally Imwinkelried, *supra* note 83.

212. See *supra* note 183 and accompanying text; see also *supra* Part I.A.1.

213. See *supra* Part II.A.

214. A defense attorney presents legal arguments during summation. She also may convey the substance of an argument through the tone and content of questions posed to witnesses on direct and cross-examination. For an example of the relevance and potential effect of an advocate’s specific language and tone in this context, see Subin, *Is This Lie Necessary?*, *supra* note 50, at 692.

215. See *supra* Part II.B.

216. See *supra* note 68 and accompanying text.

217. See *supra* note 71 and accompanying text.

218. See *supra* note 71.

219. See *supra* note 71.

inferences from properly introduced evidence—in other words, preventing the defense from making plain to the jury specific ways in which the prosecution has not overcome reasonable doubt—disadvantages the defense by lowering the high probative hurdle otherwise placed before the prosecution in every criminal case. False inferences of this type obfuscate the truth in the case of the guilty client, but their importance to the adversary process's function to safeguard individual rights militates strongly in favor of permitting defense counsel to advance them in court.

Returning to the practical realm, this form of false inference also should not be read to run afoul of the Model Rules. For one, the lack of disciplinary proceedings brought as a result of this tactic evidences that it falls within “conventional professional understandings” of ethical attorney conduct.²²⁰ In addition, the procedurally distinct function of an attorney's legal arguments to the jury supports the notion that “a criminal defense lawyer's jury summation arguing for the acquittal of a client whom he knows to be guilty . . . [should] be viewed as [an] assertion[] of the client's legal position or of conclusions that arguably should be drawn from the facts put before the court,”²²¹ rather than as “false statement[s] of fact or law” prohibited by Model Rule 3.3.²²²

Some false inferences of the second type—those advanced for their purported truth²²³—stand on shakier ethical ground and may be more difficult to identify in practice. Dogged cross-examination of witnesses known to be truthful is a widely accepted practice.²²⁴ But without taking care to ground her comments in the evidence, defense counsel's conduct may elide into simply making false statements in violation of Model Rule 3.3.²²⁵ Here, the connection between the defense attorney's inference and the evidence is thin: the attorney no longer infers from the evidence as much as attempts to convince the jury of a falsehood *not* supported by the evidence. Courts should intervene when defense attorneys simply may be peddling unsupported falsehoods to the jury.²²⁶ But so long as an attorney's assertions remain grounded in the evidence, a court should permit defense counsel to defend a guilty client by advancing false inferences that serve to lay bare weaknesses in the prosecution's case.

220. See Green, *supra* note 81, at 367–69 (arguing that, to the extent that criminal obstruction of justice statutes may suggest otherwise, those statutes reflect neither the rules governing attorney conduct nor what Green describes as “the lore of the profession”).

221. *Id.*

222. MODEL RULES OF PROF'L CONDUCT r. 3.3(a) (AM. BAR ASS'N 2016); see also Green, *supra* note 81, at 369; Suni, *supra* note 14, at 1662–63, 1663 n.91 (advising that false inferences in this context “do[] not appear to rise to the level of a Rule 3.3 violation,” and arguing that false inferences of this type do not run afoul of the defense advocate's duty to refrain from dishonest, fraudulent, deceitful, or misrepresentative conduct as an officer of the court).

223. See *supra* note 68 and accompanying text.

224. See *supra* note 182.

225. See *supra* note 38 and accompanying text.

226. See *supra* Part I.A.2 (discussing defense attorneys' duty to serve as officers of the court).

The same distinction between a false defense advanced to rebut the prosecution's evidence and one offensively advanced for its purported truthfulness²²⁷ applies to the tactic of arguing a guilty client's actual innocence. If defense counsel's argument arises from the admitted evidence, courts should apply the same logic set forth above with respect to false inferences²²⁸ to differentiate a legal argument from the types of false statement proscribed by Model Rule 3.3.²²⁹ A permissible actual innocence defense of this type identifies particular facts adduced at trial and constructs from them a plausible narrative in which the defendant did not commit the crime. Professor Bruce A. Green's suggestion that arguments of this type are best characterized as legal positions rather than statements of fact²³⁰ is as compelling in this context as in the case of false inferences. Simply put, attorneys and judges should view both tactics as permissible means of actively putting the government to its proof.²³¹

Unlike the other false defense tactics this Note considers, blame shifting in the case of a guilty client deliberately implicates an innocent third party in criminal activity. This undercuts potential justifications of the tactic focused on values like advancing defendants' dignity and autonomy or inspiring confidence in the criminal process: a defense attorney who uses this tactic simply shifts the harms caused by a criminal prosecution from a guilty client onto someone who does not deserve them.²³² Several scholars have advanced this concern—although others more focused on “the strength of the systemic justifications for aggressive advocacy” would shift blame from a guilty client without compunction.²³³ In her article devoted to the blame-shifting tactic, Professor Suni explains that, while reasonable minds have differed regarding shifting blame from a guilty client, the rules of professional conduct seem not to prohibit doing so.²³⁴ This Note endorses Suni's well-reasoned conclusion that blame shifting falls within the bounds of permissible zealous advocacy and that courts therefore should permit this practice.²³⁵

CONCLUSION

This Note seeks to contextualize and synthesize the vibrant discourse surrounding false defenses in order to offer concrete guidance to courts and lawyers considering whether, when, why, and how attorneys should be permitted to zealously defend guilty clients. In so doing, this Note aims to improve upon the approach taken by courts that have treated false defenses

227. *See supra* note 68 and accompanying text.

228. *See supra* notes 215–26 and accompanying text.

229. *See supra* notes 220–22 and accompanying text.

230. *See supra* note 222 and accompanying text.

231. *See supra* note 220 and accompanying text (referencing Green's argument that conventional wisdom in the legal profession does not view defense counsel's reliance on false inferences as unethical attorney conduct).

232. *See* Suni, *supra* note 14, at 1658.

233. *Id.* at 1658 n.64.

234. *See id.* at 1659–74.

235. *See id.*

as a monolithic category to be accepted or rejected in one fell swoop.²³⁶ Instead, following *Jiménez-Bencevi*'s²³⁷ and the *Poventud* majority's²³⁸ lead, this Note strives to account for important differences among the variety of tactics available to a defense attorney charged with knowingly representing a guilty client. This accounting reveals that false defenses knowingly advanced through false evidence impede truth seeking without advancing legitimate individual rights. The Model Rules thus prohibit defense counsel from knowingly eliciting false testimony from a lay or expert witness, whether or not that testimony is sincere. The case of a sincere and accurate expert witness whose testimony may be used to support a falsehood presents a difficult question, but courts should permit this tactic so long as defense counsel uses the expert's opinion merely to emphasize weaknesses in the prosecution's case rather than knowingly treating the expert's opinion as though it were new evidence that supports a false proposition.

The Model Rules' restriction against introducing false evidence does not apply to false defenses advanced through legal arguments. Defense counsel advances the adversary system's rights-protecting function by using a false legal argument to highlight a deficiency in the prosecution's case. For this reason, this Note concludes that courts generally should embrace the tactics of drawing false inferences, arguing actual innocence, and shifting blame as instances of ethical—albeit dishonest—zealous advocacy, even though these tactics impede truth seeking at trial.

Finally, this Note also strives to contribute much-needed depth and perspective to real-world approaches to false defenses in the courts. The constraints within which defense counsel representing a guilty client ought to work will become clearer only through incisive, nuanced, and well-reasoned judicial interpretations of the boundaries delimiting ethical from unethical false-defense tactics. Courts and practitioners hopefully will delve more deeply into the ethics of different false defenses as the scenarios this Note describes continue to arise in practice.

236. *See supra* Part III.A–B.

237. *See supra* Part III.C.

238. *See supra* notes 161–63 and accompanying text.