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“THE WHOLE TRUTH?”: HOW RULES OF EVIDENCE MAKE LAWYERS DECEITFUL

*Bruce A. Green**

I. INTRODUCTION

In theory the law of evidence,¹ like the adversary process in general,² is intended to promote the discovery of the truth.³ In practice, however, the evidentiary rules sometimes foster either the misperception that lawyers and their witnesses are deceitful or the accurate perception of actual deceit on the part of lawyers and their witnesses, thereby undermining the search for truth at trial. The evidentiary rules promote the appearance of deceit by restricting the introduction of evidence that jurors expect to receive; they promote actual deceit by legitimizing prevailing methods of witness preparation that make testimony less truthful, rather than more truthful.

In the public’s mind, the manner in which the truth is ascertained at trial is perhaps best symbolized by the oath that witnesses are required to take before testifying⁴—in the most familiar formulation, an oath “to tell the truth, the whole truth, and nothing but the truth.”⁵ Although designed to send a message to the witnesses themselves,⁶ the oath also sends a message to jurors and to the public about the witnesses’ under-

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1. Many states have adopted their own evidence rules. See, e.g., CAL. EVID. CODE §§ 1-1605 (West 1966 & Supp. 1991); LA. CODE EVID. ANN. arts. 101-1008 (West 1991). Many are modeled on the Federal Rules of Evidence. See 1 GREGORY P. JOSEPH & STEPHEN A. SALZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES, ch. 1, at 1 (Supp. 1990) (twenty-two states have adopted evidence codes based on Federal Rules). This Essay accordingly focuses on the Federal Rules of Evidence.

2. See, e.g., John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 324 (1989) (citations omitted) (“Judicial pronouncements, the public perception of the function of the judicial system, and ethical rules support the view that ascertaining the truth is the paramount goal of the adversarial system and the primary basis for its legitimacy.”).

3. See FED. R. EVID. 102.

4. See FED. R. EVID. 603.

5. See, e.g., ARK. CODE ANN. § 16-2-101 (1987); COLO. REV. STAT. § 13-90-117 (1987); FLA. STAT. ANN. § 90.605 (West 1979); IND. CODE § 34-1-14-2 (1986).

6. See FED. R. EVID. 603 (oath intended to awaken witness’s conscience and impress upon him or her duty to be truthful).

taking at trial. It connotes that the witnesses are required to represent events accurately, not to dissemble, and to represent events completely, not to withhold. More broadly, the oath conveys that the trial is dedicated to eliciting accurate and complete accounts of all the events that bear on the parties' contentions.

The popular conception, that the truth is ascertained at trial, is reinforced and refined by other aspects of adversary proceedings which—like the requirement of the oath—are encapsulated in the evidentiary rules. For example, witnesses on direct examination provide their accounts in response to the nonleading questions of the lawyers who call them to the stand.⁷ This mode of presentation gives the impression that the witnesses are answering spontaneously, drawing on their own recollection, and speaking in their own words, so that it is fair for jurors to evaluate the truthfulness of the testimony in light of their own experience in assessing the credibility of those with whom they deal on a day-to-day basis. Similarly, cross-examination⁸ underscores the traditional notion that the truth will make itself known through the clash of adversaries. The lawyers, each dedicated single-mindedly to his or her client's cause,⁹ skillfully challenge the opposing witnesses in an effort to reveal lies, misstatements and omissions.¹⁰

II. PERCEPTIONS OF DECEIT

When viewing the conduct of lawyers in the context of the expectations reinforced in the course of a trial, jurors are sometimes led to conclude that trial lawyers are being deceitful when in fact the lawyers are

7. See, e.g., FED. R. EVID. 611(c) (leading questions should not be used on direct examination except as necessary to develop witness's testimony).

8. See FED. R. EVID. 611(b) (controlling scope of cross-examination).

9. See generally GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 121-35 (1978) (describing traditional theory of adversary system).

10. The traditional belief in the effectiveness of cross-examination finds its strongest expression in Professor Wigmore's characterization of cross-examination as "the greatest legal engine ever invented for the discovery of truth." 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourne rev. ed. 1974). This view has been challenged by knowledgeable commentators, however. As Professor Applegate recently observed in an impressive article on witness preparation:

Whether cross-examination deserves the praise heaped upon it or the faith placed in it is an open question. For every tale of a brilliant, slashing "but for which the case would have surely been lost" cross-examination, there are hundreds of cross-examinations that are barely serviceable. Judge Frank has said that a "cool, steady liar who happens not to be open to contradiction will baffle the most skillful cross-examiner in the absence of accidents, which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose."

Applegate, *supra* note 2, at 309 (quoting Jerome Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. REV. 545, 559 (1951)).

simply abiding by the rules of evidence. Consider, for example, the operation of the hearsay rules in a criminal trial.¹¹ When a police officer testifies that he or she questioned the defendant and obtained a confession, arrested the defendant and discovered evidence in his or her possession, or carried out a surveillance that revealed inculpatory conduct, the jury understandably will wonder what prompted the officer to take these investigative steps. The hearsay rules may prevent the jury from learning, however, that the investigation was precipitated by information previously received from informants or other witnesses.¹² The officer will be required to begin his or her account of the investigation *in medias res*¹³ by describing the questioning, arrest or surveillance itself, and omitting the events leading up to it. The officer's omission may not go unnoticed, however. The jury may engage in speculation about why the officer focused on this particular defendant. The jury may reasonably consider the omitted information necessary to assess the officer's credibility. For example, the jury may recognize that if the officer targeted the defendant at random or because of some longstanding animus, his or her testimony should be entitled to less weight. Moreover, the jury may erroneously infer that the prosecution omitted to elicit an explanation for the officer's conduct precisely because the truth would have undermined the officer's credibility.¹⁴

11. Although comparable examples might have been drawn from civil cases, the examples throughout the text of this Essay are taken from criminal proceedings.

12. See, e.g., *United States v. Hernandez*, 750 F.2d 1256, 1257-58 (5th Cir. 1985); *State v. Boehner*, 756 P.2d 1075, 1077-79 (Idaho Ct. App. 1988). *But see State v. Harper*, 384 S.E.2d 297, 299 (N.C. Ct. App. 1989) (statements by third parties explaining officer's conduct not hearsay). The exclusion of this type of evidence rests on a judgment concerning relevancy as well as on the hearsay rule. Courts take the view that until the officer's motive is called into question on cross-examination, the out-of-court statements that prompted his or her conduct are irrelevant. See, e.g., *Boehner*, 756 P.2d at 1077-79 & n.4. This judgment is based largely, whether acknowledged or not, on fear that the jury will consider the statements for their truth—the purpose forbidden by the hearsay rule. FED. R. EVID. 802. Absent that danger or a comparable danger of unfair prejudice, courts would generally allow a testifying witness to give the jury a complete picture by describing what led up to the events in question.

13. *In medias res* is defined as: "Into the heart of the subject, without preface or introduction." BLACK'S LAW DICTIONARY 788 (6th ed. 1990).

14. Rules of privilege may have a similar effect. For example, on those rare occasions when the government obtains incriminating evidence from the defendant's lawyer, the attorney-client privilege may bar the government from offering evidence explaining how the evidence was obtained. See, e.g., *Hitch v. Pima County Superior Court*, 708 P.2d 72, 78-79 (Ariz. 1985) (potentially incriminating physical evidence turned over to defense counsel must be delivered to prosecution, but prosecution is not allowed to inform jury of source of evidence). The absence of such an explanation would be obvious and would invite speculation by the jury as to whether the evidence is in fact authentic.

Another illustration of how the hearsay rules make lawyers seem deceitful takes place at trial when a lawyer uses a writing to refresh a witness's recollection. Although the opposing party may offer the relevant portions of the document into evidence, the party examining the witness generally may not do so,¹⁵ even if the document contains the witness's own prior statement.¹⁶ When the lawyer asks the witness to review an apparently meaningful writing, then fails to offer it in evidence, the jury can be expected to speculate about what was in the writing and distrust the lawyer for not disclosing it.

On occasions such as these when it is apparent to the jury that information exists but is being withheld, the jury will not know to blame the rules of evidence for the omission. Unlike when evidence is proffered but an objection is sustained in view of the jury, when evidence is withheld altogether in conformity with the rules of evidence the jury has no clue that the omission is dictated by law. The jury may reasonably conclude that the prosecuting attorney or his or her witness is deliberately withholding "the whole truth" as a matter of choice.

Likewise, the operation of evidentiary rules that allow evidence to be admitted only after "the door is opened" by opposing counsel may lead jurors to conclude that a lawyer is acting deceptively. For example, in a narcotics prosecution, the jury often will learn for the first time of a criminal defendant's uncharged misconduct either after the defendant testifies (if the evidence is offered for the purpose of impeachment)¹⁷ or during the government's rebuttal case (if the evidence is offered under Federal Rule of Evidence 404(b) to prove criminal intent).¹⁸ The jury may well wonder why the prosecutor held back this obviously important information during the government's case-in-chief and may speculate that the

15. FED. R. EVID. 612 (party using writing may introduce it only if it is independently admissible).

16. See, e.g., FED. R. EVID. 801(c), (d)(1)(B) (hearsay rule applies to out-of-court statement made by trial witness; prior statement consistent with witness trial testimony excluded from definition of hearsay if "offered to rebut [a charge] of recent fabrication or improper influence or motive").

17. See FED. R. EVID. 609(a) (allowing introduction of evidence of prior conviction for purpose of attacking witness's credibility if crime involved dishonesty or false statement or punishable by death or imprisonment exceeding one year). As amended January 26, 1990, effective December 1, 1990, Rule 609(a)(1) does not permit a conviction to be used in impeaching a criminal defendant unless the crime involved dishonesty or false statement or the probative value of the conviction outweighs its prejudicial effect. FED. R. EVID. 609(a)(1).

18. E.g., United States v. Colon, 880 F.2d 650, 660 (2d Cir. 1989) (prior bad acts offered to prove criminal defendant's intent generally not admissible until conclusion of defendant's case); see FED. R. EVID. 404(b). But see United States v. Smith Grading & Paving, 760 F.2d 527, 531 (4th Cir.) ("the better practice" is for government to offer prior bad acts in its case-in-chief), cert. denied, 474 U.S. 1005 (1985).

prosecutor is withholding other, equally important evidence. The apparently belated introduction of this evidence may give rise to other adverse inferences. For example, it may lead a jury to speculate that the evidence was fabricated at the last moment. Belated introduction may also invite the argument that the government itself believed that its case was weak, and that is why it introduced this additional evidence as an apparent afterthought.

The rule against bolstering a witness's credibility on direct examination may have a similar effect. For example, prosecutors who call an accomplice witness are entitled to impeach him or her on direct examination¹⁹ and customarily do so, in anticipation of cross-examination, in order to avoid the appearance that they are hiding significant information from the jury. When the witness has entered into a written "cooperation agreement" with the government, the prosecutor may elicit that fact and ask the witness to identify the agreement.²⁰ In some jurisdictions, however, the prosecutor may not introduce the agreement itself.²¹ The jury then is not allowed to learn the entire contents of the agreement until the witness has been impeached.²² This is because some aspects of the agreement are thought to bolster the witness's credibility.²³ When the agreement is first identified during the direct examination, jurors might wonder why they are not being given a chance to see it, and though they will ultimately learn of its contents during re-direct, they may nevertheless mistrust the prosecutor for initially withholding it.

In such instances, evidentiary rules which are predicated in large measure on the law's distrust of juries²⁴ have the unintended, and perhaps ironic, result of encouraging the jury's distrust of lawyers. The rules do so by fostering the perception that lawyers are deliberately withholding evidence. While the credibility of a lawyer is, of course, not formally in issue at trial, and it would be improper to place it in issue, as a

19. See FED. R. EVID. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

20. United States v. Borello, 766 F.2d 46, 57 (2d Cir. 1985); see also United States v. Fernandez, 829 F.2d 363, 365 (2d Cir. 1987) (discussing scope of permissible reference to agreement in direct examination).

21. See, e.g., United States v. Edwards, 631 F.2d 1049, 1052 (2d Cir. 1980); see also United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980) (court should determine whether witness appears to have been coerced to cooperate in deciding admissibility of agreement).

22. See, e.g., Roberts, 618 F.2d at 536.

23. See, e.g., Borello, 766 F.2d at 56-58 (holding it reversible error to admit evidence of witness's entire cooperation agreement on direct examination before challenge to witness's credibility because court allowed witness's credibility to be impermissibly bolstered).

24. See generally Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1980) (stating that premise of exclusion is based on expectation that jury will erroneously assess credibility of evidence).

practical matter lawyers are justifiably concerned about how they are perceived. It is a matter of popular wisdom that a jury's deliberations are affected by each juror's perception of the lawyers. When evidentiary rules cause a lawyer to appear deceitful, it undermines the jury's efforts to find the truth and reach a just decision.

III. HOW EVIDENTIARY RULES PROMOTE ACTUAL DECEIT

Lawyers also engage in conduct that is in fact deceitful, albeit entirely lawful. Unbeknownst to the jury,²⁵ and contrary to the jury's expectations, in many cases lawyers carefully craft and rehearse the testimony of witnesses before calling them to the stand. Professor Applegate's recent analysis of the professional literature on how to prepare witnesses for trial reviews the various ways in which lawyers shape both the content and style of witnesses' testimony.²⁶ For example, by apprising their witnesses of the law relevant to the case and of the statements made by others, as well as by asking questions in a suggestive manner, lawyers cause witnesses to recall things differently from how they originally perceived them; by rehearsing their witnesses' testimony, lawyers make witnesses inordinately certain of the quality of their recollections;

25. Professor Applegate has posited that lawyers tacitly agree not to inquire deeply on cross-examination into how adverse witnesses were prepared by opposing counsel in order to avoid "the considerable inconveniences of conducting their own witness preparation in public." See Applegate, *supra* note 2, at 280-81 & n.12.

Moreover, many judges are reluctant to permit extensive cross-examination into the nature and scope of witness preparation for understandable reasons. A superficial inquiry is likely to create a perception that the attorney acted improperly—a perception that would be inappropriate because, within limits, the practice of witness preparation is an entirely acceptable and necessary aspect of advocacy. A more extensive inquiry, designed to show that in the particular instance witness preparation was excessive and resulted in inaccurate testimony, would be time-consuming, confusing and unproductive, since jurors have no understanding of what methods are and are not appropriate. Moreover, the inquiry might be thought to encroach on information protected by the attorney-client or work product privileges.

An extreme judicial reaction against a lawyer's attempt to use witness preparation as a basis for impeaching an adverse witness occurred recently in *Fineman v. Armstrong World Indus.*, 1991-92 Trade Reg. Rep. (CCH) ¶ 69,600, at 66,667 (D.N.J. June 25, 1991). In *Fineman* the court overturned a verdict for the plaintiff based on what it considered to be extraordinary attorney misconduct on summation. *Id.* at 66,667-70. Among other things, the court pointed to the argument by plaintiff's counsel based on evidence that a witness, in preparing for only three hours of testimony, had "spent 22 hours [holed] up in a conference with" the defendant's lawyer. *Id.* at 66,670. The lawyer noted that some preparation is reasonable to assuage a witness's nervousness, but asked: "If you're going to tell the truth, why do you have to be terrified? Why do you have to spend 22 hours preparing if all you're going to do is get up there, tell it the way it is?" *Id.* The court saw this as "a particularly egregious example of misconduct," *id.*, but did not explain why.

26. See Applegate, *supra* note 2, at 298-307, 322-23.

by molding the personality of their witnesses, lawyers make them more believable than they would ordinarily appear.²⁷

In some respects, pretrial meetings between lawyers and prospective witnesses may, of course, promote the discovery of truth. It is essential for a lawyer, in his or her capacity as an investigator, to discover all the information, positive and negative, that bears on his or her client's cause. Moreover, the lawyer's questions may bring to light significant information that was previously forgotten and cause the witness to clarify the basis of his or her knowledge.

As currently practiced and promoted in the professional literature, however, witness preparation may do more to *undermine* than to promote the discovery of truth. Many commentators have observed that extensive rehearsal may cause witnesses to give less accurate accounts of what they originally perceived while, at the same time, making it more difficult for opposing counsel to expose inaccuracies through cross-examination.²⁸ Jurors are encouraged to decide who is telling the truth based, in part, on the appearance and demeanor of witnesses. Even in the absence of extensive rehearsal, as Professor Wellborn recently showed, demeanor does not provide an accurate guide to witness credibility.²⁹ A witness's demeanor is an especially poor indicator of truthfulness when the witness has been extensively coached.³⁰ The failure to apprise jurors of the prevalence and extensiveness of witness preparation is especially misleading in light of jurors' expectations.³¹ Scripted testimony is mistakenly evaluated by jurors on the assumption that it is spontaneous and in the witness's own words.

Although pretrial preparation of witnesses has drawn criticism as a distortion of the truth-seeking process,³² little has been done to regulate

27. See *id.*

28. See, e.g., *id.* at 290-300, 307-11; Stephan Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITTS. L. REV. 547, 555-56 (1984). Although it might be supposed that cross-examination is effective in response to the unintended influence that ordinary interviewing has on witness testimony, see Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 131-33 (1988), there is less reason for confidence that cross-examination is effective against deliberate efforts to shape testimony.

29. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1081-82 (1991).

30. See *id.* at 1079 & n.13.

31. See *supra* notes 4-10 and accompanying text.

32. See, e.g., Applegate, *supra* note 2, at 279 n.3 ("The interviewing and preparation of witnesses . . . is a practice that, more than almost anything else, gives trial lawyers their reputation as purveyors of falsehoods." (quoting DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 96 (1988))). Particular concern has been expressed with respect to the testimony of child witnesses. See, e.g., John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705 (1987).

it.³³ Only the rules against subornation of perjury impose any direct limit on the practice.³⁴ In the absence of any significant restriction, trial lawyers may interview and prepare witnesses in whatever manner will best promote their client's cause. Indeed, the ethical duty of zealous representation may oblige a lawyer to coach and rehearse witnesses if it will be helpful to do so.³⁵

The absence of significant limits on witness preparation has been attributed primarily to the demands of partisan advocacy: trial lawyers must have prior contact with prospective witnesses, at least to some extent, to competently advise their clients and to present the case cogently and persuasively to a jury within the limited time available.³⁶ What commentators have overlooked, however, is the role of evidentiary rules in legitimizing contemporary methods of witness preparation.

Extensive preparation of witnesses is a practical necessity for any attorney seeking to comply with the dictates of the evidentiary rules. As trial lawyers know from experience, when a lawyer first meets a witness and solicits an account of the events in issue in a case, the response will almost invariably take a form that would be unpresentable at trial. It may contain legally irrelevant information,³⁷ speculation,³⁸ opinion³⁹ and hearsay,⁴⁰ all of which may be inadmissible.⁴¹ For reasons of both administrative expediency and fairness, judges expect a trial lawyer to re-

33. In contrast, lawyers' access to witnesses during trial may be regulated by sequestration orders which impede witnesses from learning in advance of their testimony what evidence has previously been introduced at trial. *See, e.g.*, FED. R. EVID. 615 (court has authority to order exclusion of witnesses upon request of party). Sequestration orders have been justified on the ground that a witness's contacts with lawyers and other witnesses during trial will make it less likely that cross-examination will elicit truthful testimony based on the witness's own recollection. *See Perry v. Leeke*, 488 U.S. 272, 281-82 & n.4 (1989). These orders do nothing, of course, to eliminate the far greater distortion of witness testimony resulting from extensive pretrial preparation.

34. *See* Landsman, *supra* note 28, at 556 & n.54.

35. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981); *id.* DR 7-101; *id.* EC 7-1; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983). *See generally* Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687 (1991) (as matter of zealous representation, lawyers sometimes go so far as to engage in potentially illegal conduct to promote clients' cause).

36. *See* Applegate, *supra* note 2, at 338-41; *see also* MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 143-60 (1990) (discussing tactics to prepare witnesses within scope of canons of ethics); Nikos Patouris, *Partisan Justice and Party-Dominated Justice*, 57 N.Y.U. L. REV. 203, 206 (1982) (reviewing MARVIN E. FRANKEL, PARTISAN JUSTICE (1980)).

37. FED. R. EVID. 401.

38. FED. R. EVID. 602.

39. FED. R. EVID. 701.

40. FED. R. EVID. 802.

41. *See* FED. R. EVID. 402, 602, 701, 802.

frain from eliciting inadmissible evidence, particularly when questioning a witness with whom the lawyer has had an opportunity to meet; moreover, it is unethical to elicit inadmissible evidence intentionally.⁴² Since a lawyer cannot have complete confidence in the efficacy of artful questioning, witnesses must be rehearsed to ensure that their testimony on direct examination is responsive, that it takes a proper form, and that it does not reveal inadmissible information.

Sometimes the evidentiary rules make it necessary to coach witnesses, not simply to omit aspects of what they may consider to be "the whole truth," but to state things differently from the way in which they actually happened. Suppose, for example, that one defendant in a criminal trial made a confession that implicated his co-defendant; the defendant admitted to a police officer following his arrest, "I robbed the bank with John Smith." The confession would be admissible against the defendant who made it,⁴³ but not against John Smith, the co-defendant.⁴⁴ The prosecution would be entitled, however, to elicit testimony about the confession in "redacted" form.⁴⁵ In preparation for trial, the prosecutor would have to coach the police officer to testify, when asked what the defendant told her, that he said, "I robbed the bank with somebody else."⁴⁶ While this retelling may not be misleading, and may indeed pro-

42. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(7) (1981).

43. See FED. R. EVID. 801(d)(2)(A).

44. The confession would generally be inadmissible against someone other than the declarant both because it is hearsay, FED. R. EVID. 801-802, and because its use would violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 206-07, 211 (1987); *Lee v. Illinois*, 476 U.S. 530, 539-42, 546 (1986); *Bruton v. United States*, 391 U.S. 123, 135-37 (1968). If the admission of a non-testifying co-defendant is offered against the defendant, he or she will be deprived of the Sixth Amendment right to cross-examine and confront the co-defendant.

45. *Richardson*, 481 U.S. at 209. "Redacted" testimony is testimony that has been edited.

46. See, e.g., *United States v. Alvarado*, 882 F.2d 645, 650-53 (2d Cir. 1989), (holding admission of redacted testimony not abuse of discretion and did not violate defendant's Sixth Amendment right, as redacted statements neither distorted meaning of testimony nor excluded information substantially exculpating declarant), *cert. denied*, 493 U.S. 1071 (1990). The rules of evidence are applied strictly against the prosecution because they are designed to protect the defendant against unfair prejudice, thereby requiring prosecutors to take special steps in advance of trial to protect against eliciting inadmissible testimony, such as hearsay. At the same time, however, prosecutors are held to a higher ethical standard than other lawyers when it comes to conduct relating to the integrity of the jury's verdict; in particular, prosecutors have obligations, not shared by other lawyers, with respect to the truthfulness of their witnesses' accounts. See, e.g., *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) (prosecutor acted improperly by rehabilitating witness "after becoming aware that [witness] may have perjured himself"). As a consequence, prosecutors are presented especially starkly with the tension between the ethical obligation to refrain from eliciting false testimony and the obligation to shape witnesses' testimony in advance of trial to comply with the strictures of the rules of evidence.

mote the discovery of truth, it can scarcely be said that the witness has told "nothing but the truth" from an ordinary (rather than a legal) perspective.⁴⁷

The extent of witness preparation contemplated by the evidentiary rules is obviously modest in relation to what is counseled by the popular literature on trial advocacy⁴⁸ and actually carried out in practice. Educating a witness to omit hearsay, speculation and opinion, or to amend an account in a way that does not distort it, is a far cry from conduct designed to refashion both the witness's recollection and his or her personality. Nevertheless, the evidentiary rules encourage the more deceitful practices in at least two ways.

First, from the perspective of trial lawyers, the evidentiary rules legitimize witness preparation, a practice that might otherwise be hard to justify. Evidentiary rules require that witnesses be coached to ensure that their testimony is admissible.⁴⁹ Some methods of preparation that undermine the accuracy of testimony may be rationalized as necessary to conform to the rules of evidence. Other methods that are obviously unnecessary from an evidentiary standpoint may be rationalized as different only in degree. The evidentiary rules thus contribute to the legal profession's acceptance of conduct that perhaps ought to be more strictly regulated.⁵⁰

Second, from the perspective of witnesses, the evidentiary rules undermine the seriousness of their oath "to tell the truth, the whole truth, and nothing but the truth." The rules foster the perception that some level of deception is permissible at a trial. To conform with the rules of evidence, which they may understand only partly if at all, witnesses are instructed that it is appropriate, indeed essential, to testify in a manner different from what comes most naturally, to withhold some parts of the truth and to alter others. Witnesses might easily conclude that a little selectivity and distortion is appropriate to promote other ends as well.

IV. PROPOSAL

At first glance, it might appear that the two different problems identified here require two different solutions. The first problem—that the

47. More frequently, in civil as well as criminal cases, witnesses must be coached to omit portions of an opposing party's admission that are barred by the rules of evidence. See, e.g., EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 201, at 595 n.15 (3d ed. 1984) (references to liability insurance may have to be omitted from account of party's admission).

48. See Applegate, *supra* note 2, at 298-323 (reviewing popular literature).

49. See *supra* text accompanying notes 38-48.

50. For proposed restrictions which would fundamentally alter lawyers' current practices of pretrial investigation and preparation, see Landsman, *supra* note 28, at 556-65.

evidentiary rules are currently applied so as to make lawyers appear deceitful—seems to call for reconsideration of how the rules are applied. The second problem—that the evidentiary rules encourage witness preparation practices that are in fact deceitful—seems to demand, at least initially, the adoption of ethical rules that distinguish proper from improper practices.

The obvious solutions may not be the right ones, however. While the risk that lawyers will appear deceitful ought to be recognized and given appropriate weight when applying the rules of evidence, it may be that, on balance, this harm is not serious enough to warrant admitting evidence that would otherwise be excluded. For example, in the case of the hearsay statements that would explain an officer's investigative conduct, the harm to a prosecuting lawyer's credibility created by the exclusion of this evidence may be less serious than the prejudice to the defense that would result if the out-of-court statements were admitted and accepted by a jury as true.

Similarly, although it would be useful for courts to adopt ethical rules defining improper practices in preparing witnesses, it would probably be impractical to do so while accepting the prevailing view that some ex parte communications with witnesses are essential to provide competent representation.⁵¹ It is difficult to distinguish between specific practices that promote the discovery of truth and those that undermine it.⁵² Nor is it easy to enunciate a general standard identifying the point at which communications with witnesses cease to be appropriate.⁵³

The best answer to both problems may, instead, be to correct popular misconceptions that jurors bring to the courthouse. First, jurors

51. Professor Landsman's interesting article, in contrast, rejects this premise and takes the view that ex parte contacts with witnesses should be limited to those situations in which the risk of suggestion is minimal or the availability of information is otherwise jeopardized. *Id.* at 559-61; see also STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 38 (1984) (cautioning against unrestricted interrogation and preparation of witnesses before trial due to danger of unknowing alteration of testimony).

52. Professor Applegate identifies one particular practice, the preparation of witnesses as a group, that he views as especially undesirable. See Applegate, *supra* note 2, at 351 ("Group preparation poses extraordinary dangers of collusion, influence, and fabrication."). He does not go so far as to propose forbidding the practice, however, but does propose that the practice should be discouraged by permitting the opposing party to expose the practice in the course of impeaching the witnesses who were jointly prepared. *Id.*

53. Professor Applegate draws a distinction between communications with witnesses "to obtain information, clarify important points, expose or resolve misperceptions, and organize the presentation of the case," which are desirable, and "polishing, scripting, and rehearsing," which are not. *Id.* at 343. In practice, it will often be impossible to demonstrate that a lawyer's communications fell exclusively into the latter categories, and therefore an ethical rule based on this distinction might well be unenforceable.

should be made aware of the unseen effect of evidentiary rules. They are entitled to know that the law may require lawyers to wait until a certain point in the trial before introducing evidence and that, in some cases, lawyers may be barred from introducing evidence that obviously exists, even if it has been referred to at trial. An instruction to this effect,⁵⁴ given right after jury selection and just before opening statements, would reduce the danger that juries will misperceive lawyers to be willfully withholding significant information. Second, jurors are entitled to know that witnesses are customarily prepared—at times extensively—for testifying at trial. An instruction of this nature would let juries take a more informed approach to resolving issues of credibility. If lawyers' practices cannot easily be changed, then jurors' expectations should be changed, so that the practices become less deceptive both in appearance and in actuality.

54. Standard instructions currently given to jurors do not provide this information; if anything, standard instructions permitting the jury to base its determination on the absence of evidence reinforce the misunderstanding that a party's failure to produce evidence within its possession is invariably a matter of choice. See, e.g., 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 71.19, at 141 (1970) ("If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party which could have produced it and did not."); WILLIAM C. MATHEWS & EDWARD J. DEVITT, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 8.01, at 83 (1965) ("A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence.").